SCHUETTE V. BAMN: THE SHORT-LIVED RETURN OF THE GHOST OF FEDERALISM PAST

I. INTRODUCTION ................................................................. 366
II. SCHUETTE'S FACTS AND HOLDING ................................ 367
   A. FACTS LEADING UP TO SCHUETTE ............................... 368
   B. PROCEDURAL HISTORY OF SCHUETTE ......................... 369
   C. THE SUPREME COURT’S HOLDING IN SCHUETTE ............. 371
III. BACKGROUND INFORMATION ........................................... 372
   A. THE POLITICAL PROCESS DOCTRINE AND THE EQUAL PROTECTION CLAUSE: SCHUETTE’S BATTLEGROUN... 373
   B. THE PRECEDENT RELIED ON BY THE PLURALITY AND CONCURRENCES ................................................. 377
      1. THE PRECEDENT RELIED ON BY THE PLURALITY ...... 377
      2. THE PRECEDENT RELIED ON BY THE CONCURRENCES ........................................................................ 380
         a. The Deference Cases: “[N]ear-Limitless” Sovereignty of States Designing Their Governing Structures ...... 380
         b. The Washington v. Davis Rule .................. 381
IV. THE SCHUETTE DECISION .................................................. 383
   A. THE PLURALITY AND CONCURRING OPINIONS: THE DECISION OF THE COURT; POINTS OF AGREEMENT AND DEPARTURE ................................................................. 383
      1. THE PLURALITY: JUSTICE KENNEDY JOINED BY CHIEF JUSTICE ROBERTS AND JUSTICE ALITO .......... 384
      2. JUSTICE SCALIA’S CONCURRENCE ...................... 387
      3. JUSTICE BREYER’S CONCURRENCE ....................... 390
   B. THE DISSENT: JUSTICE SOTOMAYOR JOINED BY JUSTICE GINSBURG .................................................. 391
V. CRITICAL ANALYSIS OF THE COURT’S DECISION IN SCHUETTE .............................................................. 396
   A. SCHUETTE’S EFFECT ON STATE LAW AND POLICYMAKING AND SUBSEQUENT SUPREME COURT CASES .................................................................................. 397

365
B. SCHUETTE’S HOLDING AND ITS EFFECT ON EXISTING LAW AND POLICY .......................................................... 400
C. FILLING IN THE GAPS: HOW SCHUETTE MAY HAVE BEEN BETTER DECIDED ............................................. 403
VI. CONCLUSION ....................................................................................................................................................... 405

"[M]isunderstandings and neglect occasion more mischief in the world than even malice and wickedness. At all events, the two latter are of less frequent occurrence."

I. INTRODUCTION

In November of 2006, the residents of Michigan went to the voting booths faced with a proposal to amend their constitution to ban the use of racial-preferences in state university admissions processes. The ballot proposal (Proposal 2) passed with roughly fifty-eight percent voting in favor of the proposal. After its passage, Proposal 2 became Article I, Section 26 of the Michigan Constitution (Section 26), which in pertinent part provides:

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.

Section 26 effectively banned the use of race-sensitive admissions programs in state universities. Proposal 2, which went into effect in December of 2006, set in motion various controversies. Ultimately, one of those controversies was settled

5. MICH. CONST. art. I, § 26(1).
by the United States Supreme Court in *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)* on April 22, 2014. That controversy is the subject of this casenote.

The Court’s decision in *Schuette* overruled the United States Sixth Circuit Court of Appeals’s holding that Section 26 was unconstitutional. However, the sharply divided opinions in *Schuette* raised more questions than they answered. Section II of this Note chronicles the factual background and holding of the Supreme Court’s decision in *Schuette*. Section III provides a review of the case law cited to and discussed by the Justices. Section IV reviews the Supreme Court’s decision, rationale, and concurring opinions. Finally, Section V provides a critical analysis of the Court’s decision and the ramifications the decision may yield in other areas of law.

II. SCHUETTE'S FACTS AND HOLDING

Bill Schuette, Attorney General of Michigan and named petitioner in *Schuette v. BAMN*, intervened in the consolidated actions against Michigan Governor Jennifer Granholm, the Board of Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University (the State). These separate actions were instituted by the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN plaintiffs) and Michigan public universities’ faculty, students, and prospective students (University plaintiffs). Specifically, the BAMN and University plaintiffs challenged Section 26 of the Michigan Constitution, which prohibited the use of race-sensitive admissions policies in collegiate admissions, as violative of the Equal Protection Clause.

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7. The political process doctrine is a jurisprudential doctrine which holds that a state violates the Equal Protection Clause when it organizes its political process in a manner that renders the participation of minorities in the process ineffective. See *Schuette*, 134 S. Ct. at 1632 (plurality opinion). For case law establishing the doctrine, see discussion infra at Part III.A.
8. *Shuette*, 134 S. Ct. at 1629-30 (plurality opinion).
9. *Id.* The United States District Court for the Eastern District of Michigan consolidated the two suits. *Id.* at 1630.
of the Fourteenth Amendment to the United States Constitution.\(^{10}\)

**A. FACTS LEADING UP TO SCHUETTE**

Following the Supreme Court’s decisions in *Gratz v. Bollinger*\(^{11}\) and *Grutter v. Bollinger*,\(^{12}\) Ward Connerly and Jennifer Gratz organized a campaign to amend Michigan’s constitution to ban the use of race-sensitive admissions programs in public universities.\(^{13}\) This campaign evolved into what later became known as Proposal 2.\(^{14}\) Connerly and Gratz’s campaign was not without controversy, however. For instance, in *Operation King's Dream v. Connerly*, several non-profit organizations and individuals appealed a district court’s denial of injunctive relief to restrain the placement of Proposal 2 on the November 2006 ballot.\(^{15}\) In the district court, the parties litigated whether “fraud during the initiative petition process [could] serve as a basis for injunctive relief under Section 2 of the Voting Rights Act to keep a proposal off the ballot.”\(^{16}\) For the first time on appeal, however, the plaintiffs argued that Section 26 should be invalidated because Proposal 2’s placement on the ballot violated Section 2 of the Voting Rights Act.\(^{17}\) The Sixth Circuit dismissed the suit, finding both issues to be moot.\(^{18}\) The Sixth Circuit found that the issue litigated in the district court was moot because Proposal 2 was already placed on the ballot, the vote had taken place, the

\(^{10}\) Schuette v. BAMN, 134 S. Ct. 1623, 1629 (2014); see also U.S. CONST. amend. XIV, § 1.

\(^{11}\) Gratz v. Bollinger, 539 U.S. 244 (2003) (holding that the University of Michigan’s undergraduate race-sensitive admissions program violated the Equal Protection Clause because it was not narrowly tailored).

\(^{12}\) Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that the University of Michigan’s Law School’s race-sensitive admissions program did not violate the Equal Protection Clause because it was narrowly tailored).


\(^{14}\) BAMN, 652 F.3d at 610-11.

\(^{15}\) Operation King’s Dream v. Connerly, 501 F.3d 584 (6th Cir. 2007).

\(^{16}\) See id. at 592.

\(^{17}\) Id.

\(^{18}\) Id.
Michigan voters passed Proposal 2, and Michigan's constitution was amended to include the changes outlined in the Proposal.\textsuperscript{19} The court also declined to address the issue raised on appeal for the first time because the issue was not litigated in the district court.\textsuperscript{20}

\textbf{B. PROCEDURAL HISTORY OF SCHUETTE}

In 2007, the District Court for the Eastern District of Michigan consolidated two separate actions brought by the BAMN and University plaintiffs challenging the constitutionality of Section 26 on the grounds that it violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{21} In \textit{BAMN v. Regents of University of Michigan}, the University plaintiffs argued that because Section 26 created an undue burden on racial minorities by shifting the political arena to a higher level of government, it violated the Equal Protection Clause.\textsuperscript{22} The BAMN plaintiffs made a similar argument, but went a step further to argue that Section 26 burdened women as well as racial minorities.\textsuperscript{23} Specifically, the BAMN plaintiffs argued that the Supreme Court's opinion in \textit{Grutter v. Bollinger},\textsuperscript{24} which held that universities have a constitutional right to academic freedom rooted in the First Amendment,\textsuperscript{25} gives universities the right to consider race and gender in prospective students to promote academic diversity.\textsuperscript{26} Therefore, because Section 26 denied the

\textsuperscript{19} See Operation King's Dream v. Connerly, 501 F.3d 584, 591-92 (6th Cir. 2007) ("Simply put, the opportunity to keep Proposal 2 off the November 2006 general election ballot has long since passed.").

\textsuperscript{20} See \textit{Operation King's Dream}, 501 F.3d at 592.


\textsuperscript{22} \textit{Id.} at 933-34.

\textsuperscript{23} \textit{Id.} at 934. BAMN also argued that Section 26 violated the First Amendment and is preempted by Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. \textit{See id.} at 935. BAMN's preemption argument rested on the notion that Section 26 would lead to a vast decline in university enrollment by race- or gender-based minorities which contradicted the purpose of Title VI and Title IX. \textit{Id.} The district court found neither Title VI nor Title IX preempted Section 26 because the constitutional provision merely prohibited race- or gender-based preferential treatment. \textit{See id.} at 959.

\textsuperscript{24} Grutter v. Bollinger, 539 U.S. 306 (2003) (finding that the University of Michigan Law School's race-sensitive admissions program was narrowly tailored).

