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Schuette, Electoral Process Guarantees, and the New Neutrality

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Mark Strasser*

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I. INTRODUCTION

In 2014, in *Schuette v. Coalition to Defend Affirmative Action*,¹ the United States Supreme Court addressed the breadth of electoral process guarantees, which have stood as a bulwark against attempts to impose extra electoral burdens on discrete minorities. While the *Schuette* holding is clear—federal constitutional guarantees are not necessarily violated by the voters’ amending their state constitution to preclude the state from affording racial preferences²—the plurality opinion raises more questions than it answers both with respect to the particular constitutional doctrine before the Court and with respect to equal protection jurisprudence more generally. In its haste to reverse

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1. 134 S. Ct. 1623 (2014).

2. *Id.*

the 6th Circuit,³ which had taken the Court at its word,⁴ the plurality has now not only left open what electoral process guarantees mean⁵ and whether they have any force,⁶ but has also muddled equal protection jurisprudence. Both the ways in which the plurality modified equal protection jurisprudence, and that it did so *sub silentio*,⁷ will doubtless convince some that the Court is no longer committed to the fair and equal treatment of the laws. In any event, *Schuette* is bound to bring about much confusion in the lower courts until the Court clarifies what it means.⁸

Part II of this Article discusses several cases in which the Court developed the electoral process guarantees jurisprudence, concluding that the jurisprudence was reasonably clear in paradigmatic cases where extra electoral burdens were placed on racial minorities who sought the benefits or protections that other groups might seek. Part III discusses *Schuette*, focusing on some of the ways that the plurality mischaracterized the then-existing jurisprudence. The Article concludes that the *Schuette* plurality not only undermined the electoral process jurisprudence that it claimed to follow, but misapplied settled equal protection principles, which will create chaos in the lower courts unless corrected or clarified.

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3. *BAMN v. Regents of Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012).
 4. *Cf. Schuette*, 134 S. Ct. at 1667 (Sotomayor, J., dissenting) (“The political-process doctrine . . . resolves this case as a matter of *stare decisis*.”); *id.* at 1641 (Scalia, J., concurring in the judgment) (“The relentless logic of *Hunter* and *Seattle* would point to a similar conclusion in this case. In those cases, one level of government exercised borrowed authority over an apparently ‘racial issue,’ until a higher level of government called the loan. So too here.”).
 5. *Id.* at 1641–42 (Scalia, J., concurring in the judgment) (“The plurality . . . disavows the political-process-doctrine basis on which *Hunter* and *Seattle* were decided . . . it does not take the next step of overruling those cases. Rather, it reinterprets them beyond recognition.”); *id.* at 1664 (Sotomayor, J., dissenting) (“I agree with Justice Scalia that the plurality has rewritten those precedents beyond recognition.”).
 6. *Id.* at 1664 (Sotomayor, J., dissenting) (“And what now of the political-process doctrine? After the plurality’s revision of *Hunter* and *Seattle*, it is unclear what is left.”).
 7. The plurality implied that its holding was consistent with, if not mandated by past precedent. *See id.* at 1634 (“The rule that the Court of Appeals elaborated and respondents seek to establish here would contradict central equal protection principles.”). *But see id.* at 1664 (Sotomayor, J., dissenting) (“The plurality’s attempt to rewrite *Hunter* and *Seattle* so as to cast aside the political-process doctrine *sub silentio* is impermissible as a matter of *stare decisis*.”); *id.* at 1641 (Scalia, J., concurring in the judgment) (“The relentless logic of *Hunter* and *Seattle* would point to a similar conclusion in this case.”).
 8. *Cf. id.* at 1654 (Sotomayor, J., dissenting) (“Today, by permitting a majority of the voters in Michigan to do what our Constitution forbids, the Court ends the debate over race-sensitive admissions policies in Michigan in a manner that contravenes constitutional protections long recognized in our precedents.”).

