SCHUETTE v. COALITION TO DEFEND AFFIRMATIVE ACTION: THE MAJORITY'S TYRANNY TOWARD UNEQUAL EDUCATIONAL OPPORTUNITY

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INTRODUCTION

> Under our Constitution, majority rule is not without limit. Our system of government is predicated on an equilibrium between the notion that a majority of citizens may determine governmental policy through legislation . . . nonetheless some things the Constitution forbids even a majority of citizens to do.[1]

For years, stakeholders in education have worked tirelessly to ensure that every child, regardless of his or her race, class, gender, or racial and ethnic identity, has access to equal educational opportunity. Despite these efforts, the opportunity gap in K-12 schools continues to grow and racial disparities in education remain a prominent fixture in the education milieu. Many legal scholars characterize the failed education reform efforts in the aftermath of *Brown v. Board of Education* as a slow retreat from substantive equality. This is primarily due to the Court's transition from judicial activism for disadvantaged minorities through race-conscious measures to post-racial determinism—the notion that any use of race is presumptively unconstitutional since all state-sponsored discrimination has been eradicated.[2] This doctrinal shift toward post-racial determinism is further evidenced by a series of rulings in the post-*Brown* era that undermined efforts to create diverse and equitable

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1. Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN), 134 S. Ct. 1623, 1667 (2014) (Sotomayor, J., dissenting).

2. Cedric Merlin Powell, *Justice Thomas,* Brown*, and Post-Racial Determinism*, 53 WASHBURN L.J. 451, 452–53 (2014).

schools under the guise of neutrality.[3] The judicial endorsement of color-blind rhetoric, despite the glaring racial disparities in education achievement outcomes, has been an effective tool in limiting the use of race-conscious measures in education. Although opponents of the use of race-conscious policies to integrate public schools have relied heavily on the judicial system to further their interests, there is a burgeoning movement to further those goals through the political process.

For decades, the Supreme Court has played an integral role in shaping the structure of our democratic process. At the heart of our democratic system is the principle of equal participation through the concept one man, one vote.[4] In the context of education, the political process can be used as a path toward educational equity through the enactment of laws designed to ensure that every child has equal educational opportunity regardless of his or her race, ethnicity, class, gender, or sexual orientation. But what happens when the political process is used to hinder as opposed to promote educational equity? Or when the majority capitalizes on knowledge that minorities are politically a paradigmatically powerless group by asserting its advantage to enact state laws that undermine minority interests?[5] The very essence of democracy is premised on the belief that every individual should have an equal voice in the political process. However, how do you preserve the founding principles of democracy, which is a system that recognizes each individual's right to civic participation, while preventing those rights from being altered or discarded by a tyranny of the majority?[6] The recent Supreme Court ruling in *Schuette v. Coalition to*

3. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 735 (2007) ("The districts have also failed to show that they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives.'"); Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 284 (W.D. Tex. 1971) (arguing that public education should not be a system based upon wealth, but instead should be a system of "fiscal neutrality"), *rev'd*, 411 U.S. 1 (1973). *See also* Cedric Merlin Powell, *Harvesting New Conceptions of Equality: Opportunity, Results, and Neutrality*, 31 ST. LOUIS U. PUB. L. REV. 255, 279 (2012) ("[*Milliken v. Bradley*] is a seminal decision because it literally changes the meaning of the Fourteenth Amendment in the school cases and beyond. It lays the doctrinal groundwork for the post-racial *Parents Involved* decision, and it sets the stage for the post-racial merging of Fourteenth Amendment and Title VII principles in *Ricci*. The doctrinal thread that runs through all of the decisions is the protection of white interests and privilege. The Court literally ignores evidence of systemic racial discrimination in order to preserve suburban school districts and insulate them from the burden of urban integration.").

4. *See* Reynolds v. Sims, 377 U.S. 533, 557–61 (1964); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964).

5. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 84 (1980).

6. *See* Thomas L. Murphy, *The Dangers of Overreacting to "Judicial Activism,"* UTAH B.J., Jan.–Feb. 2006, at 38, 41.

Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN) addresses this very quandary through the lens of the political process doctrine.

Manipulating the political process for the purpose of oppressing minority groups violates the spirit and purpose of the Equal Protection Clause. A core strand of the Supreme Court's equal protection jurisprudence is to ensure that all citizens have the right to meaningfully participate in the democratic process.[7] Restructuring the political process to unfairly burden minorities for the purpose of hindering their ability to represent their interests is an act of moral exclusion. According to Moral Exclusion Theory, moral exclusion may be defined as "a psychosocial orientation toward certain individuals or groups for whom justice principles or considerations of fairness and allocation of resources are not applicable."[8] Moral exclusion serves as a breeding ground for discrimination, prejudice, and practices that benefit the majority at the expense of the minority. Under Moral Exclusion Theory, the dominant group creates moral boundaries in which those considered outside the boundaries (i.e. the minority group) are expendable and any harm inflicted upon them is considered just.[9] Examining the intersection of moral exclusion and the political process doctrine is an important step toward understanding barriers to educational equity in K-12 schools.

The *Schuette* decision has alarming implications for equal education opportunity because it constitutionalized statewide reverse discrimination suits and thus will have the effect of overturning what is left of race-conscious measures designed to create diverse and equitable learning environments. This Article will highlight how the Court's decision in *Schuette* morally excludes minority children from equal educational opportunity. Part I will provide a brief doctrinal history of the road to *Schuette* through a discussion of the emergence of the political process doctrine and equal protection jurisprudence in the pre-*Schuette* era. Part II examines the Court's decision in *Schuette* to highlight how the Court misapplied the political process doctrine to advance the rhetoric of neutrality. Part III of the article highlights how the *Schuette* Court's interpretation of the political process doctrine promotes the moral exclusion of minority children from equal educational opportunity. Part IV will conclude with a discussion of how to transition from moral *exclusion* to moral

7. *See* Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN), 134 S. Ct. 1623, 1651 (2014) (Sotomayor, J., dissenting).

8. Laura Leets, *Interrupting the Cycle of Moral Exclusion: A Communication Contribution to Social Justice Research*, 31 J. APPLIED SOC. PSYCHOL. 1859, 1860 (2001).

9. Susan Opotow, *Moral Exclusion and Injustice: An Introduction*, J. SOC. ISSUES, Spring 1990, at 1, 1.

inclusion of minority children in K-12 education milieus in the post-*Schuette* Era.