\textsuperscript{25} \textit{Id.} at 329.

university that right, it violated the First Amendment.\textsuperscript{27}

In BAMN, both parties filed extensive Motions for Summary Judgment.\textsuperscript{28} The United States District Court for the Eastern District of Michigan granted the State’s Motion to Dismiss the BAMN plaintiffs’ First Amendment claims for lack of standing.\textsuperscript{29} The district court also found that the Supreme Court precedent relied on by the BAMN and University plaintiffs in their Equal Protection argument did not prohibit a state from barring programs that give preferential treatment on the basis of race or gender.\textsuperscript{30} The district court granted the State’s motion for summary judgment and dismissed the consolidated actions, thereby upholding Section 26.\textsuperscript{31} Thereafter, the University plaintiffs filed a motion to reconsider the grant of summary judgment, arguing that the district court made an improper distinction “between prohibiting ‘preferential treatment’ and withholding ‘equal protection.’”\textsuperscript{32} However, the district court rejected that argument and stood by its original decision.\textsuperscript{33}

In 2011, the United States Court of Appeals for the Sixth Circuit heard the BAMN and University plaintiffs’ various appeals of the district court’s grants of summary judgment.\textsuperscript{34} There, the BAMN and University plaintiffs argued that Section 26 violated the Equal Protection Clause because it “impermissibly restructure[ed] the political process along racial lines.”\textsuperscript{35} Additionally, the BAMN plaintiffs argued that Section 26 violated the Equal Protection Clause because it impermissibly classified persons on the basis of race.\textsuperscript{36}

The Sixth Circuit found that the Supreme Court precedent

\textsuperscript{28} Id. at 932.
\textsuperscript{29} Id. at 944.
\textsuperscript{30} Id. at 957.
\textsuperscript{31} Id. at 960.
\textsuperscript{33} Id.
\textsuperscript{34} See BAMN v. Regents of the Univ. of Mich., 652 F.3d 607, 607 (6th Cir. 2011), aff’d on reh’g en banc, 701 F.3d 466 (6th Cir. 2012), rev’d sub nom. Schuette v. BAMN, 134 S. Ct. 1623 (2014).
\textsuperscript{35} Id. at 613
\textsuperscript{36} Id.
cited by the plaintiffs in their district court arguments did in fact apply and reversed the district court’s decision.\textsuperscript{37} Specifically, the court found that the race-sensitive admissions programs in question primarily benefited minorities.\textsuperscript{38} Thus, the court held that section 26 violated the Equal Protection Clause because the restructuring of the political process placed such a burden on minorities that they were effectively denied the equal right to participate in the political process.\textsuperscript{39} The Sixth Circuit decision ordered the district court to enter summary judgment in favor of the plaintiffs, thereby declaring Section 26 unconstitutional.\textsuperscript{40} After a rehearing, where the Sixth Circuit sitting en banc affirmed the Sixth Circuit panel’s decision, the State appealed to the United States Supreme Court and the Court granted certiorari.\textsuperscript{41}

\textbf{C. THE SUPREME COURT’S HOLDING IN SCHUETTE}

\textit{Schuette} is a plurality opinion,\textsuperscript{42} followed by three concurring opinions,\textsuperscript{43} and finally, a dissenting opinion,\textsuperscript{44} all which framed the legal issue differently. The Court ultimately held that Section 26, which prohibited considering race or gender in university admissions, did not violate the Equal Protection Clause, and when a state asks its voters to make sensitive policy

\begin{thebibliography}{99}
\bibitem{37} BAMN v. Regents of the Univ. of Mich., 652 F.3d 607, 613-17 (6th Cir. 2011), aff’d on reh’g en banc, 701 F.3d 466 (6th Cir. 2012), rev’d sub nom. Schuette v. BAMN, 134 S. Ct. 1623 (2014).
\bibitem{38} Id.
\bibitem{39} Id.
\bibitem{40} Id. at 633. Sitting en banc, the Sixth Circuit granted a rehearing and ultimately agreed with the panel’s decision. BAMN v. Regents of the Univ. of Mich., 701 F.3d 466 (6th Cir. 2012) (en banc), rev’d sub nom. Schuette v. BAMN, 134 S. Ct. 1623 (2014). There, the court found that the political process doctrine was controlling. \textit{Id.} at 475. The \textit{en banc} court found that Section 26 was unconstitutional because it violated the Equal Protection Clause and also reversed the district court’s grant of summary judgment in favor of petitioners and entered summary judgment in favor of respondents. \textit{Id.} at 491; see also Christopher E. D’Alessio, Supreme Court Commentary, \textit{A Bridge Too Far: The Limits of the Political Process Doctrine in Schuette} v. Coalition to Defend Affirmative Action, 9 DUKE J. CONST. L. & PUB. POLY SIDEBAR 103, 113-15 (2013) (discussing the \textit{en banc} decision).
\bibitem{41} Schuette v. BAMN, 133 S. Ct. 1633, 1633 (2013) (mem.).
\bibitem{43} Id. at 1638-39 (Roberts, C.J., concurring); id. at 1639-48 (Scalia, J., concurring in the judgment, joined by Thomas, J.); id. at 1648-51 (Breyer, J., concurring in the judgment).
\bibitem{44} Id. at 1651-83 (Sotomayor, J., dissenting, joined by Ginsburg, J.).
\end{thebibliography}
determinations, courts have no authority to disempower voters by setting the vote aside.\textsuperscript{45} The next section discusses the case law relied upon in \textit{Schuette} in order to set the stage for the legal battleground the parties faced.

### III. BACKGROUND INFORMATION

Before \textit{Schuette}, the admissions practices of the University of Michigan's undergraduate and law school programs had each come under the scrutiny of the United States Supreme Court.\textsuperscript{46} In \textit{Gratz v. Bollinger}, the Supreme Court invalidated the undergraduate admissions program as violative of the Equal Protection Clause,\textsuperscript{47} and in \textit{Grutter v. Bollinger}, the Court upheld the law school's admissions practice, finding that it did not violate the Fourteenth Amendment.\textsuperscript{48} Following the Court's decisions in \textit{Gratz} and \textit{Grutter}, the University of Michigan still used race-sensitive admissions policies in a limited capacity,\textsuperscript{49} which led to much debate on the issue.\textsuperscript{50} Following these events, Michigan voters passed a state-wide initiative to amend Michigan's Constitution to ban the use of racial preferences in public contracting and public university admissions practices.\textsuperscript{51}

\begin{footnotesize}
\begin{enumerate}
\item[47] Gratz, 539 U.S. at 270-71, 275 (holding that the University of Michigan's undergraduate admissions program was not narrowly tailored to achieve the University's compelling interest rooted in educational diversity because the admissions policy automatically distributed twenty points, "or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race").
\item[48] Grutter, 539 U.S. at 340-41, 343 (holding that the University of Michigan Law School's admissions program was narrowly tailored to achieve educational diversity because it considered race as one factor among many, because the school had considered "workable race-neutral alternatives" and because the admissions program did not "unduly harm nonminority applicants").
\item[49] See Schuette, 134 S. Ct. at 1652 n.2 (Sotomayor, J., dissenting) (noting that "race-sensitive admissions policies" that comply with the Court's instructions from \textit{Grutter} must use race flexibly, must not maintain quotas, must be limited in tenure, and must be employed "only after 'serious, good faith consideration of workable race-neutral alternatives'" (citing \textit{Grutter}, 539 U.S. at 334, 339, 341-43)). Following \textit{Grutter} and \textit{Gratz}, the University of Michigan's undergraduate admissions program shifted toward a "holistic" system in lieu of the point allotment system that was invalidated in \textit{Gratz}. See Brief Amicus Curiae for Richard Sander in Support of Petitioner at 2-3, Schuette v. BAMN, 134 S. Ct. 1623 (No. 12-682), 2013 WL 3417868, at *2-3. This "holistic" system matched the Law School's admissions program, which had been upheld in \textit{Grutter}. \textit{Id.}
\item[50] Schuette, 134 S. Ct. at 1629 (plurality opinion).
\item[51] After its passage "Proposal 2" became "Section 26." See BAMN v. Regents of
\end{enumerate}
\end{footnotesize}
In Schuette, respondents' challenge to Section 26 was also rooted in the Equal Protection Clause. The Constitution "neither knows nor tolerates classes among citizens." This principle of neutrality emerges from the Equal Protection Clause, which provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause has been used to enforce the principle of neutrality in state and federal legislative enactment in a variety of contexts.

A. THE POLITICAL PROCESS DOCTRINE AND THE EQUAL PROTECTION CLAUSE: SCHUETTE'S BATTLEGROUND

Typically, changing a public university admissions policy in Michigan required citizens to either lobby the Board of Regents to facilitate the change or lobby it to elect a board member who shared the citizens' respective views. By using popular vote to prohibit public universities from implementing admissions policies that consider race through amending the State's Constitution, petitioners deviated from the typical political process. Whether this deviation violated the Equal Protection Clause depended on the application of the political process doctrine. The political process doctrine is a jurisprudential doctrine holding that a state violates the Equal Protection Clause when it organizes its political process in a manner that prevents minorities from participating in the process on equal terms.

The political process analysis focuses on the discriminatory effect of restructuring the process unlike a traditional equal protection
analysis, which focuses on discriminatory intent.\(^{59}\)

The Supreme Court's decision in *Reitman v. Mulkey*\(^ {60}\) laid the foundation for what would become known as the political process doctrine. In *Mulkey*, the Court addressed a voter-enacted amendment to California's constitution, which effectively prohibited the state legislature from interfering with a property owner's decision to decline to sell or rent residential property.\(^ {61}\) Although the amendment appeared to be facially neutral, the majority held that the design and intended outcome of the amendment was to overrule state law that protected buyers and lessees from discrimination by private sellers and lessors.\(^ {62}\) Further, the Court found that the amendment had the additional purpose of preventing the state from enacting similar legislation in the future.\(^ {63}\) The majority ultimately concluded that the amendment effectively established a constitutional right for sellers and lessors to discriminate, which violated the Fourteenth Amendment and led to real and specific injury.\(^ {64}\)

The Supreme Court first alluded to the political process doctrine in *Hunter v. Erickson*.\(^ {65}\) In *Hunter*, the Court addressed a voter-enacted amendment to the Akron city charter, which overturned an ordinance that prohibited discrimination in the housing market.\(^ {66}\) The amendment required that any subsequent anti-discrimination housing ordinance be approved by referendum, while other ordinances regulating real property were not subject to this requirement.\(^ {67}\) The Court found that while the amendment was facially neutral, it "place[d] special burden[s] on racial minorities within the governmental process" by singling out and placing unique requirements on the anti-discrimination housing ordinance, which in effect led to widespread racial discrimination.\(^ {68}\) The majority reasoned that a state may not disadvantage "any particular group by making it more difficult to

\(^{59}\) See D'Alessio, supra note 40, at 108.

\(^{60}\) Reitman v. Mulkey, 387 U.S. 369 (1967).

\(^{61}\) Id. at 371.

\(^{62}\) Id. at 373-74.

\(^{63}\) Id. at 374.

\(^{64}\) Id. at 381.

\(^{65}\) Hunter v. Erikson, 393 U.S. 385 (1968); see also D'Alessio, supra note 40, at 108 (describing *Hunter* as the foundation of the political process doctrine).

\(^{66}\) *Hunter*, 393 U.S. at 386-87.

\(^{67}\) Id. at 390.

\(^{68}\) Id. at 391.
enact legislation on its behalf." Ultimately, the majority in *Hunter* held that the amendment "discriminate[d] against minorities, and constitute[d] a real, substantial, and invidious denial of the equal protection of the laws." Thus, the political process doctrine was established.