II. ELECTORAL PROCESS GUARANTEES

In a series of cases, the Court has explained some of the electoral process protections provided by the Fourteenth Amendment to the United States Constitution.⁹ That long-evolving jurisprudence is designed to assure a level playing field so that minorities will not have to overcome extra electoral burdens when seeking the kinds of benefits and protections that others seek.¹⁰ While the level-playing-field analogy is relatively straightforward, the Court has never adequately explained all aspects of the jurisprudence, for example, which groups are protected by the guarantees. Instead, the cases in which the guarantees were triggered often involved analyses of the conditions under which electorates were prohibited from imposing special burdens on racial minorities, leaving open which groups could successfully invoke these guarantees to invalidate extra electoral burdens placed upon them. Up until *Schuetz* was decided, the Court had been content with providing guidance in the paradigmatic cases with respect to what counted as electoral burdening and what did not, and then permitting lower courts to decide other kinds of cases in light of that guidance.

A. *Reitman* Plants the Seeds

*Reitman v. Mulkey*¹¹ spelled out some of the elements¹² that would later be central in electoral process guarantees jurisprudence.¹³ At issue in *Reitman* was the constitutionality of Proposition 14, adopted by referendum, which specified:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.¹⁴

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9. See *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Hunter v. Erickson*, 393 U.S. 385 (1969); *James v. Valtierra*, 402 U.S. 137 (1971); *Gordon v. Lance*, 403 U.S. 1 (1971); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Crawford v. L.A. Bd. of Educ.*, 458 U.S. 527 (1982).
 10. *Schuetz*, 134 S. Ct. at 1653 (Sotomayor, J., dissenting) (“Our precedents do not permit political restructurings that create one process for racial minorities and a separate, less burdensome process for everyone else.”).
 11. 387 U.S. 369 (1967).
 12. Cf. *Schuetz*, 134 S. Ct. at 1631 (“[T]his Court’s decision in *Reitman v. Mulkey*, 387 U.S. 369 (1967), is a proper beginning point for discussing the controlling decisions.”).
 13. See John F. Niblock, Comment, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153, 158 (1993) (discussing a “concern driving the decisions in *Reitman*, *Hunter*, and *Washington* [that] has to do with obstacles erected to the full participation of minority groups in the political process”).
 14. *Reitman*, 387 U.S. at 371.

The referendum nullified existing legislation precluding racial discrimination in the housing market.¹⁵ The California Supreme Court characterized Proposition 14 as having had the “immediate design and intent . . . ‘to overturn state laws that bore on the right of private sellers and lessors to discriminate,’ the Unruh and Rumford Acts.”¹⁶ While the California court was correct that the amendment nullified the existing statutory protections, such a result was not in and of itself constitutionally offensive, because the state does not have an affirmative constitutional obligation to prevent private discrimination. “[T]he State [is] permitted a neutral position with respect to private racial discriminations and . . . the State [is] not bound by the Federal Constitution to forbid them.”¹⁷ But that means to be constitutionally offensive, Proposition 14 would have to be construed as non-neutral in the relevant sense and as effecting more than a mere repeal.¹⁸

State neutrality with respect to private discrimination is distinguishable from state promotion of private discrimination, and “a significant state involvement in private discriminations [can] amount to unconstitutional state action.”¹⁹ The California high court reasoned that “the intent [behind the referendum was] . . . to create a constitutional right to discriminate on racial grounds in the sale and leasing of real property”²⁰ and, further, that the Proposition was designed “to forestall future state action that might circumscribe this right.”²¹ By forestalling future action that might limit the right to discriminate, the Proposition was not merely repealing existing law²² but was, in addition, making it more difficult to reinstate antidiscrimination protections.

Suppose that the referendum had not amended the California Constitution but instead had merely repealed the laws passed by the legislature. Those in favor of the repealed legislation might have tried to build coalitions within the legislature and might have again sought to convince legislators of the wisdom of passing antidiscrimination legislation, *perhaps* after taking into account some of the objections that

15. *See id.* at 374 (discussing anti-discrimination statutes passed by the California Legislature).

16. *Id.*

17. *Id.* at 374–75.

18. *See* Shelby D. Green, *Imagining a Right to Housing, Lying in the Interstices*, 19 *GEO. J. ON POVERTY L. & POL’Y* 393, 423 (2012) (“[T]he [California] court conceded that the State was permitted to take a neutral position with respect to private racial discrimination and that the State was not bound by the federal Constitution to forbid private racial discriminatory practices.”).

19. *Reitman*, 387 U.S. at 375 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)).

20. *Id.* at 376.

21. *Id.* at 374.

22. *Id.* at 376–77.

had swayed the electorate to enact a repeal.²³ By amending the state constitution, Proposition 14 precluded those seeking antidiscrimination protections from simply going back to their legislators. Instead, the state constitution would have to be amended before such protections could be enacted.