I. THE EQUAL PROTECTION CLAUSE AND POLITICAL PROCESS DOCTRINE: THE ROAD TO *SCHUETTE*

Racial preferences in the context of governmental decision-making have been a long and heated debate in the public sphere, especially in the context of education. The Equal Protection Clause of the Fourteenth Amendment is often at the center of legal disputes regarding the constitutionality of race-conscious policies. Although the Supreme Court promoted diverse and equitable learning environments through a series of landmark education law cases,[10] there are strong indices that affirmative action policies are in their final days. In recent years, equal protection jurisprudence has shifted from race-conscious to race-neutral approaches to educational equity.[11] Advocates of color-blind approaches to equal opportunity have developed a unique strategy to prohibiting the use of racial preferences in government decision-making under the guise of neutrality through the state political process. Specifically, several states have passed referendums that invalidate the use of racial preferences in governmental decisions.[12] As a result, the political process doctrine emerged as a framework for evaluating the constitutionality of these controversial ballot initiatives.

The central purpose of the political process doctrine is to safeguard minorities' rights to equal participation in the political process.[13] Under the political process doctrine, a governmental action violates the Fourteenth Amendment rights of minority groups when the following two criteria are met:

10. Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (holding that (1) the law school had a compelling interest in attaining a diverse student body, and (2) the admissions program was narrowly tailored to serve its compelling interest in obtaining the educational benefits that flow from a diverse student body and thus did not violate the Equal Protection Clause); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12 (1978) ("The fourth goal asserted by [the university] is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education."); Brown v. Bd. of Educ., 347 U.S. 483, 493–95 (1954) ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. . . . We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

11. Powell, *supra* note 2.

12. Peter M. Bean, *Have We Reached* Grutter*'s "Logical End Point?" The Fight Over State Law Bans on Preferential Treatment Programs and the Future of Affirmative Action in the United States*, 22 AM. U. J. GENDER SOC. POL'Y & L. 485, 490 (2014).

13. Lisa White Shirley, Comment, *Reassessing the Right of Equal Access to the Political Process: The* Hunter *Doctrine, Affirmative Action, and Proposition 209*, 73 TUL. L. REV. 1415, 1416–17 (1999).

(1) the governmental action has a racial focus and targets a program that primarily benefits minorities, and (2) the governmental action restructures the political process in a way that places a unique burden on racial minorities' ability to advocate for their own interests. This section will briefly highlight the three seminal cases that collectively provide the doctrinal framework for the political process doctrine.

A. Political Process Doctrine Trilogy: Hunter, Seattle, *and* Crawford

1. *Hunter v. Erickson*: Burdens Minority Interests

The central issue in *Hunter*[14] was whether an amendment to a city charter to prevent a city council from implementing a fair housing ordinance without the approval of the majority of Akron voters violated the Equal Protection Clause.[15] In this case, the plaintiff, an African American woman, alleged she was denied equal opportunity to live in certain residences because the owners specified to her real estate agent their refusal to sell to minorities.[16] As a result, she was not permitted to view certain properties because of her race.[17] Prior to the plaintiff's incident, the Akron City Council enacted a fair housing ordinance to address this type of housing discrimination to ensure that all individuals, regardless of race, color, religion, national origin, or ancestry, have equal opportunity to the same available housing facilities.[18] The central goal of the city's fair housing ordinance was to deter discriminatory housing practices that promoted substandard, unsafe, segregated housing for minorities.[19] Following the passage of the city's anti-discrimination housing ordinance, voters in opposition of the anti-discrimination ordinance amended the city charter through a ballot initiative requiring a majority vote at a general election to approve any law which regulates any aspect of the real estate market based on considerations of race.[20] Thus, this ballot initiative only permitted the passage of race-conscious anti-discrimination housing laws

14. Hunter v. Erickson, 393 U.S. 385 (1969).

15. *Id.* at 386.

16. *Id.* at 387.

17. *Id.*

18. *Id.* at 386. The year the Akron City Council enacted the Fair Housing Act was 1964, which coincided with the historic passing of the 1964 Civil Rights Act. During this era in U.S. history, a significant number of legal milestones were passed to support the spirit and purpose of the Equal Protection Clause of the Fourteenth Amendment: equality regardless of an individual's race, class, gender, religion, or national origin.

19. *Hunter*, 393 U.S. at 391 ("The preamble to the open housing ordinance which was suspended by § 137 recited that the population of Akron consists of 'people of different race, color, religion, ancestry or national origin, many of whom live in circumscribed and segregated areas, under substandard unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing.'").

20. *Id.* at 387.

through the political process, removing the power from local city officials to do so. As a result, the city of Akron was unable to process the plaintiff's housing discrimination complaint due to the recently passed anti-discrimination housing ordinance that invalidated the fair housing ordinance absent a change in the charter amendment. As a result, the amendment left minority citizens, such as the plaintiff, with no protections from discriminatory housing practices. The plaintiff filed suit contending that the charter amendment violated the Equal Protection Clause of the Fourteenth Amendment.[21]

The *Hunter* Court ruled in favor of the plaintiff, holding that the charter amendment violated the Equal Protection Clause.[22] The Court reasoned that the charter amendment's exclusive focus on antidiscrimination ordinances "places special burdens on racial minorities within the governmental process" and is therefore not permitted.[23] Government action may not be taken with the malicious intent to harm a racial minority.[24] The *Hunter* case established the bedrock principle that a state may not restructure the procedures of the government for the purpose of targeting racial minorities, even if the manner is facially neutral.[25] Since the charter amendment invalidated a law designed to protect racial minorities and altered the political process in a manner that resulted in invidious discrimination that burdened minority interests, the Court applied the most stringent scrutiny.[26] In applying strict scrutiny, the Court found that the charter amendment was unconstitutional because Akron failed to provide a compelling governmental interest for the amendment.[27] The Court rejected Akron's principal argument in support of the charter amendment, which was based on the uncontested fact that fair housing legislation is likely to invoke a great deal of passion within the community.[28] It was not necessary,

21. *Id.* at 387–88.

22. *Id.* at 393.

23. *Id.* at 391.

24. *See Hunter*, 393 U.S. at 392–93.

25. *Id.* at 391 ("Like the law requiring specification of candidates' race on the ballot, *Anderson v. Martin*, [375 U.S. 399 (1964)], § 137 places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others.").

26. *Id.* at 391–92 ("Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are 'constitutionally suspect,' and subject to the 'most rigid scrutiny.'" (citations omitted)).