The final Supreme Court cases relevant to the development of the political process doctrine are *Washington v. Seattle School District No. 1* and *Crawford v. Board of Education of Los Angeles*. In *Seattle*, a local school board enacted a mandatory busing program designed to relieve the lasting effects of segregation on racial minorities. Those in opposition to the use of busing to desegregate the school district passed a state initiative that prohibited the use of busing for that purpose. The Court, primarily using the precedent set forth in *Hunter*, sought to determine whether the initiative violated the Equal Protection Clause. In *Seattle*, the Court reasoned that, while desegregation would have benefited Caucasian as well as minority children, the use of busing to desegregate the school district would primarily benefit minority children. Next, the Court determined that the effect of the initiative placed a special burden on minorities because it "remov[ed] the authority to address . . . racial problem[s]—and only . . . racial problem[s]—from the existing decisionmaking body" because it required those advocating desegregating the busing system to "seek relief from the state legislature, or from the statewide electorate." The *Seattle* majority outlined the parameters of the political process doctrine by noting that, while states generally have wide latitude in delegating the order of their political process:

[A] different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places

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70. *Id.*
73. *Seattle*, 458 U.S. at 462.
74. *Id.* at 463-64.
75. *Id.* at 467-69.
77. *Id.* at 474.
special burdens on racial minorities within the governmental process," thereby "making it more difficult for certain racial and religious minorities...to achieve legislation that is in their interest."\textsuperscript{78}

The \textit{Seattle} Court found that the initiative reordered the political process in such a manner that minorities were specially burdened, so as to dilute their meaningful participation in the political process.\textsuperscript{79} Therefore, the initiative violated the Equal Protection Clause.\textsuperscript{80}

In \textit{Crawford}, the Court addressed an amendment to the California constitution that barred the state's judiciary from mandating student assignments and transportation except to remedy a specific violation of the Equal Protection Clause.\textsuperscript{81} There too, the plaintiffs argued that the constitutional amendment created special burdens on minorities based solely on racial classifications and altered the political process in doing so.\textsuperscript{82} However, the Court rejected that argument, finding that the amendment "neither says nor implies that persons are to be treated differently on account of their race."\textsuperscript{83} The \textit{Crawford} majority went on to state, "this Court previously has held that even when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown."\textsuperscript{84} The Court further drew a distinction between state laws that discriminate on the basis of race and state laws that address race in a neutral fashion.\textsuperscript{85} "This distinction is implicit in the Court's repeated statement that the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place[,]" the Court reasoned.\textsuperscript{86} Unlike \textit{Crawford}, the Court found, the laws at issue in \textit{Mulkey} and \textit{Hunter} went beyond repealing
antidiscrimination legislation to actually endorsing state-authorized discrimination.\textsuperscript{87} The Court also reasoned that it would be counterintuitive to find the amendment unconstitutional because the amendment effectively adopted the Equal Protection Clause's text.\textsuperscript{88} The \textit{Crawford} Court worried that striking down the repeal of race-related legislation would infringe on the authority of states to deal with problems within their own borders.\textsuperscript{89} Thus, the Court held that the amendment was constitutional because the plaintiffs could not demonstrate that the amendment had been enacted with a discriminatory purpose.\textsuperscript{90}

\textbf{B. THE PRECEDENT RELIED ON BY THE PLURALITY AND CONCURRENCES}

In \textit{Schuette}, a majority of the Court reasoned that the political process doctrine did not apply, in stark contrast to the Sixth Circuit and the dissenting opinion.\textsuperscript{91} In doing so, the plurality and concurring opinions differed on which line of cases controlled and presented several outlooks on this divisive issue explored in the following sub-sections.

\textbf{1. THE PRECEDENT RELIED ON BY THE PLURALITY}

The plurality relied on \textit{Coalition for Economic Equity v. Wilson}\textsuperscript{92} and \textit{Coral Construction, Inc. v. City \\& County of San Francisco}\textsuperscript{93} for its holding. This line of legal precedent began to take shape in the United States Ninth Circuit Court of Appeals's decision in \textit{Wilson}. The Sixth Circuit's decision in \textit{Schuette} directly contradicted the Ninth Circuit's decision in \textit{Wilson}, even though both cases were comprised of similar facts, thereby creating a split amongst the federal appellate courts.\textsuperscript{94}

In \textit{Wilson}, the Ninth Circuit addressed whether a voter-

\begin{itemize}
\item \textsuperscript{87} Crawford v. Bd. of Educ., 458 U.S. 527, 538 \\& n.20 (1982).
\item \textsuperscript{88} \textit{Id.} at 535.
\item \textsuperscript{89} \textit{Id.} at 540.
\item \textsuperscript{90} \textit{Id.} at 545.
\item \textsuperscript{91} See discussion infra at Part IV.A.
\item \textsuperscript{92} Coal. for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997).
\item \textsuperscript{93} Coral Const. Inc. v. City \\& Cnty. of San Francisco, 235 P.3d 947 (Cal. 2010).
\item \textsuperscript{94} See J. Kevin Jenkins \\& Pamela Larde, \textit{BAMN! The Sixth Circuit Strikes Down Michigan's Proposal 2}, 2013 B.Y.U. Educ. \\& L.J. 253, 270 (2013); see also D'Alessio, supra note 40, at 111 ("In 1997, the Ninth Circuit decided . . . \textit{Wilson}, a case with facts virtually identical to those in \textit{Schuette}.")
\end{itemize}
enacted California constitutional amendment that prohibited racial preferences in education, public employment, and public contracting violated the Equal Protection Clause. The court noted that "[t]he first step in determining whether a [state] law violates the Equal Protection Clause is to identify the classification that it draws." In regards to the classification, the Ninth Circuit noted that the amendment eliminated preferential treatment based on race or gender and by doing so did not classify individuals on the basis of race or gender, and, "as a matter of law and logic, [could] not violate the Equal Protection Clause."

The Ninth Circuit also addressed the line of cases that outline the political process doctrine. After performing the political process doctrine analysis, the Wilson court found that it "ma[de] little sense to apply 'political [process]' equal protection principles where the group alleged to face special political burdens itself constitutes a majority of the electorate." Further, the court questioned whether a state law that prohibits a group from seeking preferential treatment could ever result in the personal harms demonstrated in Hunter and Seattle.

Next, the Ninth Circuit reasoned that enacting a law at a different level of government than usual automatically results in an equal protection violation because "[e]very statewide policy has the 'procedural' effect of denying someone an inconsistent outcome at the local level." Lawmaking procedures do not create equal protection violations simply because they place a burden on a particular group. Such a holding would likely eliminate particular lawmaking procedures altogether in certain

95. Coal. for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997).
96. Id. at 702.
97. Id.
98. The Ninth Circuit refers to the political process doctrine as the "political structure analysis," but cites the line of case mentioned in Sub-section A of this section. See id. at 702-03.
99. Id. at 704. In Wilson, the plaintiffs argued that amendment "place[d] procedural burdens in the path of women and minorities" but women and minorities constituted a majority of the California electorate at the time and the amendment had passed by a majority vote. Id. Given these facts, the court asked in puzzlement, "Is it possible for a majority of voters impermissibly to stack the political deck against itself?" Id.
100. See Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 704 (9th Cir. 1997).
101. Id. at 706.
102. Id.
fields, the court reasoned. Further, the court held that “[e]ven a state law that does restructure the political process can only deny equal protection if it burdens an individual’s right to equal treatment.” The Ninth Circuit ultimately held that the amendment did not violate the Equal Protection Clause.

Interestingly enough, Wilson relied partly on Crawford in its reasoning. In fact, the Wilson court noted the difference between Crawford, Hunter, and Seattle by pointing out that Crawford involved the repeal of race-based legislation, as opposed to Hunter and Seattle, which prohibited states from shifting decisionmaking power over particular racial issues to higher levels of government. Thus, Wilson stands for the proposition that when a state law is facially neutral and effectively adopts the Equal Protection Clause’s substance, it cannot trigger an equal protection violation.

In Coral, the California Supreme Court was faced with the same amendment barring race- and gender-based preferences that was in controversy in Wilson. There too, the court was faced with an equal protection challenge rooted in the political process doctrine. The court made a distinction between cases where state laws use racial preferences to remedy discrimination and cases where state laws prohibit racial preferences and discrimination. The former laws require states to justify their use with a compelling governmental interest, and the latter, like the amendment that was in controversy, do not require such strong justification. Relying on the reasoning from Wilson, the Coral court reached the same conclusion. “[T]he political

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103. See Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 706 (9th Cir. 1997) (citing James v. Valtierra, 402 U.S. 137, 142 (1971)).
104. Id. at 707.
105. Id. at 708-09 (quoting Crawford v. Bd, of Educ., 458 U.S. 527, 535 (1982)).
106. Id. at 706 (quoting Crawford, 458 U.S. at 538).
107. Id. at 708-09.
108. See Coral Const., Inc. v. City & Cnty. of San Francisco, 235 P.3d 947, 952 (Cal. 2010). Although the Ninth Circuit had already decided the issue of the amendment’s constitutionality, the California Supreme Court stated that it was not bound by that decision, but nevertheless came to the same conclusion. See id. at 958-59.
109. Id. at 956-61.
110. See id. at 960.
111. Id. at 952 (citing Adarand Constructors, Inc. v. Pea, 515 U.S. 200, 224, 230 (1995)).
112. Id. at 960.
[process] doctrine does not invalidate state laws that broadly forbid preferences and discrimination based on race, gender and other similar classifications."

The court reiterated the principle from Wilson that, "[e]ven a state law that does restructure the political process can only deny equal protection if it burdens an individual’s right to equal treatment." Thus, the court held that the amendment did not violate the political process doctrine; therefore, it did not violate the Equal Protection Clause.