A mere repeal of legislation would have been treated in the same way that the failure to pass that legislation in the first place would have been treated.²⁴ The California high court “did not posit a constitutional violation on the mere repeal of the Unruh and Rumford Acts.”²⁵ It was the additional elements that made Proposition 14 constitutionally offensive, because the referendum “would and did have wider impact than a mere repeal of existing statutes.”²⁶ In addition, the “right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State’s basic charter, immune from legislative, executive, or judicial regulation at any level of the state government.”²⁷ The *Reitman* Court noted that the challenged proposition “authorize[d] racial discrimination in the housing market. [Thus] [t]he right to discriminate . . . [became] one of the basic policies of the State.”²⁸ Because there were “no persuasive considerations indicating that [the California Supreme Court’s] judgments should be overturned,”²⁹ the United States Supreme Court deferred to the California high court’s determination that the referendum’s passage “will significantly encourage and involve the State in private discriminations.”³⁰ The Court’s deference on that point was important. States are constitutionally prohibited from supporting private discrimination,³¹ so the United States Supreme Court’s deference with respect to the determination that the amendment would encourage private discrimination provided the basis for the Court’s affirmance of the California Supreme Court’s striking down Proposition 14 as a violation of Fourteenth Amendment guarantees.³²

23. Cf. Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1437 n.54 (2012) (discussing “the ‘Mrs. Murphy exemption,’ which exempts dwellings with four or fewer families, if one of them is the owner’s,” from housing antidiscrimination restrictions).

24. See *Reitman*, 387 U.S. at 389 (Harlan, J., dissenting).

25. *Id.* at 376.

26. *Id.* at 376–77.

27. *Id.* at 377.

28. *Id.* at 381.

29. *Id.*

30. *Id.*

31. *Id.* at 375 (“[A] significant state involvement in private discriminations could amount to unconstitutional state action.”) (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)).

32. See *id.* at 375–76 (“The judgment of the California court was that § 26 unconstitutionally involves the State in racial discriminations and is therefore invalid under the Fourteenth Amendment.”); *id.* at 381 (“Affirmed.”).

The *Reitman* Court did not even attempt to perform “the ‘impossible task’ of formulating an infallible test for determining whether the State ‘in any of its manifestations’ has become significantly involved in private discriminations.”³³ Instead, it noted that “[o]nly by sifting facts and weighing circumstances’ on a case-by-case basis can a ‘non-obvious involvement of the State in private conduct be attributed its true significance,’”³⁴ although in this case it was not necessary for the Court itself to do that sifting and weighing because the California Supreme Court had already done that. The latter court, “armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of § 26, and familiar with the milieu in which that provision would operate, has determined that the provision would involve the State in private racial discriminations to an unconstitutional degree.”³⁵ The United States Supreme Court deferred to the California Supreme Court with respect to the degree to which the amendment encouraged private discrimination, although the decision to defer was itself controversial.³⁶

In his dissent, Justice Harlan argued that the California “repeal of its prior statutes forbidding private discrimination”³⁷ should not be treated any differently than would “California’s failure to pass any such antidiscrimination statutes in the first instance.”³⁸ Yet, Proposition 14 was not a mere statutory repeal, because “the State’s basic charter”³⁹ had been amended. But even granting that the proposition at issue involved more than a mere statutory repeal, Justice Harlan argued that the “Fourteenth Amendment does not reach such state constitutional action [i.e., amending the state constitution to insulate private discrimination] any more than it does a simple legislative repeal of legislation forbidding private discrimination.”⁴⁰ His belief that modifying the state constitution in this way was permissible was due to his rejecting that the proposition would encourage or promote discrimination. First, he noted:

The only “factual” matter relied on by the majority of the California Supreme Court [when concluding that the amendment would promote discrimination] was the context in which Proposition 14 was adopted, namely, that several strong antidiscrimination acts had been passed by the legislature and opposed by many of those who successfully led the movement for adoption of Proposition 14 by popular referendum.⁴¹

33. *Id.* at 378 (citing *Burton*, 365 U.S. at, 722).

34. *Id.* (citing *Burton*, 365 U.S. at 722).

35. *See id.* at 378–79.

36. *Id.* at 390–91 (Harlan, J., dissenting).

37. *Id.* at 389.