27. *Id.* at 392. Akron attempted to demonstrate a compelling governmental interest to justify the discrimination that resulted from restructuring the political process by "[c]haracterizing it simply as a public decision to move slowly in the delicate area of race relations." *Id.* The Court rejected Akron's argument, stating that the amendment was not needed to slow the pace of the public discourse and action in the area of race relations or to provide Akron citizens the opportunity to participate in the decision-making process. *Id.*

28. *Id.* at 395 (Harlan, J., concurring).

however, to pass this amendment in order to assure that particularly sensitive issues would ultimately be decided by the general electorate.[29] Akron had already established a procedure, which was based upon a neutral principle that mandated a general referendum on the issue with the support of at least ten percent of the voters.[30]

The *Hunter* case is significant because the Court establishes one of the three core elements of the political process doctrine. Government restructuring that burdens racial minorities' interests within the political process violates the Equal Protection Clause of the Fourteenth Amendment. The *Hunter* Court requires that the following two criteria be met to establish a racial classification: (1) the law at issue concerns a racial issue, and (2) the law restructures the political process in a way that burdens minority interests.[31] Additionally, under *Hunter*, the political process doctrine requires that strict scrutiny is the standard of review for any law that restructures the political process in a racial manner or shifts a decision related to race from one level of government to another.[32]

2. *Washington v. Seattle School District*: Shifting Governmental Authority

This case arose from attempts by the Seattle School District to remedy racially isolated schools due to de facto segregation.[33] School district efforts to alleviate racial isolation through transfer programs and magnet schools were unsuccessful.[34] As a result, Seattle School District implemented a mandatory busing program, called the Seattle Plan, for the purpose of creating racially diverse schools.[35] Under the Seattle Plan, both black and white students were reassigned to promote diverse and equitable schools.[36] Seattle residents who opposed the school district's mandatory desegregation programs proposed a state law, Initiative 350, to prohibit mandatory busing policies to desegregate Seattle schools.[37] Although Initiative 350 passed by an overwhelming majority of voters,[38] the victory was short-lived. The Seattle School District filed a lawsuit against the State of Washington challenging the constitutionality of

29. *Hunter*, 393 U.S. at 395 (Harlan, J., concurring).

30. *Id.*

31. Shirley, *supra* note 13, at 1420–21.

32. *See* David R. Friedman, Schuette v. Coalition to Defend Affirmative Action *and the Forgotten Oath*, 66 STAN. L. REV. ONLINE 117, 117–18 (2013), *available at* http://www.stanfordlawreview.org/sites/default/files/online/articles/66_SLRO_117.pdf.

33. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 460 (1982).

34. *Id.* at 461.

35. *Id.*

36. *Id.*

37. *Id.* at 461–62.

38. *Seattle Sch. Dist. No. 1*, 458 U.S. at 463.

Initiative 350 under the Equal Protection Clause, which guarantees racial minorities the right to fully participate in the political process.[39]

According to the Court, the racial focus of Initiative 350 provoked the application of the *Hunter* doctrine.[40] Relying upon and expanding the precedent established in *Hunter*, the Court held that Initiative 350 violated the Equal Protection Clause of the Fourteenth Amendment because, although facially neutral, the initiative targeted a program designed to benefit racial minorities.[41] Second, Initiative 350 reallocated governmental power to enact mandatory desegregation policies from local to state government.[42] The redistribution of power created an unjustifiable discriminatory burden on racial minorities within the political process, making it more difficult to achieve legislation in their interests, which violates the Equal Protection Clause.[43] This case is significant because it further developed the framework for the political process doctrine by establishing that government restructuring places an unfair discriminatory burden on minorities when it moves governmental decision-making to develop policies benefiting minorities from a lower to higher level of government.

3. *Crawford v. Board of Education of L.A.*

The *Crawford*[44] case is the last case in the political process doctrine trilogy. In this case, California voters passed Proposition I, an amendment to the California Constitution that limited state court-ordered busing to desegregate schools, except in instances where a federal court issued a busing mandate to remedy a violation of the Equal Protection Clause of the Fourteenth Amendment.[45] The central issue in *Crawford* was whether Proposition I, which repealed legislation that benefited racial minorities, violated the Fourteenth Amendment.[46]

In evaluating the constitutionality of Proposition I, the Court applied the political process doctrine, finding no constitutional violation where a state, through the political process, chooses to constrict its expansive busing program to align with the federal desegregation standards.[47] The Court reasoned that a

39. *Id.* at 464, 467.

40. *Id.* at 467. In applying the *Hunter* doctrine to evaluate an Equal Protection challenge, the Court considered State actions that place special burdens on racial minorities to be "no more permissible" than denying these members the right to vote. *Id.* at 470. In effect, a stricter analysis is required "when the State allocates governmental power nonneutrally." *Id.*

41. *Id.* at 484–85, 487.

42. *Id.* at 477.

43. *Seattle Sch. Dist. No. 1*, 458 U.S. at 483–84.

44. Crawford v. Bd. of Educ., 458 U.S. 527 (1982).

45. *Id.* at 531–32.

46. *Id.* at 529.

47. *Id.* at 535.

state's actions of simply repealing or revising desegregation or other laws designed to deter discrimination, in and of itself has "never . . . been viewed as embodying a presumptively invalid racial classification."[48] The Court found no racial classification present in Proposition I because the law did not state that persons are to be treated differently due to their race.[49] The Court further reasoned that Proposition I did not prohibit the enforcement of any federal law or constitutional mandate.[50] To the contrary, Proposition I merely aligned itself with the desegregation criteria established by the Federal Constitution.[51]

B. Equal Protection Jurisprudence in the Pre-Schuette Era

Schuette arose during a paradigm shift in constitutional jurisprudence from the endorsement of race-conscious measures to race-neutrality in the pursuit of educational equity. Although it is a well-established principle in equal protection jurisprudence that limited uses of race is constitutionally permissible to enable students to receive the educational benefits that flow from diversity, preferential treatment of minorities has not gone unchallenged.[52] Opponents of affirmative action admissions policies have initiated numerous equal protection challenges to the use of race in school admissions.[53] It is within this backdrop that the Court has continued to grapple with the endemic challenge of promoting diverse and equitable learning environments while not disadvantaging minorities and non-minorities. To this end, the Supreme Court decisions in *Bakke*, *Grutter*, and *Parents Involved* have collectively served as a benchmark for constitutional analysis of race-conscious school admissions policies.[54]

48. *Id.* at 539.