2. THE PRECEDENT RELIED ON BY THE CONCURRENCES

Justice Scalia authored a concurring opinion in Schuette, joined by Justice Thomas, which relied on two lines of precedent different from the plurality. The first line of precedent provides states great deference in how they structure their "political process" (deference cases). The other precedent line of cases stand for the proposition that when the intent to discriminate is absent, state action that is facially neutral cannot violate the Equal Protection Clause (Washington v. Davis rule). This subsection will discuss each line of precedent in turn.

a. The Deference Cases: “[N]ear-Limitless” Sovereignty of States Designing Their Governing Structures

In Schuette, Justice Scalia cited a line of cases that discussed the legal freedom of states to design their governing processes and structures. This area of law evolved from a 1907 United States Supreme Court decision, Hunter v. City of Pittsburgh. In Hunter, the Supreme Court of Pennsylvania directed the consolidation of two cities. In an election, a majority of the residents of one city opposed the merger, but a majority of the larger second city voted in favor of

114. Id. at 960 (quoting Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 707 (9th Cir. 1997)).
115. Id. at 961.
117. Id. at 1646.
118. Id. at 1647-48.
119. Id. at 1646.
121. Id. at 174.
it.\textsuperscript{122} In regards to the powers of states to govern their subordinate subdivisions, the Court stated:

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted [sic] to them. . . . The state, therefore, at its pleasure, may modify or withdraw all such powers . . . . In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.\textsuperscript{123}

The \textit{Hunter} Court emphasized that these principles were well-settled doctrines.\textsuperscript{124} Although the decision from \textit{Hunter} was decided over one hundred years before \textit{Schuette}, its principles were reaffirmed in \textit{Holt Civic Club v. City of Tuscaloosa}.\textsuperscript{125}

In \textit{Holt Civic Club}, an unincorporated civic association and individual citizens of the city of Holt, Alabama challenged the constitutionality of Alabama statutes that placed the City of Holt under the City of Tuscaloosa’s criminal jurisdiction and business regulations.\textsuperscript{126} There, the Court reasoned that “Government . . . is the science of experiment,” and noted that the Court has afforded “wide leeway” to the states to decide how they should delegate the legislative power possessed by them.\textsuperscript{127} The Court in \textit{Holt Civic Club} ultimately concluded that the Alabama statutes did not violate the Equal Protection Clause or the Due Process Clause because the State was within its discretion to experiment with how it would govern itself and the political subdivisions within it.\textsuperscript{128} Thus, the restructuring was not a constitutional violation because Alabama had leeway to decide how it should govern itself.\textsuperscript{129}

\textbf{b. The \textit{Washington v. Davis} Rule.}

In \textit{Washington v. Davis}, two African-American police officers filed a lawsuit against the Commissioner of the District of

\begin{footnotesize}
\textsuperscript{122} Hunter v. City of Pittsburgh, 207 U.S. 161, 175 (1907).
\textsuperscript{123} Id. at 178-79.
\textsuperscript{124} Id. at 178.
\textsuperscript{125} Holt Country Club v. City of Tuscaloosa, 439 U.S. 60 (1978).
\textsuperscript{126} Id. at 61-62.
\textsuperscript{127} Id. at 71 (quoting Anderson v. Dunn, 19 U.S. 204, 226 (1821)).
\textsuperscript{128} Id. at 75.
\textsuperscript{129} See id. at 75.
\end{footnotesize}
Columbia, the Chief of the District of Columbia's Metropolitan Police Department, and the Commissioners of the United States Civil Service Commission. The claimants complained that their applications were rejected because the police department's recruiting procedures discriminated against African-American applicants. The claimants brought a Constitutional challenge, rooted in the Due Process Clause of the Fifth Amendment. The Court drew the first distinction between the purpose of policies or laws and their impact. The Washington Court rejected the Court of Appeals's reasoning that the disparate impact of the challenged practices should be examined instead of an employer's potentially discriminatory purpose. Supreme Court precedent did not dictate that laws or official acts were unconstitutional simply because they had a "racially disproportionate impact"; rather, the Court reasoned, that a discriminatory purpose must be shown. In fact, the majority stated, "[a] statute, otherwise neutral on its face, must . . . be applied so as invidiously to discriminate on the basis of race" for it to violate equal protection. The Court reasoned that to hold a neutral statute invalid "absent compelling justification" merely because it burdens one race as opposed to another would raise questions as to the validity of legislation in a variety of areas of law including licensing statutes, public service statutes, tax regulations, and welfare law.

Numerous United States Supreme Court cases have reaffirmed the principles outlined in Washington, yielding what Justice Scalia's concurrence and the dissent called, "the Washington v. Davis rule." The Washington v. Davis rule's use was demonstrated in Crawford, where the Court reasoned that "even when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only

131. Id. at 233.
132. Id. at 234.
136. Id. 240-42.
137. Id. at 241 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).
138. Id. at 248.
if a discriminatory purpose can be shown.” Further, in Village of Arlington Heights v. Metropolitan Housing Development Corp., the Court cited the Washington v. Davis rule: “Official action will not be held unconstitutional solely because it results in a racially disproportionate impact.” The next section walks through the Court’s decision and the rationale behind the plurality and concurring opinions.

IV. THE SCHUETTE DECISION

Multiple opinions led to the decision of the Court, with Justice Kennedy authoring the plurality opinion in Schuette. Justice Scalia, along with Justice Thomas, concurred with the plurality’s opinion in upholding Section 26, but for different reasons. With an eight-Justice Court sitting, Justice Kennedy’s plurality opinion and the concurrences of Chief Justice Roberts and Justices Alito, Scalia, Thomas, and Breyer, resulted in a majority of the Court upholding Section 26. Justice Sotomayor filed a dissenting opinion that was joined by Justice Ginsburg. The following section lays out the opinions of the court in order of appearance.

A. THE PLURALITY AND CONCURRING OPINIONS: THE DECISION OF THE COURT; POINTS OF AGREEMENT AND DEPARTURE

While the plurality and concurring opinions in Schuette provide much to analyze, this sub-section provides the reasoning behind each authored opinion. First, this sub-section outlines and provides the reasoning behind the plurality opinion authored by Justice Kennedy. Next, this sub-section probes the concurrence of Justice Scalia, which was joined by Justice Thomas. Finally, this sub-section details Justice Breyer’s concurrence in order to provide an overview of how the Justices decided this case.

142. Id. at 1628-1638 (Kennedy, J., joined by Roberts, C.J. and Alito, J.); id. at 1638-39 (Roberts, C.J., concurring); id. at 1639-1648 (Scalia, J., concurring in the judgment, joined by Thomas, J.); id. at 1648-51 (Breyer, J., concurring in the judgment).
143. Id. at 1651-83 (Sotomayor, J., dissenting, joined by Ginsburg, J.).
1. THE PLURALITY: JUSTICE KENNEDY JOINED BY CHIEF JUSTICE ROBERTS AND JUSTICE ALITO

The plurality opinion framed the issue presented in Schuette by asking, "whether, 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."\(^{144}\) First, the plurality noted that other states had laws similar to Michigan’s and that the universities within those states adopted a variety of racially neutral alternative approaches.\(^{145}\) Therefore, by voting to prohibit racial preferences in higher education admissions practices, Michigan simply joined the ongoing "national dialogue" regarding the use of race-conscious admissions policies in higher education.\(^{146}\)

After setting the stage, the plurality opinion considered whether the political process doctrine controlled the issue at hand.\(^{147}\) The plurality reasoned that Mulkey and Hunter both involved "state action[s] which encouraged [racial] discrimination, [that aggravated] real and specific injury."\(^{148}\) The plurality also found that in Seattle, the voter-enacted state prohibition on busing "had the serious risk, if not purpose, of causing specific injuries on account of race, just as had been the case in Mulkey and Hunter."\(^{149}\) The constitutionality of the busing program was assumed by the Court in Seattle, Justice Kennedy reasoned, which led the Court to focus its legal analysis on the state’s disapproval of the busing plan.\(^{150}\) The Court found that the state’s disapproval aggravated the injury caused by race.\(^{151}\)

Next, the plurality opinion reasoned that the rationale behind its decision in Seattle adopted a statement from the Hunter concurrence,\(^{152}\) leading to an impermissible reading of

\(^{144}\) Schuette v. BAMN, 134 S. Ct. 1623, 1630 (2014) (plurality opinion).
\(^{146}\) See id. at 1631 (citing Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 692 (9th Cir. 1997)).
\(^{147}\) Id. at 1630-38 (discussing Mulkey, Hunter, and Seattle).
\(^{148}\) Id. at 1631.
\(^{149}\) Schuette v. BAMN, 134 S. Ct. 1623, 1633 (2014) (plurality opinion).
\(^{150}\) Id.
\(^{151}\) See id.
\(^{152}\) Id. at 1634. That procedural change in Hunter had "the clear purpose of making it more difficult for certain racial and religious minorities to achieve
Seattle by the Sixth Circuit.\textsuperscript{153} This broad reading by the Sixth Circuit was expressly rejected by the plurality in Schuette.\textsuperscript{154} The plurality reasoned that if it were to accept this reading of Seattle, then “any state action with a ‘racial focus’ that makes it ‘more difficult for certain racial minorities than for other groups’” to achieve a legislative purpose would be subject to strict scrutiny.\textsuperscript{155} Next, the plurality reasoned that the broad reading of Seattle would require the Court to decide which policies served the “interest” of racial groups, which “raises serious constitutional concerns.”\textsuperscript{156} Thus, Seattle was not a “proper guide for decisions and should not be deemed authoritative or controlling.”\textsuperscript{157} If Seattle were interpreted in such a manner it would force the Court to accept that all individuals of a race think alike.\textsuperscript{158} The plurality opinion continued, reasoning that if Seattle required courts to determine how particular races define their interests in political matters, the Court would again be forced to classify individuals according to race, which is contrary to the evolving policy and law.\textsuperscript{159} The plurality stated,

Were courts to embark upon this venture not only would it be undertaken with no clear legal standards or accepted sources to guide judicial decision but also it would result in, or at least impose a high risk of, inquiries and categories dependent upon demeaning stereotypes, classifications of questionable constitutionality on their own terms.\textsuperscript{160}

Next, the plurality opinion reasoned that, even if the

\textsuperscript{153} See Schuette v. BAMN, 134 S. Ct. 1623, 1633-34 (2014) (plurality opinion).

\textsuperscript{154} Id.

\textsuperscript{155} Id. at 1634 (quoting Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 472, 474 (1982)).

\textsuperscript{156} Id.

\textsuperscript{157} Id.

\textsuperscript{158} Schuette v. BAMN, 134 S. Ct. 1623, 1647 (2014) (plurality opinion) (citing Shaw v. Reno, 509 U.S. 630, 647 (1993)).

\textsuperscript{159} Id. at 1635.