38. *Id.*

39. *Id.* at 377 (majority opinion).

40. *Id.* at 389 (Harlan, J. dissenting).

41. *Id.* at 391.

He also explained that the California high court's conclusion that the proposition would encourage discrimination was not based on the trial court's findings.⁴² The same point was made about the conclusion that the intent behind the proposition was to promote discrimination.⁴³ Thus, because Justice Harlan rejected that the state itself was promoting discrimination, he rejected that the California amendment was unconstitutional.⁴⁴

In the electoral process guarantees jurisprudence, certain features of *Reitman* are emphasized while others are irrelevant. A key consideration is whether the contested action is more than a mere repeal in the sense that the disadvantaged group now has a greater electoral burden than do other groups when seeking to obtain advantages or protections.⁴⁵ However, the discussion in *Reitman* about whether the state is encouraging private discrimination by virtue of its having modified the law has not played a similar role in the subsequent cases informing this jurisprudence.⁴⁶

B. The Jurisprudence Is Clarified

The Court made clear which elements of *Reitman* would be incorporated into the electoral process guarantees jurisprudence when it decided *Hunter v. Erickson*.⁴⁷ At issue in *Hunter* was whether an Akron referendum "amending the city charter to prevent the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the voters of Akron"⁴⁸ was unconstitutional in light of *Reitman* guarantees. The Akron referendum had taken place after the City Council had "enacted a fair housing ordinance premised on a recognition of the social and economic losses to society which flow from substandard, ghetto housing and its tendency to breed discrimination and segregation."⁴⁹ The referendum, which passed by majority vote, made

42. *See id.* at 390 ("There were no findings as to the general effect of § 26.").

43. *Id.* ("The Court declares that the California court held the intent of § 26 was to authorize private racial discriminations in the housing market . . . , but there is no supporting fact in the record for this characterization." (citation omitted)).

44. *See id.* at 395 ("I believe the state action required to bring the Fourteenth Amendment into operation must be affirmative and purposeful, actively fostering discrimination. Only in such a case is ostensibly 'private' action more properly labeled 'official.' I do not believe that the mere enactment of § 26, on the showing made here, falls within this class of cases.").

45. *See infra* notes 55–57 and accompanying text.

46. *See infra* notes 52–71 and accompanying text. *But see infra* notes 207–11 and accompanying text (discussing the *Schuetz* plurality alluding to Harlan's *Reitman* dissent).

47. 393 U.S. 385 (1969).

48. *Id.* at 386.

49. *Id.*

the City Council housing antidiscrimination laws ineffective unless ratified by the Akron electorate.⁵⁰

The City of Akron distinguished its referendum from the unconstitutional referendum at issue in *Reitman* by noting that “the city charter declares no right to discriminate in housing, authorizes and encourages no housing discrimination, and places no ban on the enactment of fair housing ordinances.”⁵¹ Thus, if *Reitman* were understood to invalidate only those referenda creating a right to discriminate or only those referenda construed as placing a state imprimatur on discrimination, then the Akron ordinance would seem to pass muster. Or, if *Reitman* were understood to preclude outright bans on antidiscrimination legislation but not to preclude merely making it somewhat harder for minorities to achieve desired goals, then *Reitman* would be inapplicable to the Akron referendum’s constitutionality. However, the differences between the California and Akron referenda emphasized by the City of Akron did not immunize the Akron amendment from invalidation under *Reitman*.

While the Akron referendum did not place an outright ban on antidiscrimination measures, it nonetheless imposed a burden on certain minorities that other groups seeking benefits or protections did not also have to bear. The referendum measure “not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future ordinance could take effect.”⁵² By requiring subsequent ratification by the electorate for certain measures but not others, the referendum measure “drew a distinction between those groups who sought the law’s protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends.”⁵³ Because the referendum imposed this additional condition for certain antidiscrimination measures, the Court rejected that the Akron referendum was a mere repeal of the antidiscrimination ordinance.⁵⁴

50. *See id.* at 387 (“Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.” (quoting Akron City Charter § 137)).

51. *Id.* at 389.

52. *Id.* at 389–90.

53. *Id.* at 390.

54. *Id.* at 390 n.5 (“Thus we do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment.”).