49. *Crawford*, 458 U.S. at 537–38 ("Indeed, even if Proposition I had a racially discriminatory effect, in view of the demographic mix of the District it is not clear which race or races would be affected the most or in what way. In addition, 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.").

50. *Id.* at 535.

51. *Id.*

52. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

53. *See id*. (discussing whether the University of Michigan Law School's use of racial preferences in student admissions violated the Equal Protection Clause of the Fourteenth Amendment); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 710–11 (2007) (deciding an Equal Protection challenge to the use of a racial tie breaker in a K-12 school assignment plan); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 269–71 (1978) (determining whether an affirmative action policy that resulted in the repeated rejection of a medical student's application for admission violated the Fourteenth Amendment's Equal Protection Clause and the Civil Rights Act of 1964).

54. It is important to note the relevancy of the Supreme Court's most recent affirmative action case, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013). Since this Article focuses on the K-12 schooling system, the *Fisher* case will be discussed in a subsequent article, which

1. *Regents of University of California v. Bakke*

Many legal scholars characterize *Regents of University of California v. Bakke*[55] as a seminal case that changed the legal landscape in the context of higher education in ways that will be felt for generations to come.[56] The central issue before the Court in *Bakke* was whether a university's affirmative action admissions policy violated the plaintiff's Fourteenth Amendment rights.[57] *Bakke* is significant in the equal protection jurisprudence milieu because it placed higher education admissions and race at the "forefront of constitutional law issues."[58] In this case, the plaintiff, a white male, applied twice for admission to the University of California Medical School at Davis.[59] He was rejected both times. The controversy lies in the medical school's admissions policy. The medical school had a race-conscious admissions policy that reserved sixteen places in each entering class for disadvantaged minority students in an effort to integrate the medical profession and increase the number of physicians willing to serve underserved populations.[60] The plaintiff's admissions criteria (college GPA and MCAT test scores) exceeded those of many of the minority students admitted during the two years his applications were rejected. The plaintiff filed a lawsuit contending that the medical school's special admissions program excluded him on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment.[61]

A divided Court ruled that the university's special admissions program was unconstitutional because it used explicit racial classifications to disregard individual rights by excluding them solely for not being a minority.[62] The Court vehemently condemned this type of admissions policy for denying potential non-minority applicants the opportunity to compete for one of the available admissions seats.[63] Additionally, the Court reasoned that, since the

focuses solely on the implications of the *Schuette* decision on higher education school admissions. The *Fisher* case is significant because it presents for the first time the question of whether the success of a race-neutral policy demands that a university abandon the use of race as a factor in the admission of other students. *See Fisher*, 133 S. Ct. at 2415. Additionally, the case provides a first opportunity to challenge the Court's willingness to continue its deference to higher education administrators in their pursuit to achieve campus diversity through racial preferences.

55. *Bakke*, 438 U.S. at 265.

56. Steven M. Kirkelie, Comment, *Higher Education Admissions and Diversity: The Continuing Vitality of* Bakke v. Regents of the University of California *and an Attempt to Reconcile Powell's and Brennan's Opinions*, 38 WILLAMETTE L. REV. 615, 616 (2002).

57. *Bakke*, 438 U.S. at 269–70.

58. Kirkelie, *supra* note 56, at 655.

59. *Bakke*, 438 U.S. at 276.

60. *Id.* at 279.

61. *Id.* at 277–78.

62. *Id.* at 329.

63. *Id.* at 319–20.

plaintiff was unable to prove that the white applicant would not have been admitted in the absence of the racial preferences utilized in the special admissions program, he was entitled to be admitted.[64] Lastly, the Court held that the use of race as one of "several" admissions criteria was constitutionally permissible under the Equal Protection Clause of the Fourteenth Amendment.[65] The admissions plans at issue utilized a point system that consider things such as the applicant's extra-curricular activities, GPA, MCAT score, and letters of recommendation, as opposed to relying exclusively on race in admissions decisions.[66]

2. *Grutter v. Bollinger*

This case challenged the constitutionality of the University of Michigan's race-conscious school admissions policy that considered race in conjunction with several other factors, such as LSAT score, GPA, and letters of recommendation, when considering student applicants on an individual basis.[67] The goal of the race-conscious admissions program was to enroll a critical mass of diverse students for the purpose of obtaining the educational benefits that flow from diversity, such as promoting cross-cultural understanding and invalidating stereotypes.[68] The admissions policy came under intense scrutiny when a white student applied for admission to the University of Michigan Law School and was denied admission despite having an LSAT score of 161 and a 3.8 undergraduate GPA.[69] The student filed a lawsuit challenging the university's race-conscious admissions policy as a violation of her equal protection rights by discriminating against her on the basis of race.[70]

The Supreme Court in *Grutter* held that the University of Michigan's narrowly tailored use of race in their law school admissions for the purpose of furthering a compelling state interest in obtaining the educational benefits of diversity was not a violation of the Equal Protection Clause.[71] The Court emphasized that the admissions program looked at each individual applicant on a case-by-case basis, and race or ethnicity was only considered as one of several factors in the admissions decision.[72] Therefore, the university's race-conscious admissions program did not result in a quota.[73] The University of

64. *Bakke*, 438 U.S. at 320.

65. *Id.* at 314 ("Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.").

66. *Id.* at 274.

67. Grutter v. Bollinger, 539 U.S. 306, 311–16 (2003).

68. *Id.* at 316, 330.

69. *Id.* at 316.

70. *Id.* at 316–17.

71. *Id.* at 343.

72. *Grutter*, 539 U.S. at 336–37.

73. *Id.* at 335.

Michigan's law school admissions office considered both quantitative and extracurricular qualifications, as well as each applicant's potential for contribution to educational diversity.[74] This case helped shape affirmative action jurisprudence in higher education by solidifying the legal principle that admissions programs may not use a quota system; however, considerations of race are permissible when each individual applicant is examined in a flexible, non-mechanical way.