\textsuperscript{160} Id. But cf. id. at 1675 (Sotomayor, J., dissenting) (“Yet as Justice [Scalia] recognizes, Hunter and Seattle provide a standard. . . . Surely this is the kind of factual inquiry that judges are capable of making. . . . The same could have been said about desegregation: Not all members of a racial minority in Seattle necessarily regarded the integration of public schools as good policy. Yet the Seattle Court had little difficulty saying that school integration as a general matter ‘inure[d] . . . to the benefit of the minority.’” (quoting Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 472 (1982))).
analysis required by *Seattle* could be undertaken, it would require courts to determine the policy areas that certain racial groups have a political interest in. By doing so, the Court would create "incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage." In other words, if the Court framed the debate in *Schuette* in terms of race, the Court would only be engaging in perpetuating stereotypes which would lead to litigants doing the same. The Court also hypothesized, "were the *Seattle* formulation, and the reasoning of the Court of Appeals in this case, to remain in force," it would have validated racial division, not discouraged it.

Furthermore, the Court reasoned that the concerns presented by the *Seattle* formulation did not require resolution in *Schuette* because the adoption of Section 26 did not involve the specific injury at issue in *Mulkey* and *Hunter*. The plurality also found that the Sixth Circuit's judgment called into question well-settled rulings on similar state laws, which would likely be invalidated if the Court upheld the Sixth Circuit's opinion. In support of this pronouncement, the plurality held that this case involved the question at issue in *Coral* and *Wilson*, not *Mulkey*, *Hunter*, and *Seattle*. By adding Section 26 to their state constitution, Michigan voters simply exercised their right to meaningfully shape state policy. The Court noted that Michigan voters merely used the system provided to them in order to "bypass public officials["] lack of response "to the concerns of a majority of the [State's] voters."

162. *Id.*
163. *See id.*
164. *See id.* at 1638-39 (Roberts, C.J., concurring) ("[I]t is not 'out of touch with reality' to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely that doubt, and—if so—that the preferences do more harm than good."). *But cf. id.* at 1676 (Sotomayor, J., dissenting) ("The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race . . . . Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: 'I do not belong here.'").
165. *Id.* at 1636 (plurality opinion).
167. *Id.* ("That question is not how to address or prevent injury caused on account of race but whether voters may determine whether a policy of race-based preferences should be continued.").
168. *Id.*
169. *Id.*
In its rationale, the Court noted that while the Constitution secures the right of an individual to be free from unlawful governmental action it "embraces, too, the right of citizens to debate . . . and decide and then through the political process, act in concert to try to shape the course of their own times and the course of a nation."\textsuperscript{170} If the Court were to hold that the public policy question addressed in Section 26 was too difficult for voters, it would be an "unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common."\textsuperscript{171} The plurality further reasoned that taking difficult policy questions out of the hands of voters would implicate serious First Amendment issues and not advance the political process.\textsuperscript{172} Furthermore, the plurality made it clear that its holding would not eliminate the potential for redress by the courts when injury is inflicted on racial minorities in cases like \textit{Mulkey}, \textit{Hunter}, and \textit{Seattle}.\textsuperscript{173} Finally, the Court stated that its decision was not about how to resolve racial preferences, but rather about which was the proper branch of government to resolve them.\textsuperscript{174} The plurality pointed out that no constitutional authority or Supreme Court precedent existed to justify the Court setting aside a Michigan law enacted by its voters.\textsuperscript{175} Therefore, the Court reversed the judgment of the Sixth Circuit, and upheld Section 26 as constitutionally valid because it did not violate the Equal Protection Clause.\textsuperscript{176}

2. \textbf{Justice Scalia's Concurrence}

Like the plurality opinion, Justice Scalia set the stage by inquiring, "Does the Equal Protection Clause of the Fourteenth Amendment forbid what its text plainly requires?"\textsuperscript{177} The concurrence agreed with the plurality in questioning the validity

\textsuperscript{170} Schuette v. BAMN, 134 S. Ct. 1623, 1636-37 (2014) (plurality opinion).
\textsuperscript{171} Id. at 1637.
\textsuperscript{172} Id.
\textsuperscript{173} Id. at 1637-38.
\textsuperscript{174} Id. at 1638.
\textsuperscript{175} Schuette v. BAMN, 134 S. Ct. 1623, 1638 (2014) (plurality opinion). \textit{But see} id. at 1683 (Sotomayor, J., dissenting) ("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. I respectfully dissent.").
\textsuperscript{176} Id. at 1638 (plurality opinion).
\textsuperscript{177} Id. at 1639 (Scalia, J., concurring in the judgment).
of the political process doctrine. However, Justice Scalia did not agree with the plurality’s interpretation of the Court’s holdings from *Seattle* and *Hunter*. In fact, the concurrence reasoned that had the Court applied the logic of *Hunter* and *Seattle*, it would likely have struck down Section 26. While noting that the plurality disavowed the political process doctrine also, Justice Scalia’s concurrence found that the plurality interpreted it beyond comprehension and should have overruled that line of cases completely. The plurality found that the challenged act in *Hunter* “target[ed] racial minorities,” but Justice Scalia reasoned that the Court never considered intent in reaching its decision in that case. Also, the concurrence noted that the plurality misinterpreted the holding from *Seattle* as well when it found that the government furthered the “infliction of specific’ and presumably, constitutional ‘injury.”

In his concurrence, Justice Scalia agreed with the plurality’s reasoning that the political process doctrine presented great difficulty in its administration. Justice Scalia added, however, that the political process doctrine analysis “misreads the Equal Protection Clause to protect ‘particular group[s],’ a construction that we have tirelessly repudiated in a ‘long line of cases understanding equal protection as a personal right.”

According to the concurrence, if the *Hunter* and *Seattle* line of cases were left to stand, it would “nearly swallow[ ] the rule of

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178. Schuette v. BAMN, 134 S. Ct. 1623, 1640 (2014) (Scalia, J., concurring in the judgment) (noting that the plurality misinterpreted *Hunter* and *Seattle* to encompass the element of intentional discrimination).

179. Id. (disagreeing with the plurality’s “reinterpretation of Seattle and Hunter [which makes] them stand in part for . . . [the] proposition that whenever state action poses ‘the serious risk . . . of causing specific injuries on account of race,’ it denies equal protection” (quoting id. at 1633 (plurality opinion))).

180. Id. at 1641.

181. Id. at 1641-42.

182. Id. at 1642.

183. Schuette v. BAMN, 134 S. Ct. 1623, 1642 (2014) (Scalia, J., concurring in the judgment) (quoting id. at 1636 (plurality opinion)).

184. Id. at 1643-45 (“Patently atextual, unadministrable, and contrary to our traditional equal-protection jurisprudence, *Hunter* and *Seattle* should be overruled.”).

185. Id. at 1644 (quoting Adarand Constructors, Inc. v. Pea, 515 U.S. 200, 224, 230 (1995)). But see id. at 1672 (Sotomayor, J., dissenting) (“Yes, equal protection is a personal right, but there can be no equal protection violation unless the injured individual is a member of a protected group or a class of individuals. It is membership in the group—here the racial minority—that gives rise to an equal protection violation.”).
structural state sovereignty.” Justice Scalia hypothesized that continuing to apply the logic behind Hunter and Seattle could lead to absurd results. The concurrence argued that, if a state delegated its power to ban racial preferences to a university board and the board failed to use this power, the mere fact that the state delegated this power would pre-empt the state from taking the power back. Thus, a state in this predicament would inevitably violate the political process doctrine and equal protection because it would be reorganizing its “political process.” As such, to hold that the process by which Michigan voters amend their state’s constitution through popular vote is not a part of the Michigan political process would be a “very peculiar notion” to voters who have done just that twenty times since the constitution’s ratification. Justice Scalia further argued that Hunter and Seattle also contradicted another line of cases where the Court has recognized the “near-limitless sovereignty of each State to design its governing structure as it sees fit.”

Finally, Justice Scalia’s concurrence reasoned that the “dozens of cases” that reaffirmed the Washington v. Davis rule have refuted the notion that “a facially neutral law may deny equal protection solely because it has a disparate racial impact,” and in this aspect, the concurrence disagreed with the plurality as well. Justice Scalia stated that not overruling Hunter and

186. Schuette v. BAMN, 134 S. Ct. 1623, 1641 (2014) (Scalia, J., concurring in the judgment). But see id. at 1673 (Sotomayor, J., dissenting) (“But state sovereignty is not absolute; it is subject to constitutional limits. The Court surely did not offend state sovereignty by barring States from changing their voting procedures to exclude racial minorities. So why does the political-process doctrine offend state sovereignty? The doctrine takes nothing away from state sovereignty that the Equal Protection Clause does not require.”).

187. Id. at 1646 (Scalia, J., concurring in the judgment) (quoting Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 485 (1982) (Powell, J., dissenting)). Contra at 1673 (Sotomayor, J., dissenting) (“It would not. As explained previously, the voters in Michigan who opposed race-sensitive admissions policies had any number of options available to them to challenge those policies.”).

188. Id. (Scalia, J., concurring in the judgment)

189. Id. 1646-47.

190. Id. at 1646 (citing Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71 (1978)) (“So it would seem to go without saying that a State may give certain powers to cities, later assign the same powers to counties, and even reclaim them for itself.”).

191. Schuette v. BAMN, 134 S. Ct. 1623, 1647 (2014) (Scalia, J., concurring in the judgment). But cf. id. at 1674 (Sotomayor, J., dissenting) (“[Justice Scalia] would acknowledge, however, that an act that draws racial distinctions or makes racial classifications triggers strict scrutiny regardless of whether discriminatory intent is shown. That should settle the matter. Section 26 draws a racial distinction . . . It is odd to suggest that prior precedents call into question a later one. Seattle (decided in
Seattle left “ajar an effects-test escape hatch,” which is contrary to the Washington v. Davis line of cases. Justice Scalia would have not only upheld Section 26, but would have overruled Hunter and Seattle and held that a law which provides equal protection cannot thereby violate it.

3. JUSTICE BREYER’S CONCURRENCE

Justice Breyer’s concurrence took a different approach than the plurality opinion and Justice Scalia’s concurrence. First, Justice Breyer identified the issue as addressing Section 26’s constitutionality inasmuch as it applied to programs which use race in the admissions process that are only justified by the benefits to be derived from diverse student bodies. Second, while Justice Breyer believed that the Constitution permitted the race-sensitive admissions program previously described, he understood the Constitution to empower the voters, not the courts, to be the proper parties to resolve the debate over the use of racial preferences in admissions programs. In this sense, Justice Breyer’s concurrence agreed with the plurality and Justice Scalia’s concurrence.