When analyzing the referendum, the Court made two distinct points. First, the referendum subjected legislation affecting certain groups to a more demanding procedure when those groups sought to effect change. “Only laws to end housing discrimination based on ‘race, color, religion, national origin or ancestry’ must run § 137’s gantlet.”⁵⁵ Such laws might be contrasted with other laws that the City Council might pass. “The automatic referendum system does not reach housing discrimination on sexual or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes.”⁵⁶ It was at least in part because the Akron electorate distinguished among the types of referenda requiring ratification that the referendum was constitutionally suspect.⁵⁷

Yet, legislation by its very nature distinguishes among groups or categories, subjecting some to regulations to which others are not subject,⁵⁸ so the mere fact that some categories or groups are comparatively disadvantaged does not establish that legislation is constitutional infirm.⁵⁹ The reason that Akron’s referendum was unconstitutional was due to the types of groups chosen to bear this greater electoral burden.⁶⁰

Two distinct points might be made about the categories chosen to bear this increased electoral burden. First, the classifications themselves might provide reason for the Court to look at the Proposition with “with skepticism, if not a jaundiced eye”⁶¹—each of the classifications would currently be recognized as triggering strict scrutiny.⁶² Second, not only were suspect classifications being targeted, but the

55. *Id.* at 390.

56. *Id.* at 391.

57. *See id.* at 392–93 (“Akron might have proceeded by majority vote at town meeting on all its municipal legislation”).

58. *See* Denise G. Reaume, *Discrimination and Dignity*, 63 LA. L. REV. 645, 651 (2003) (“[E]very piece of legislation has some impact which leaves some better off than others (just as all legislation distinguishes between classes of persons).”).

59. *See Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966) (internal citations omitted) (“[W]e are guided by the familiar principles that a statute is not invalid under the Constitution because it might have gone farther than it did, that a legislature need not strike at all evils at the same time, and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.”).

60. *See infra* notes 61–65 and accompanying text.

61. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994).

62. *See* Robert I. Berdon, *Connecticut Equal Protection Clause: Requirement of Strict Scrutiny When Classifications Are Based upon Sex, Physical Disability or Mental Disability*, 64 CONN. B.J. 386, 391 (1990) (“[R]eligion, race, color, ancestry and national origin are not generally believed to require under the federal constitution this most exacting judicial review of strict scrutiny.”).

Court was confident that it understood who would bear the brunt of the burdens imposed.

The Court recognized that Akron had not made any formal distinctions within the categories picked out for this special burden. “It is true that the section draws no distinctions among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end.”⁶³ However, this formal equality did not immunize the referendum measure from further review. “[A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law’s impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that.”⁶⁴ The *Hunter* Court held that the ordinance “discriminates against minorities, and constitutes a real, substantial, and invidious denial of the equal protection of the laws.”⁶⁵

In his concurrence, Justice Harlan recognized that the provision at issue “has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest.”⁶⁶ Because the “charter amendment is discriminatory on its face, Akron must ‘bear a far heavier burden of justification’ than is required in the normal case.”⁶⁷

Justice Harlan was making two distinct points. One involved the purpose behind the legislation, namely, to make it more difficult for minorities to promote their own interests.⁶⁸ Here, he was presumably following the majority’s conclusion that the ordinance “discriminates against minorities, and constitutes a real, substantial, and invidious denial of the equal protection of the laws.”⁶⁹ For present purposes, though, the more important issue is why he thought the “charter amendment . . . [was] discriminatory on its face”⁷⁰ when the amendment did not state that it applied to only certain races or religions but, instead, simply included those general categories. The majority provided that answer as well when noting that “there was an explicitly racial classification treating racial housing matters differently from other . . . housing matters.”⁷¹ The facial discrimination involved expressly focusing on the category of race rather than on expressly focusing on a particular race.

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

64. *Id.* at 391.

65. *Id.* at 393.

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

67. *Id.* (citing *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964)).

68. *Id.*

69. *Id.* at 393 (majority opinion).

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

71. *Id.* at 389 (majority opinion).