3. *Parents Involved in Community Schools v. Seattle Public Schools*

This case addressed the constitutionality of race-conscious school assignment plans in K-12 schooling systems. Ironically, more than fifty years ago, the Supreme Court justices in *Brown*, addressed whether public schools could be "required" to integrate,[75] whereas the legal issue in *Parents Involved* was whether public schools are permitted to "voluntarily" integrate.[76] In this case, de facto segregation within Seattle Public Schools and Jefferson County Schools created racially segregated schools due to segregated housing patterns.[77] In an effort to promote integration, both school districts adopted race-conscious school admissions policies.[78]

The Seattle Public School system implemented a plan that used a series of tiebreakers to determine which students were admitted to oversubscribed schools.[79] The first tiebreaker gave preference to students with a sibling attending the school.[80] The second and most controversial tiebreaker to allocate spots in oversubscribed schools, classified students as white and non-white and gave preference to a student's race for the purpose of achieving a target racial balance.[81] Under the Jefferson County Schools plan, students are grouped into

74. *Id.* at 315–16. The Court stated:

> The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential "to contribute to the learning of those around them." The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School . . . . The policy aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions."

Id. (citations omitted).

75. *See* Brown v. Bd. of Educ., 347 U.S. 483, 488 (1954).

76. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 711 (2007).

77. *Id.* at 712.

78. *Id.* at 726–27.

79. *Id.* at 711.

80. *Id.* at 711–12.

81. *Parents Involved*, 551 U.S. at 712.

attendance zones based on their home address, which dictated initial school assignments.[82] Next, parents and students were provided with various school choice options among educational programs and schools (e.g., magnet schools) within their designated attendance zone.[83] The primary goal of the attendance zones and school choice opportunities was to maintain a minimum of fifteen percent and no more than fifty percent African American enrollment in each school for the purpose of achieving racially diverse schools.[84] The parents of students attending the school districts filed suit alleging that the student assignment plans that relied on race classifications to assign students to schools violated the Equal Protection Clause of the Fourteenth Amendment.[85]

The Supreme Court ruled in favor of the plaintiff, holding that the school assignment plans were unconstitutional because the school districts failed to show that the use of racial classifications was necessary to achieve their stated goal of racially diverse schools.[86] In reaching its decision, the Court reasoned that the school districts failed to present any empirical evidence that the level of racial diversity necessary to achieve the asserted educational benefits of diversity coincide with the racial demographics of the respective school districts.[87] The Court further emphasized that the type of racial balancing used in the school assignment plans is not "transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"[88] Although the *Parents Involved* Court acknowledged that diversity is a compelling governmental interest, it denounced the type of racial proportionality utilized in the school assignment plans at issue in the case.[89]

This case contributed to the affirmative action jurisprudence framework by establishing that the legal principles established in *Grutter* are not applicable in K-12 settings, because, unlike the university in *Grutter*, the school admissions policy in *Parents Involved* applied a very constricted approach to diversity (white, non-white classification) and failed to evaluate students on an individual basis. Lastly, the *Parents Involved* Court articulated the importance

82. *Id.* at 716.

83. *Id.*

84. *Id.*

85. *Id.* at 714.

86. *Parents Involved*, 551 U.S. at 735.

87. *Id.* at 727 ("The district did not attempt to defend the proposition that anything outside its range posed the 'specter of exceptionality.' Nor did it demonstrate in any way how the educational and social benefits of racial diversity or avoidance of racial isolation are more likely to be achieved at a school that is 50 percent white and 50 percent Asian-American, which would qualify as diverse under Seattle's plan, than at a school that is 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white, which under Seattle's definition would be racially concentrated.").

88. *Id.* at 732.

89. *Id.* at 722, 732.

of school districts demonstrating that they made a good faith effort to consider race-neutral alternatives before using explicit racial classifications.[90] Both Seattle Public Schools and Jefferson County Public Schools failed to meet that burden.

II. EMPOWERING THE MAJORITY BY ANY MEANS NECESSARY: *SCHUETTE V. COALITION TO DEFEND AFFIRMATIVE ACTION*

At first glance, *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*[91] appears to be a case that challenges existing Supreme Court precedent regarding the constitutionality of race-conscious admissions policies. However, although the outcome of *Schuette* directly impacts the use of race in higher education school admissions, the issue is framed differently.[92] This case examined whether an amendment to a state constitution approved by the majority of voters can be invalidated under the Equal Protection Clause of the Fourteenth Amendment.[93]

Since the historic *Grutter* decision in 2003, citizens of the state of Michigan and beyond have engaged in discourse surrounding the use of race-conscious admissions policies in higher education. Michigan voters responded to the existing equal protection jurisprudence permitting limited use of race in school admissions by spearheading a movement to amend the state constitution to rescind affirmative action admissions policies through a ballot initiative, Proposal 2.[94] Under Proposal 2, it is unconstitutional for elected members of a university's governing board to establish race-conscious admissions programs in Michigan.[95] Successful anti-affirmative action grass roots efforts propelled Proposal 2 to Michigan's 2006 election ballot for consideration.[96] Proposal 2 passed by a margin of fifty-eight percent to forty-two percent and was enacted as article I, section 26 of the Michigan Constitution.[97] Section 26 of the constitution reads in part as follows:

90. *Id.* at 735.

91. Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN), 134 S. Ct. 1623 (2014).

92. *See id.* at 1630.The Court emphasized, however, that the guiding principle regarding the constitutionality of considerations of race in higher education admissions remained unchanged. *See id.*

93. *Id*. at 1629–30.

94. Christopher E. D'Alessio, Note, *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. POL'Y SIDEBAR 103, 103 (2013), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1108&context=djclpp_sidebar.

95. *Id.*

96. *Id.* at 105.

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

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public or college university, community college or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in subsection 1.[98]

Opponents of the passage of Proposal 2 responded with two legal challenges to the constitutionality of article I, section 26 of the Michigan Constitution.[99] Among the plaintiffs asserting the legal challenge were the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN); faculty; and current and prospective students to Michigan public universities.[100] The defendants included the governor, Board of Trustees of Michigan State University, Board of Governors of Wayne State University, and the Board of Regents of the University of Michigan.[101] The district court consolidated the cases and granted summary judgment in favor of the defendants, thus upholding Proposal 2.[102]

The plaintiffs appealed the district court's decision to the Sixth Circuit Court of Appeals after the district court denied a motion to reconsider summary judgment.[103] The Sixth Circuit reversed the grant of summary judgment, holding that Proposal 2 violated the legal principles set forth in *Washington v. Seattle School District No. 1*,[104] which, according to the Sixth

98. MICH. CONST. art. I, § 26.

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

100. *Id.* at 1629–30.

101. *Id.* at 1630.