Third, Justice Breyer’s concurrence reasoned that Hunter and Seattle stood for important principles; however, they did not apply to Schuette because there was not a reordering of the political process like in Hunter and Seattle. His concurrence reasoned that in Schuette, Michigan delegated power to elected university boards who in turn delegated the authority over admissions-related policies to unelected university faculty members and administrators. Justice Breyer found that in enacting Section 26, Michigan voters took back the authority

1982) postdated both Washington v. Davis (1976) and Arlington Heights (1977). Justice [Scalia]'s suggestion that Seattle runs afoul of the principles established in Washington v. Davis and Arlington Heights would come as a surprise to Justice Blackmun, who joined the majority opinions in all three cases.


193. Id. at 1639-40 (“By adopting [the Equal Protection Clause], they did not simultaneously offend it.”).

194. Id. at 1648-51 (Breyer, J., concurring in the judgment).

195. Id. at 1649 (quoting Grutter v. Bollinger, 539 U.S. 306, 328 (2003)).

196. Id.


198. Id. at 1650.
granted to persons whom they did not elect. 199 This created an important distinction between Schuette and the Hunter and Seattle cases. In those cases, "minorities had participated in the political process and they had won. The majority’s subsequent reordering of the political process repealed the minority’s successes and made it more difficult for the minority to succeed in the future." 200 In doing so, the concurrence reasoned, "[t]he majority thereby diminished the minority’s ability to participate meaningfully in the electoral process," whereas, here "[t]here [was] no prior electoral process in which the minority participated." 201 Furthermore, Justice Breyer held that extending Hunter and Seattle to situations where decision-making power was "moved from an administrative body to a political one would . . . risk discouraging experimentation by interfering with efforts to see when and how race-conscious policies work." 202

Finally, Justice Breyer found that Hunter and Seattle stood contrary to the principle that "favors decisionmaking through the democratic process." 203 The concurrence concluded that the Court did not need to look further than the United States Constitution to decide whether Section 26 was valid under the circumstances of the case. 204 Therefore, Justice Breyer joined in the judgment of the court in upholding Section 26. 205

B. THE DISSENT: JUSTICE SOTOMAYOR JOINED BY JUSTICE GINSBURG

Justice Sotomayor vehemently argued that the political process doctrine was the controlling line of precedent in Schuette. 206 The dissent began by arguing that this case involved a situation where a majority of the Michigan voters changed the political process in such a way that it "uniquely disadvantaged

200. Id. at 1650-51.
201. Id. at 1651.
202. See id. at 1650-51. Contra id. at 1667 (Sotomayor, J., dissenting) ("Such a scenario is not before us.").
203. Id. at 1651 (Breyer, J., concurring in the judgment).
205. Id.
206. Id. at 1659 (Sotomayor, J., dissenting).
racial minorities." The dissent argued that Section 26 created two different processes for Michigan citizens to influence admissions practices: "one for people interested in race-sensitive admissions policies and one for everyone else." Now, Michigan voters who want the state universities to consider race in admissions programs can only do so by amending the State's constitution. This restructuring of the political process, Justice Sotomayor argued, is not only unconstitutional under prior Supreme Court precedent, but is "no more permissible than denying [the minority] the [right to] vote, on an equal basis with others."

First, the dissent set the stage by providing several historical examples of situations where the Court stepped in when the majority denied subsets of the population the right to participate meaningfully and equally in the political process. These examples are important, Justice Sotomayor argued, because they provide the historical context which lit the background for the Court's intervention in Hunter and Seattle. The dissent noted that Hunter and Seattle recognized a fundamental principle of the Court's equal protection precedent—the political process doctrine. Under the political process doctrine, the dissent found that state action deprives minorities of equal protection when it: "(1) has a racial focus, targeting a policy, or program that ‘inures primarily to the benefit of the minority,’” and (2) restructures the political process in such a manner that it “uniquely burdens racial minorities’ ability” to participate meaningfully in that process. Justice Sotomayor argued that Schuette was a case that mirrored Seattle and should be resolved under the political process doctrine.

Justice Sotomayor began applying the political process doctrine by first noting that Section 26 had a racial focus similar to the desegregation of public schools because they both were

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208. Id. at 1653.
209. Id.
210. Id. (quoting Hunter v. Erikson, 393 U.S. 385, 391 (1969)).
211. Id. at 1654-56 (collecting cases).
213. Id. at 1659 (quoting Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 472 (1982)).
214. Id. at 1657.
designed to increase access to higher education for minorities.\textsuperscript{215} Next, the dissent found that Section 26 restructured the political process in such a manner that it effectively denied racial minorities’ meaningful access to the process by creating a more burdensome and distinct route to enact admissions policies that would consider diversity.\textsuperscript{216}

The typical process to enact change to a public university’s policies in Michigan required going through its eight-member governing board.\textsuperscript{217} Each university’s respective board has a degree of legislative power to enact rules and regulations that are binding on the university.\textsuperscript{218} Thus, the boards are a part of the political process in Michigan, Justice Sotomayor reasoned.\textsuperscript{219} The dissent further reasoned that, not only are the boards a part of the political process, but their members often “included their views on race-sensitive admissions in their campaigns” to become board members.\textsuperscript{220} Justice Sotomayor noted that before Section 26, Michigan’s political structure allowed its citizens to vote for both opponents and supporters of racially based admissions policies, but after the enactment of Section 26, the boards retained authority over all admissions policies except those that would include race.\textsuperscript{221} Post-Schuette, to change admissions policies over this issue alone would require a Michigan citizen to attempt to amend the State constitution.\textsuperscript{222} Amending Michigan’s constitution is no easy task, as over 320,000 signatures are needed to get a proposal on the ballot.\textsuperscript{223} Further, Justice Sotomayor argued, the cost of amending the State constitution is so significant that it limits the ability of racial minorities to place an amendment on the ballot.\textsuperscript{224} For these reasons, the dissent found that Section 26 restructured the political process in such a manner so as to uniquely burden racial minorities.\textsuperscript{225} The dissent’s core argument that Section 26

\begin{thebibliography}{9}
\bibitem{216} Id. at 1660.
\bibitem{217} Id.
\bibitem{218} \textsc{Mich. Comp. Laws Ann.} § 390.5 (West 2010); \textit{see also} id. § 390.3 (“The government of the university is vested in the board of regents.”).
\bibitem{219} Schuette, 134 S. Ct. at 1659 (Sotomayor, J. dissenting).
\bibitem{220} Schuette v. BAMN, 134 S. Ct. 1623, 1661 (2014) (Sotomayor, J., dissenting).
\bibitem{221} Id.
\bibitem{222} Id.
\bibitem{223} Id.
\bibitem{224} Id. at 1662.
\bibitem{225} Schuette v. BAMN, 134 S. Ct. 1623, 1662-63 (2014) (Sotomayor, J.,
\end{thebibliography}
violated the political process doctrine can be broken down into three reasons: (1) Section 26 only stripped the university of its authority to self-govern where race-sensitive admissions policies are concerned; (2) because of Section 26’s political restructuring, Michigan citizens who wish to enact policy changes in admissions programs in an attempt to consider race must now undergo the burdensome process of amending the state’s constitution; and finally, (3) no other policy change in admissions programs would require the onerous task of amending the State’s constitution.\(^\text{226}\)

The dissent further reasoned that when governmental action violates the political process doctrine, the action is subject to strict scrutiny.\(^\text{227}\) Because Michigan did not assert any compelling state interests to justify Section 26, the law should be ruled unconstitutional, the dissent averred.\(^\text{228}\)

Next, the dissent elaborated on what it believed to be the correct interpretation of Seattle and Hunter. Justice Sotomayor agreed with the portion of Justice Scalia’s concurrence that criticized the plurality’s interpretation of the cases.\(^\text{229}\) Justice Sotomayor reasoned that Seattle and Hunter did not involve discriminatory intent as the plurality argued; rather, the race-based injury that minorities suffered at the hands of the restructuring of the political process justified the Court’s decisions in those cases.\(^\text{230}\) Further, the dissent disagreed with the reasoning behind Justice Breyer’s concurrence that the political process doctrine did not apply in this case because there was no political restructuring so-to-speak.\(^\text{231}\) Justice Sotomayor argued that, although sometimes the boards delegated authority to unelected actors, the boards retained the ultimate authority in three ways: (1) they often met with university officials to discuss admissions policies, (2) the boards could amend any admissions policies that the unelected actors set, and (3) the boards could appoint university officials who shared their policy views in regards to admissions practices.\(^\text{232}\) Therefore, the dissent argued,


\(^{227}.\) Id. at 1662-63.

\(^{228}.\) Id. at 1663.

\(^{229}.\) Id. at 1664.

\(^{230}.\) Id. at 1663-64.


\(^{232}.\) Id. at 1666.
Section 26 did in fact restructure the political process.\textsuperscript{233}

Furthermore, the dissent opined, the political process doctrine not only should resolve \textit{Schuette} as a matter of stare decisis, but the doctrine itself is "correct as a matter of first principles" because it is consistent with the Court's prior equal protection precedent.\textsuperscript{234} Citing a footnote from \textit{United States v. Carolene Products Co.}, Justice Sotomayor noted that the Court previously recognized that "prejudice against discrete and insular minorities" is a condition that seriously undermines minorities' ability to participate in the political process, so that a "more searching judicial inquiry" might be needed.\textsuperscript{235} The precepts delineated by the \textit{Carolene} Court "lie at the heart of the political process doctrine," Justice Sotomayor reasoned.\textsuperscript{236} Specifically, Section 26 diluted racial minorities' meaningful participation in the political process.\textsuperscript{237} It reconfigured the political process and created a two-tiered system of enacting university admissions policies, "subjecting laws designed to protect or benefit discrete and insular minorities to a more burdensome political process than all other laws."\textsuperscript{238}

Additionally, the dissent argued that the political process doctrine is not contrary to the Court's more recent equal protection holdings and is judicially administrable.\textsuperscript{239} First, Justice Sotomayor attacked Justice Scalia's notion that the Equal Protection Clause protects individuals rather than groups by noting that it is the individual's participation in a group that subjects him to discrimination.\textsuperscript{240} Next, the dissent argued that Justice Scalia's concern for the political process doctrine being applicable only to minorities was moot because the "minority cannot achieve such restructurings against the majority."\textsuperscript{241} Then, the dissent moved to distinguish the political process doctrine from the \textit{Washington v. Davis} line of cases on which

\textsuperscript{233} Schuette v. BAMN, 134 S. Ct. 1623, 1667 (2014) (Sotomayor, J., dissenting).
\textsuperscript{234} Id.
\textsuperscript{235} Id. at 1668 (quoting United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938)).
\textsuperscript{236} Id.
\textsuperscript{237} Id. at 1669.
\textsuperscript{238} Schuette v. BAMN, 134 S. Ct. 1623, 1669 (2014) (Sotomayor, J., dissenting).
\textsuperscript{239} Id. at 1671.
\textsuperscript{240} Id. at 1672.
\textsuperscript{241} Id. at 1673.
Justice Scalia relied. The political process doctrine line of cases dealt with legislation designed to benefit minorities, as opposed to the Washington v. Davis line of cases, which involved legislation that was intended to benefit a larger group of underprivileged citizens in which minorities were underrepresented. Lastly, the dissent noted that criticizing the political process doctrine for being unadministrable because it requires judges to determine if a particular policy benefits minorities is in contrast with the Court's prior precedents. Because Section 26 restructured the political process in such a manner that it burdened racial minorities' ability to meaningfully participate in the process, the dissent would have struck down the law as unconstitutional.