102. *Id.*

103. *Id.*

104. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN) v. Regents of the Univ. of Mich., 652 F.3d 607, 610 (6th Cir. 2012), *rev'd sub nom.* Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight to Equal. by Any Means Necessary (BAMN), 134 S. Ct. 1623 (2014). In *Washington v. Seattle School District No. 1*, the Court held an initiative prohibiting school boards from requiring any student to attend a school other than the school geographically nearest the student's residence violated the Equal Protection Clause. 458 U.S. 457, 462, 487 (1982). The initiative was passed in response to a mandatory busing program that was passed by the school

Circuit's majority opinion, "mirrors the [case] before us."[105] Thus, in determining under what circumstances, if any, voters may choose to prohibit certain preferences, including race-based preferences in governmental decision making, the Court relied heavily on the precedent established in *Washington v. Seattle School Dist No. 1*[106] and *Hunter v. Erickson*[107] to resolve the case.[108]

The central issue in *Schuette* was whether Michigan voters may use the political process (i.e. referendum) to prohibit race-conscious measures in governmental decisions, particularly with respect to school admissions.[109] In this case, Michigan voters used the initiative system to circumvent the Supreme Court precedent in *Grutter*, *Bakke*, and *Parents Involved*, which permits race-conscious admissions policies.[110] As previously discussed, in 2003, the Court assessed the constitutionality of the University of Michigan's

board. *Id.* at 461–62. The Court held the initiative unconstitutional because it shifted educational decision-making to the state. *Id.* at 474. Furthermore, the state used the racial nature of the issue to define the state's decision-making structure. *Id.* The Court concluded that the shift in decision-making authority imposed substantial and unique burdens on racial minorities. *Id.*

105. *Schuette*, 134 S. Ct. at 1630.

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

107. Hunter v. Erickson, 393 U.S. 385 (1969).

108. *Schuette*, 134 S. Ct. at 1631–33. It is helpful to highlight the relevant case, *Reitman v. Mulkey*, 387 U.S. 369 (1967), that preceded the *Seattle* case and helped establish the legal framework for the political process doctrine at the center of the *Schuette* case. In *Mulkey*, California voters amended the state constitution to protect an owner's choice to decline to rent or sell residential property from any type of prohibition or interference by the state legislature. *Mulkey*, 387 U.S. at 371. In this case, two couples experienced discriminatory housing practices. *Id.* at 372. One couple was evicted from their apartment and another denied the opportunity to rent an apartment, both were on account of race. *Id.* Additionally, in both cases the victims were barred from utilizing the protection of California's statutes that prohibit discrimination due to the amendment to the state constitution, granting owners the freedom to decline to rent or sell residential property on any basis, including race. *Id.* The plaintiffs, the two couples discriminated against, challenged the constitutionality of the amendment. *Id.* at 373. The Court held that the amendment was unconstitutional because the "immediate design and intent" of the law was to solidify a constitutional right to discriminate. *Id.* at 374. The dissent incorrectly reasoned that the amendment was constitutional because the voter's actions were not intended to encourage discrimination, but rather ensuring that the State of California would remain a neutral party in the renting and selling of private property. *Id.* at 388 (Harlan, J., dissenting).

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

110. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 722 (2007) ("The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education."); Grutter v. Bollinger, 539 U.S. 306, 334 (2003) ("Universities can, however, consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant."); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) ("[T]he State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.").

school admissions policies and found no constitutional violation in their limited use of race-conscious measures.[111]

III. POLITICAL PROCESS DOCTRINE: A TOOL FOR MORAL EXCLUSION IN K–12 SCHOOLS

The *Schuette* decision and education reform efforts that discount the significance of race to promote equal educational opportunity represent the moral exclusion of one of the most vulnerable sectors of our population, minority children, under the guise of neutrality. Moral exclusion is "a psychosocial orientation toward certain individuals or groups for whom justice principles or considerations of fairness and allocation of resources are not applicable."[112] Thus, moral exclusion occurs when groups or individuals create moral boundaries which are used to exclude others from equitable treatment and considerations of fairness.[113] Excluded individuals are perceived as nonexistent, expendable, and not worthy of being treated equal.[114] Moral exclusion is also identified as a continuous construct that varies in degree depending on the severity of the situation.[115] Assessing the concept of moral exclusion from the perspective of a continuum gives an insightful perspective into the extreme separation between those that are within the moral community and those that are excluded.

There are numerous psychological factors that contribute to the moral exclusion of individuals within a society, such as altruism, stigma, discrimination, and prejudice.[116] According to Moral Exclusion Theory, individuals who are a part of the dominant group perceive themselves and their group as more honest, fair, moral, and virtuous than those in the excluded group.[117] The dominant group socially categorizes others based on things such as race, gender, and values, and excludes them from equal treatment on the basis of those differences.[118] As a result, this theory contends that our natural tendency to socially categorize individuals serves as a breeding ground for moral exclusion. Extreme examples of moral exclusion include, but are not limited to, events such as the institution of slavery, the Holocaust, and the internment of Japanese Americans during World War II. Moral Exclusion Theory has been used as a conceptual framework to view various group dynamics in the field of sociology. However, in this Article, Moral Exclusion

111. *Grutter*, 539 U.S. at 343.
112. Leets, *supra* note 8.
113. Opotow, *supra* note 9.
114. *Id.*
115. Leets, *supra* note 8, at 1861.
116. Opotow, *supra* note 9, at 2.
117. *Id.* at 6.
118. *Id.* at 7.

Theory will be utilized as a theoretical lens to examine barriers to equal educational opportunity in the context of the recent Supreme Court decision in *Schuette*, which upheld the constitutionality of article I, section 26 of the Michigan Constitution, an anti-affirmative action ballot initiative.[119]

Although the *Schuette* decision examined the use of race-conscious admissions policies in higher education, article I, section 26 explicitly states its applicability to K-12 schools as well:

> 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.[120]

Therefore, although this Article focuses on K-12 school systems, the debilitating effects of this law on equal educational opportunity will permeate both the K-12 and higher education milieus.

A. Article I, Section 26 Morally Excludes Minority Children by Undermining Public School's Ability to Create Diverse and Equitable Schools.

The *Schuette* decision's endorsement of article I, section 26 of the Michigan Constitution morally excludes minority students by undermining school leaders' ability to create and maintain diverse and equitable schools. How can school leaders integrate racially segregated schools without race-conscious admissions policies? Article I, section 26 comes at a tumultuous time in U.S. history where K-12 schools are rapidly re-segregating to the pre-*Brown* era as school leaders, policymakers, and stakeholders in education struggle to dismantle dual education systems that unfairly disadvantage minorities and children living in poverty. The endemic challenge of remedying de jure and de facto segregation in K-12 public schools is not a new phenomenon, but well-established in social science literature.[121] According to

119. Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN), 134 S. Ct. 1623, 1630, 1638 (2014).

120. MICH. CONST. art. I, § 26.

121. Laura R. McNeal, *The Re-Segregation of Public Education Now and After the End of* Brown v. Board of Education, 41 EDUC. URB. SOC'Y 562, 564 (2009) ("The harsh reality is that more than 250 school districts still operate dual school systems, which are not only separate but inherently unequal as well. The rapid growth of segregated minority schools is most evident in urban settings, which are characterized by high-poverty, high-minority student populations. For example, large urban school districts such as Atlanta Public Schools and Chicago Public Schools have student populations that consist of 92% students of color and 8% White . . . ."); Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 761 (1993) ("The ideas, for example, that political conflict will diminish and that non-judicial mechanisms can assure equity in the resegregated minority schools are not supported

educational researchers Gary Orfield and Chungmei Lee, characteristics of racially segregated schools are inadequate facilities, poor academic achievement outcomes, low graduation rates, and poor teacher quality.[122] The Court's deliberate indifference to the harmful effects of racially segregated schools results in the moral exclusion of minority children because they are treated as expendable and not worthy of being treated equally. The Court's decision in *Schuette* to allow voters to restructure government decision-making not only limits the ability of minorities to advocate for their interests, but also undermines the spirit and purpose of *Grutter*, which is to ensure that all students receive the educational benefits that flow from diversity. Desegregating schools can only be achieved with laws and policies that promote diverse and equitable learning environments. Instead of promoting educational equity, the *Schuette* decision lays the foundation for laws like article I, section 26, which morally exclude minority students from receiving equal educational opportunity through the perpetuation of racially segregated schools. Article I, section 26 is a tool for moral exclusion because it is designed to create and maintain a dual education system between the haves and have-nots by removing the most effective remedy for de facto segregation in K-12 schools: race-conscious admissions policies.[123]

Article I, section 26 also perpetuates one of the key indices of Moral Exclusion Theory, where the dominant group excludes a minority group from equal treatment and creates moral boundaries that distinguish who is entitled to resources and considerations of fairness. Specifically, article I, section 26 morally excludes minority students by manipulating the political process to create moral boundaries between the voters with majority voting power and those with minority voting power. Article I, section 26 ensures that individuals within the moral boundaries have their educational interests represented,

empirically in several districts."); GARY ORFIELD & CHUNGMEI LEE, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 3 (2007) ("American schools, resegregating gradually for almost two decades, are now experiencing accelerating isolation and this will doubtless be intensified by the recent decision of the U.S. Supreme Court.").

122. ORFIELD & CHUNGMEI, *supra* note 121, at 5 ("On average, segregated minority schools are inferior in terms of the quality of their teachers, the character of the curriculum, the level of competition, average test scores, and graduation rates.").

123. It is important to note that advocates of race-neutral approaches to integrated racially segregated schools posit that the Socio-Economic Integration model will achieve the same results as race-conscious approaches. The Socio-Economic model uses students' household income as a proxy for race. Although this integration strategy has shown positive results, it only works in limited settings. For example, using students' socioeconomic status for school assignments is ineffective in large urban school districts with high concentrations of poverty among white and black students because assigning students based on income will not guarantee racial diversity. Thus, based on the integration strategies that are available race-conscious measures are the most effective remedy to eradicating racially isolated schools. *See* McNeal, *supra* note 121, at 571.

whereas those outside of the moral community are denied equal protection of the laws due to the majority's manipulation of the political process in a manner that disadvantages racial minorities.[124]

The *Schuette* Court's deliberate indifference to the substandard education minority children receive in racially isolated schools, through the endorsement of democratically approved legislation that erects barriers to educational equity, demonstrates the Court's continued retreat from the promise of *Brown*.[125] Moreover, for the Court to allow the political process doctrine to be used in a manner that thwarts prior judicial efforts to promote educational equity and that constructs insurmountable hurdles for minorities to advocate for their education interests is also an indication of moral exclusion. The *Schuette* decision is also disconcerting because it is contrary to prior precedent. *Hunter* and *Seattle* substantiated a bedrock principle that is at the core of equal protection jurisprudence: "The majority may not suppress the minority's right to participate on equal terms in the political process."[126] Despite this guiding doctrinal principle, the *Schuette* Court turned a blind eye to the harmful effects of article I, section 26 on minorities' ability to represent their interests in the political process and allowed voters to circumvent school integration efforts.

The *Schuette* Court's application of the *Hunter* criteria to evaluate the constitutionality of section 26 under the political process doctrine was erroneous and perpetuates the moral exclusion of minority students. As previously stated, the *Hunter* Court requires that the following two criteria be met to establish a racial classification in violation of the political process doctrine: (1) the law at issue concerns a racial issue, and (2) the law restructures the political process in a way that burdens minority interests. Additionally, under *Hunter* the political process doctrine requires that strict scrutiny be used as the standard of review for any law that restructures the political process in a racial manner or shifts a decision related to race from one level of government to another.

A strict application of the *Hunter* principles reveals the unconstitutionality of article I, section 26 and the *Schuette* Court's gross error in application. First, section 26 focuses on race by prohibiting Michigan's public schools from implementing race-conscious admissions policies.[127] Second, section 26

124. *See Schuette*, 134 S. Ct. at 1653 (Sotomayor, J., dissenting) ("But instead, the majority of Michigan voters changed the rules in the middle of the game, reconfiguring the existing political process in Michigan in a manner that burdened racial minorities.").

125. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

126. *Schuette*, 134 S. Ct. at 1659 (Sotomayor, J., dissenting).

127. *Id.* at 1629 (majority opinion).

restructures the political process in a manner that unfairly burdens minorities[128] by creating a higher standard for enacting race-conscious admissions plans for public schools.[129] Instead of applying the correct application of the political process doctrine, the Court attempted to reinterpret *Hunter* and *Seattle* by refusing to acknowledge the "intentional and invidious" racial injury caused by section 26 to minority voters in Michigan.[130] In addition, the Court's complete disregard for the precedent established in *Hunter* and intentional re-characterization of the principles set forth in *Seattle* demonstrate the Court's commitment to color-blind rhetoric that allows the majority to restructure the political process to place minorities outside the moral boundaries with little recourse.