V. CRITICAL ANALYSIS OF THE COURT'S DECISION IN SCHUETTE

The Court's decision in Schuette raised several concerns and issues that warrant a critical analysis. First, what effect does the plurality's broad holding have on existing law, policy, and future Supreme Court cases? The second issue raised by Schuette was how the plurality and concurrences handled the political process doctrine precedent, which calls into question the composition of the doctrine moving forward. This section explains how cleaning up the holding in Schuette would have easily resolved these issues.

This analysis is more concerned with the Court's usage of unnecessary and overly broad federalism language to reach its decision and less so with the correctness of that decision. This section also argues that the Supreme Court's tacit denunciation of a line of cases but failure to overturn them, combined with the absence of majority agreement as to which precedent case law applied, further complicates areas of law which are already vague for courts and jurists.

243. Id.
244. Id. at 1675-76.
245. Id. at 1671.
246. This sentiment was shared by Justice Scalia, who noted that the plurality disavowed the political process doctrine yet failed to “take the next step in overruling those cases. Rather, it interprets them beyond recognition.” Id. at 1641-42 (Scalia, J., concurring in the judgment).
A. **Schuette**'s Effect on State Law and Policymaking and Subsequent Supreme Court Cases

By holding in **Schuette** that courts lack the authority to overturn voter-enacted legislation that involves tough policy choices, the plurality injected dangerous language into the realm of state decisionmaking. The plurality opinion used overly broad federalism principles to justify its holding, which is not terribly troubling when narrowly applied to the specific facts at hand. However, constitutional law does not exist in a vacuum. In 2014 and 2015, **Schuette**'s broad language turned what should have been a narrow holding, specifically applied, into a rallying cry for several states in defense of discriminatory same-sex marriage bans. This rallying cry would be reduced to nothing more than a faint whisper the following term when the Supreme Court limited the reach of **Schuette**'s federalism language. The Roberts Court's holdings on constitutional issues have predominantly been narrow, which comports with the Court's preference for "legislation to be challenged on an as-applied rather than facial basis." **Schuette**'s broad holding, however, contravened that precept and breathed life into the oft-repeated delusion that when states enact laws through their voters the federal courts have no authority to overturn them.

The broad ruling is particularly troubling in the realm of state legislation that excludes and discriminates against certain classes of citizens. Following **Schuette**, several states cited its broad holding in support of the proposition that the Constitution does not grant federal courts the authority to overturn voter-enacted legislation. Eventually, one federal appeals court

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247. See e.g., Schuette v. BAMN, 134 S. Ct. 1623, 1635 (2014) (plurality opinion) ("There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside [state] laws that commit [tough] policy determination[s] to the voters.").


agreed with the states’ argument—the Sixth Circuit. \(^{250}\) Subsequently, the United States Supreme Court granted Writs of Certiorari in the four cases that were decided by the Sixth Circuit. \(^{251}\) Three of the four states seeking affirmation of the Sixth Circuit’s decision cited Obergefell’s broad federalism language in their briefs. \(^{252}\) The case would be decided under the name of Obergefell v. Hodges, and as fate would have it, Justice Kennedy would author the Court’s decision there too.

In Obergefell, the Court held that the fundamental right to marry grounded in the Fourteenth Amendment extends to same-sex couples. \(^{253}\) The Obergefell majority drew a distinction between the broad federalism concepts from Schuette and the role of the Court as the final arbiter of individual constitutional rights. \(^{254}\) Thus, states can commit tough policy choices to their voters, so long as those tough policy choices do not abridge the individual rights protected by the Constitution. \(^{255}\) This natural

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252. Brief in Opposition at 8, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-562), 2014 WL 7405783, at *8 (“The issue is one of state public policy, and ‘[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity . . . .’” (quoting Schuette v. BANN, 134 S. Ct. 1623, 1637 (2014) (plurality opinion))); Brief in Response to Petition for Writ of Certiorari at 1, Obergefell, 135 S. Ct. 2584 (No. 14-556), 2014 WL 7169722, at *1 (“As the Court said just last Term, ‘[f]reedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people.’” (quoting Schuette, 134 S. Ct. at 1637 (plurality opinion))); Respondents’ Brief in Support of Petition for Writ of Certiorari at 1, 10-11, 24, Obergefell, 135 S. Ct. 2584 (No. 14-571), 2014 WL 6706856, at *1, *10-11, *24 (stating three that it would be “demeaning” to democracy for a court to take a sensitive policy decision like same-sex marriage out of the hands of voters (quoting Schuette, 134 S. Ct. at 1637 (plurality opinion))). Michigan went on to compare the decision in Schuette to how international tribunals analyze the same-sex marriage question before concluding that “[d]emocracy does not presume that some subjects are either too divisive or too profound for public debate” Id. at 24, 31 (quoting Schuette, 134 S. Ct. at 1638 (plurality opinion)).

253. Obergefell, 135 S. Ct. at 2604-05.

254. See id. at 2605 (“Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.”).

and obvious limitation on federalism, however, was not clear from the *Schuette* decision, as evidenced by the Court’s need to spell it out just over a year later.

The Court would have avoided having to clarify the language from *Schuette* by simply limiting the scope of its holding, something it often does.\(^{256}\) Additionally, the Court’s broad federalism language in *Schuette* plainly ignored its storied history of overturning state laws that violate the Equal Protection Clause.\(^{257}\) Simultaneously, the plurality made little progress toward eliminating the federalism concerns it and Justice Scalia’s concurrence sought to avoid.\(^{258}\)

*Schuette’s* broad federalism language spread like wildfire through the federal courts the following year. Judicial efficiency is something that the Court has often stressed as an “important value,”\(^{259}\) but *Schuette* did very little to further that principle. This past term, federal courts were inundated with cases that cited *Schuette* in support of the proposition that the Supreme

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256. *See, e.g.*, Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2785 (2014) (holding that “[t]he contraceptive mandate [of the Affordable Care Act], as applied to closely held corporations, violates RFRA” (emphasis added)).


258. *Schuette* v. BAMN, 134 S. Ct. 1623, 1636-38 (2014) (plurality opinion); id. at 1646 (Scalia, J., concurring in the judgment).

Court cannot overturn voter-enacted state laws that make tough policy decisions.\textsuperscript{260} Those litigants failed to mention, and the Court failed to clarify in \textit{Schuette}, that the Court can, has, and will get involved when official state or federal government action violates the individual protections grounded in the Constitution.\textsuperscript{261}

These are all issues that could have been avoided if the Court was clearer about when it will invade the province of state lawmakers' authority.\textsuperscript{262} Equal protection is not an experiment that is up for a majority vote and states are certainly not afforded the discretion to violate it through legislation. This seems to be a clear and modern limitation on federalism, but the \textit{Schuette} decision is partly to blame for the return of the Ghost of Federalist Past, discrimination's ancient ally. Luckily, \textit{Obergefell} banished that ghost, but one can only wonder when it will return.

\textbf{B. \textit{SCHUETTE'S HOLDING AND ITS EFFECT ON EXISTING LAW AND POLICY}}

To mangle is to injure something so deeply as to make it unrecognizable. One of the concerns raised by Justice Scalia's concurrence and Justice Sotomayor's dissent was that the plurality opinion misinterpreted the political process doctrine line of cases, namely \textit{Mulkey}, \textit{Hunter}, and \textit{Seattle}, "beyond recognition."\textsuperscript{263} First, the plurality concluded that, "\textit{Seattle is best understood as a case in which the state action in question (the bar on busing enacted by the State's voters) had the serious risk, if not purpose, of causing specific injuries on account of race, just as in \textit{Mulkey} and \textit{Hunter}.}"\textsuperscript{264} The problem with this

\textsuperscript{260} See \textit{supra} note 249-52 and accompanying text.

\textsuperscript{261} \textit{Obergefell} v. Hodges, 135 S. Ct. 2584, 2605-06 (2015); see also \textit{supra} note 257.

\textsuperscript{262} Cf. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846, 877-79 (1992) (plurality opinion) (holding that while women have a basic right to choose an abortion, states can regulate that right to protect potential life and the health of the mother, but when those regulations impose an undue burden on the right to an abortion prior to the viability of fetus, the Court will strike down the state regulations).

\textsuperscript{263} \textit{Schuette} v. BAMN, 134 S. Ct 1623, 1640 (2014) (Scalia, J., concurring in the judgment) ("But I do not agree with [the plurality's] interpretation of \textit{Seattle} and \textit{Hunter} . . ."); \textit{id}. at 1664 (Sotomayor, J., dissenting) ("And what now of the political-process doctrine? After the plurality's revision of \textit{Hunter} and \textit{Seattle}, it is unclear what is left. The plurality certainly does not tell us. On this point, and this point only, I agree with Justice [Scalia] . . .").