Article I, section 26 further exacerbates the problem by removing the integration tool that has achieved the greatest degree of success in creating racially diverse learning environments, race-conscious policies. Other race-neutral alternatives such as socioeconomic school assignment plans only work in limited education contexts where the majority of minority students are living in poverty.[131] For example, utilizing socioeconomic status to assign students in a school district with a high-poverty student population among both white and black students is an ineffective integration tool because assigning students based on their household income will not create racial diversity. The implications for K-12 schools are alarming in the aftermath of the *Schuette* decision. How can K-12 schools prepare students for the increasingly global society in which we live in racially isolated learning environments?

B. Article I, Section 26 Promotes the Moral Exclusion of Minority Children by Codifying Racial Discrimination into Law.

Article I, section 26 of the Michigan Constitution promotes the re-segregation of Michigan's public schools by codifying racial discrimination into law. Although the majority attempts to discount the significance of the *Schuette* decision by stating that the case is not about the constitutionality of

128. Section 26 places a unique burden on minorities by requiring voters to amend the Constitution to permit the use of race in school admissions for the purposes of creating diverse and equitable schools. Prior to section 26, voters were allowed to lobby the university's governing board. *Id.* at 1660 (Sotomayor, J., dissenting). However, after the passage of section 26 supporters of race-conscious admissions must endure the arduous task of obtaining either a two-thirds majority vote from both Houses of the Michigan state legislature or meet the requirements for a ballot initiative to support their interests, which requires ten percent of the total number of votes cast in the previous gubernational election. *See* MICH. CONST. art. XII, §§ 1–2 (delineating the Michigan requirements for Constitutional amendment).

129. *Schuette*, 134 S. Ct. at 1660 (Sotomayor, J., dissenting).

130. *Id.* at 1664.

131. McNeal, *supra* note 121, at 571.

race-conscious admissions,[132] the negative impact on school desegregation efforts will be felt for years. The law's prohibition of race-conscious policies to ensure that students receive the educational benefits that flow from diversity articulated in *Grutter* undermines prior judicial efforts to integrate K-12 schools. Additionally, the *Schuette* decision sends a symbolic and substantive message to opponents of affirmative action that the political process may be used to restructure governmental decision-making to create state laws that promote, as opposed to hinder, racial discrimination. This is further evidenced by the Court's repudiation of the *Seattle* Court's recognition of the importance of balancing constitutional protections and state sovereignty to prevent the reallocation of power in a manner that unfairly burdens minority interests within the political process.[133] This practice morally excludes minorities by allowing the political process to become a tool of manipulation to advance the interests of the majority at the expense of the minority. The codification of racial discrimination into law under the guise of preserving democracy is a facade to obscure the systemic moral exclusion of minorities. As Justice Sotomayor so eloquently stated in her dissent:

> But what the majority could not do, consistent with the Constitution, is change the ground rules of the political process in a manner that makes it more difficult for racial minorities alone to achieve their goals. In doing so, the majority effectively rigs the contest to guarantee a particular outcome. That is the very wrong the political-process doctrine seeks to remedy. The doctrine "hews to the unremarkable notion that when two competitors are running a race, one may not require the other to run twice as far or to scale obstacles not present in the first runner's course."[134]

Due to the Court's deliberate indifference to anti-affirmative action constituents' manipulation of the political process doctrine, anti-discrimination laws such as article I, section 26 achieve their intended purpose, which is to promote a more narrow view of constitutional protections that lay the groundwork for the rejection of "unnecessary" race-conscious laws.[135]

132. *Schuette*, 134 S. Ct. at 1630 ("[This case] is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. . . . The question here concerns . . . 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.").

133. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 487 (1982) ("[W]e do not undervalue the magnitude of the State's interest in its system of education. Washington could have reserved to state officials the right to make all decision in the areas of education and student assignment. It has chosen, however, to use a more elaborate system; having done so, the State is obligated to operate the system within the confines of the Fourteenth Amendment.").

134. *Schuette*, 134 S. Ct. at 1670 (Sotomayor, J., dissenting).

135. Powell, *supra* note 2, at 452.

CONCLUSION

The *Schuette* decision is just another step toward the demise of race-conscious school admissions policies designed to create diverse and equitable schools. Since the historic *Brown v. Board of Education* decision, the Court has slowly retreated from the promise of *Brown* by discounting the significance of race in equal educational opportunity. The paradigm shift in the Court, from a substantive role in educational equity to mere bystanders, is evident by the majority's rhetoric in education-related cases. In *Parents Involved*, Chief Justice Roberts stated, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[136] Seven years later Justice Sotomayor, who was not on the court in 2007 when *Parents Involved* was decided, said in her dissent in *Schuette*, "The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."[137] The Justices' divergent perceptions regarding the state of race relations in the country and what impact, if any, it has on equitable outcomes for minority students are very disconcerting. As the movement to abolish race-conscious preferences continues, it is imperative that stakeholders in education debunk false notions of a post-racial society and demonstrate the harmful effects of racially isolated learning environments for minorities and society at-large. This can be accomplished through creating a stronger evidentiary basis to demonstrate the correlation between diverse learning environments and student achievement outcomes to support equal protection challenges to racially segregated schools. Additionally, proponents of race-conscious policies must make a concerted effort to garner greater support within their individual communities to defeat the passage of state ballot initiatives that are designed to undermine school integration efforts such as article I, section 26.

In closing, the Supreme Court's decision in *Schuette* is a dangerous step in the wrong direction because, as Justice Sotomayor said in her dissenting opinion, "[W]ithout checks, democratically approved legislation can oppress minority groups."[138] We must create procedural safeguards to protect minority interests that are at the core of our democratic ideals from the tyranny of the majority. The shortfalls of our education system are disconcerting because democracy and education are inextricably linked. As a nation with a foundation built on democracy, how can we continue to uphold our democratic ideals of freedom, equality, and justice for all with an education system that privileges some while marginalizing others? This notion is best captured in the

136. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

137. *Schuette*, 134 S. Ct. at 1676 (Sotomayor, J., dissenting).

138. *Id.* at 1651.

following quote by John Kenneth Galbraith, "[E]ducation makes democracy possible, and, along with economic development, it makes it necessary, even inevitable."[139]

139. JOHN KENNETH GALBRAITH, THE GOOD SOCIETY: THE HUMANE AGENDA 72 (1996).