\textsuperscript{264} \textit{id}. at 1633 (plurality opinion).
interpretation, as Justice Scalia’s concurrence and Justice Sotomayor’s dissent pointed out, was that the Mulkey, Hunter, and Seattle Courts did not address the issue of intent.\textsuperscript{265} By interpreting the political process doctrine cases in this manner, Justice Kennedy effectively added the element of intentional and invidious discrimination to the political process doctrine when the Court failed to address that issue in those cases.\textsuperscript{266} In doing so, the plurality interpreted the political process doctrine beyond recognition, which leaves the Court, and jurists, wondering what is left of the political process doctrine after Schuette. The plurality mangled the settled interpretation of the political process doctrine but was unwilling to overturn that line of cases—noting that when specific injury is inflicted by state laws courts can redress that injury and named Mulkey, Hunter, and Seattle as sources of this precept.\textsuperscript{267}

The concern moving forward is less with the plurality’s interpretation of the political process doctrine cases, but rather how extensively it criticized the administrability of the doctrine while leaving its application open for future cases. If the problems associated with the administration of the political process doctrine existed in 2014, they will exist in future cases where the doctrine applies. Justice Kennedy assessed the doctrine’s administrative problems at length, not to overrule them, but rather to distinguish them from Schuette.\textsuperscript{268} If the political process doctrine was not applicable, why did the plurality devote such time to criticizing its administrability? If Justice Kennedy felt that the political process doctrine was unadministrable, then the plurality should have joined Justice Scalia’s concurrence in overruling them. However, if Justice Kennedy felt that Schuette was easily distinguishable from the political process doctrine cases, as appears to be the case, then the focus of the plurality opinion should have been there. The plurality focused on neither, which leaves jurists with a poorly distinguished set of facts in Schuette and a mangled precedent.

The plurality in Schuette should have taken more care to distinguish the facts at hand from those presented by the political

\textsuperscript{265} Schuette v. BAMN, 134 S. Ct 1623, 1641-43 (2014) (Scalia, J., concurring in the judgment); \textit{id.} at 1664 (Sotomayor, J., dissenting).
\textsuperscript{266} \textit{Id.} at 1641-43 (Scalia, J., concurring in the judgment); \textit{id.} at 1664 (Sotomayor, J., dissenting).
\textsuperscript{267} \textit{Id.} at 1637 (plurality opinion).
\textsuperscript{268} \textit{Id.} at 1635.
process doctrine cases. In doing so, the plurality would have provided a useful metric for analyzing modern equal protection cases against a backdrop of cases that are based in the desegregation era. The plurality may have mistakenly read the element of intent into the political process doctrine cases, but those cases all demonstrated instances where official state action eliminated equality by removing the ability of anyone to level the playing field in the future. In Schuette, however, the constitutional amendment sought to promote equality by preventing the consideration of race in university admissions practices. Section 26 requires state universities to treat all applicants equally. On the contrary, the political process doctrine cases all involved official state action that sanctioned the unequal treatment of minorities. Thus, Schuette is easily distinguishable from the political process doctrine cases because Section 26 does not create an unequal playing field—it requires state universities to look at those individuals who are in the “field” as equals.

While, removing race-sensitive policies from university admissions could disadvantage groups that previously received special consideration based on race, Section 26’s discriminatory impact should not be assumed. The impact caused by Section 26 may prove to be real and unfortunate but not all laws that disadvantage a particular group violate equal protection. Further, Section 26 prevents preferential treatment as well as the discrimination of anyone based on race, nationality, religion, gender, etc.—a restatement of the Equal Protection Clause. Can a state constitutional amendment that protects individuals against discrimination also discriminate against those individuals? Because there is no constitutional right to preferential treatment on the basis of race, that question must be answered in the negative. Section 26 cannot violate equal protection because Section 26 requires it.

Part of the confusion in Schuette originates from the fact that the Court is still applying an equal protection framework from an era when states made little attempt to hide their efforts to discriminate. As time progresses, so too should the law. One role of the Supreme Court is to evolve bodies of law. One thing is for certain; Schuette evolved nothing. The Court in Schuette

270. See id. at 247.
271. See Marbury v. Madison, 5 U.S. 137 (1803) (claiming the authority to perform judicial review).
missed a valuable opportunity to sufficiently distinguish the facts at hand from the political process doctrine cases. Most importantly, the Court missed an opportunity to develop a modern equal protection framework, leaving antiquated doctrines to deal with twenty-first century discrimination.

C. FILLING IN THE GAPS: HOW SCHUETTE MAY HAVE BEEN BETTER DECIDED

As noted in the previous three sub-sections, one of the major problems with the Court’s decision in Schuette stems from the plurality’s overly broad pronouncement that the federal judiciary lacked the authority to overturn voter-enacted laws involving difficult policy decisions.272 However, the Court has frequently done just that.273 If the scope of the plurality’s statement had been tailored to apply to laws that actively prohibit discrimination, then the entire ambiguity would have been eliminated. In a parenthetical, Justice Kennedy quotes somewhat of a “savings clause”: “Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs.”274 Adopting this savings clause into the Court’s broad holding would have stated the obvious: the Constitution and the Court’s previous holdings give the courts the right to step in when official state action infringes upon a citizen’s constitutional rights.275 By expressly including the savings clause, the plurality’s decision would have read more comprehensively and would have reflected how Schuette was distinguishable from the Court’s prior holdings. In doing so, the plurality would have clearly noted that federalism has its limits—something states often forget.

It is arguable that the plurality did, in fact, include such a savings clause as evinced by the majority opinion in Obergefell, also authored by Justice Kennedy.276 The Obergefell majority carefully rearranged the plurality opinion from Schuette to create

272. Schuette v. BAMN, 134 S. Ct. 1623, 1638 (2014) (plurality opinion) (“There is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters.”).
273. See id. at 1637; see also supra note 257.
275. Id. at 1637-38.
the illusion that the limits of Schuette were self-contained.\textsuperscript{277} However, the Obergefell majority opinion merely cherry-picked quotes from Schuette, placed them behind Schuette's broad federalism language, and passed them off as Schuette's holding.\textsuperscript{278} Thus, while it is tenable in retrospect to derive a limit on Schuette's broad federalism endorsement, doing so is only possible through Obergefell's lens. The presence of such a limit in Schuette was either not clear to states defending same-sex marriage bans or it was plainly ignored.\textsuperscript{279} In either case, the blame falls squarely on the shoulders of the plurality opinion from Schuette.

Schuette was easily distinguishable from the political process doctrine line of cases, and as such, the gutting of the political process doctrine was not required to reach the Court's decision. As previously noted, in Wilson, the Ninth Circuit was faced with a nearly identical law to Section 26 and there, the court upheld the constitutionality of the law at issue without disemboweling the political process doctrine.\textsuperscript{280} Simply put, the Ninth Circuit found that by prohibiting discrimination instead of inflicting it— as was done in Hunter and Seattle—the State law at issue was easily distinguishable from the political process doctrine line of cases.\textsuperscript{281} Here, similar to the law in Wilson,\textsuperscript{282} Section 26 essentially adopted the text of the Equal Protection Clause by prohibiting discrimination and preferential treatment from the


\textsuperscript{278} See id. ("But as Schuette also said, '[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power.' Thus, when the rights of persons are violated, 'the Constitution requires redress by the courts,' notwithstanding the more general value of democratic decisionmaking." (quoting Schuette v. BAMN, 134 S. Ct 1623, 1636-37 (2014) (plurality opinion))). The quotes from Schuette used by the Obergefell majority in support of the notion that the Schuette plurality limited its broad federalism holding are actually found in dicta. The "right of the individual to not be injured by the unlawful exercise of governmental power" is a transition that introduces the plurality's rejection of the argument that difficult policy questions should not be submitted to a vote. See Schuette, 134 S. Ct. at 1636 (plurality opinion). "[W]hen hurt or injury is inflicted . . . by . . . state action, the Constitution requires redress by the courts" follows the plurality's discussion of why taking tough policy choices out of the hands of voters would raise First Amendment issues. Id. at 1637.

\textsuperscript{279} See supra note 252.

\textsuperscript{280} Coal. for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997); see supra text accompanying notes 95-107.

\textsuperscript{281} Wilson, 122 F.3d at 707.

\textsuperscript{282} Id. at 707-09.
Therefore, Section 26 could not violate equal protection because it prohibited discrimination, not inflicted it.\textsuperscript{284}

The defeat of a political minority does not automatically yield an equal protection violation and neither does the restructuring of the political process,\textsuperscript{285} so what was it about prohibiting preferential treatment in Section 26 that could have violated the Equal Protection Clause? By utilizing the Ninth Circuit’s language from \textit{Wilson}, the Court’s precedent regarding a state’s right to govern the enactment of its own laws, and the \textit{Washington v. Davis} rule,\textsuperscript{286} the Court would have provided a modern analytical framework for how to analyze the constitutionality of official state action and laws when they have a negative impact on racial minorities. The framework would have looked something like: when official state action inflicts intentional discrimination on a class of individuals that is not constitutionally justifiable, it violates the Equal Protection Clause; but, when a state-enacted law adopts the text of the Equal Protection Clause, effectively prohibiting discrimination, there can be no equal protection violation absent a discriminatory purpose. In doing so, the Court would have created a streamlined framework that could have been easily applied in the future. Further, the Court would also have avoided the need to clarify the scope of \textit{Schuette}’s broad federalism language just over a year later.

\textbf{VI. CONCLUSION}

By enacting Section 26 and amending Michigan’s constitution, the voters effectively removed the issue of race-sensitive policies in state university admissions from the hands of the universities. The amendment no longer allows Michigan public universities to consider race in their admissions programs, which from its inception as a ballot proposal caused widespread controversy. Ultimately, the proponents of race-sensitive admissions programs turned to the courts for help. After a seesaw battle that took years to resolve, the Supreme Court

\textsuperscript{283} Schuette v. BAMN, 134 S. Ct 1623, 1639 (2014) (Scalia, J., concurring in the judgment).

\textsuperscript{284} See id.

\textsuperscript{285} See id. at 1634-36 (plurality opinion).

\textsuperscript{286} Laws or official acts are not unconstitutional merely because they have a “racially disproportionate impact,” but rather a discriminatory purpose must be shown. \textit{Washington v. Davis}, 426 U.S. 229, 240-42 (1976).
eventually upheld the constitutionality of Section 26 in *Schuette*.

The Court used broad federalism concepts to justify its holding in *Schuette* but failed to remind states that federalism has its limits—the Constitution. The Constitution applies to "the few" as well as "the many"; but often, it is called upon to protect the few from the many. The Supreme Court remains the ultimate arbiter of that sacred document—not the states or their voters. *Schuette* was a case in which the Court respected a State's right to mandate that its universities shall treat all applicants equally—nothing more, nothing less. History will soon forget the specific rhythm hammered out on the war drum of the Ghost of Federalism Past; history forgets its losers. Yet, that specter will return singing the same worn out tune; but maybe, just maybe, *Schuette* will be summoned as a warning to those who choose to stand on the wrong side of history.

"I told you these were shadows of the things that have been," said the Ghost. 'That they are what they are, do not blame me!'"  

Thomas D. Kimball*

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