The *Schuette* plurality suggested that “*Hunter* rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities.”⁷² Yet, it is important to discuss the ways in which government procedures in *Hunter* targeted minorities. The referendum precluded the City Council from according protections to individuals within certain categories (including race) absent ratification by the local electorate. There was no evidence that the city itself was discriminating; rather, the “widespread racial discrimination in the sale and rental of housing, [which] led to segregated housing, forcing many to live in ‘unhealthful, unsafe, unsanitary and overcrowded conditions’”⁷³ was *private*.⁷⁴ The City Council was passing antidiscrimination legislation to preclude private individuals from so acting and, indeed, *Hunter* had claimed that she had not been shown particular houses for sale because the owners had specified that they did not want their house to be shown to someone of Mrs. Hunter’s race.⁷⁵ It was thus surprising for the *Schuette* plurality to suggest that in *Hunter* “there was a demonstrated injury on the basis of race that, *by reasons of state encouragement or participation, became more aggravated.*”⁷⁶ There was nothing in *Hunter* suggesting that the amendment somehow encouraged Akron citizens to discriminate. The injury was not in the state’s causing private individuals to discriminate nor even in permitting individuals to discriminate by virtue of having repealed the antidiscrimination provision, since a mere repeal would have been constitutional.⁷⁷ Instead, the injury imposed by the state in *Hunter* was in having “disadvantage[d] . . . [a] particular group by making it more difficult to enact legislation in its behalf.”⁷⁸ Indeed, the *Hunter* Court noted that the electorate could simply have repealed the Council measure,⁷⁹ but instead chose to add an additional hurdle by requiring additional ratification of certain antidiscrimination measures.⁸⁰

72. *Schuette v. BAMN*, 134 S. Ct. 1623, 1632 (2014).

73. *Id.* (citing *Hunter*, 393 U.S. at 391).

74. See Gail Heriot, *The Parade of Horribles Lives: Schuette v. Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality by Any Means Necessary*, 14 *ENGAGE* 14, 16 (2013) (discussing “Akron’s efforts to discourage racial discrimination by private citizens”).

75. See *Hunter*, 393 U.S. at 387 (“[O]n meeting Mrs. Hunter the agent ‘stated that she could not show me any of the houses on the list she had prepared for me because all of the owners had specified they did not wish their houses shown to [N]egroes.’”).

76. *Schuette*, 134 S. Ct. at 1624 (emphasis added).

77. *Hunter*, 393 U.S. at 390 n.5 (“[W]e do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment.”).

78. *Id.* at 393.

79. See *id.* at 390 n.6 (noting that “the city charter may be amended or measures enacted by the council repealed through a referendum which may be obtained on petition of 10% of the voters”).

80. *Id.* at 390.

C. Referenda Not Targeting Minorities

Hunter does not entail that all referenda will be examined with close scrutiny whenever imposing electoral burdens.⁸¹ In *James v. Valtierra*,⁸² the Court suggested some of the relevant considerations to determine the constitutionality of referenda, although a little background is helpful to understand the decision. Federal law created a housing agency to give state agencies loans and grants “for slum clearance and low-rent housing projects.”⁸³ To take advantage of the opportunity created by that legislation, the California Legislature created a housing authority in each city and county “to take advantage of the financing made available by the federal Housing Act.”⁸⁴ At this time, the California Constitution already “reserved to the State’s people the power to initiate legislation and to reject or approve by referendum any Act passed by the state legislature.”⁸⁵

In 1950, the California Supreme Court held that local decisions to seek federal housing aid “were ‘executive’ and ‘administrative,’ not ‘legislative,’ and therefore the state constitution’s referendum provisions did not apply to these actions.”⁸⁶ Within half a year, “the California voters adopted Article XXXIV of the state constitution to bring public housing decisions under the State’s referendum policy . . . provid[ing] that no low-rent housing project should be developed, constructed, or acquired in any manner by a state public body until the project was approved by a majority of those voting at a community election.”⁸⁷ Basically, this provision imposed a ratification condition before a local decision to develop, construct, or acquire low-cost housing could be implemented.

Citizens in two California localities (the city of San Jose and San Mateo County) challenged the referendum amending the state constitution.⁸⁸ In those localities, “housing authorities could not apply for federal funds because low-cost housing proposals had been defeated in referendums.”⁸⁹ The district court struck down the amendment,⁹⁰ re-

81. See Note, *Required Referendum for Low-Income Housing*, 85 HARV. L. REV. 122, 124–25 (1971) (“Although the majority [in *James v. Valtierra*, 402 U.S. 137 (1971)] seemed to concede that Article 34 [a referendum] disadvantages the California poor, this impact was viewed as a constitutionally unobjectionable by-product of a salutary vehicle for popular decisionmaking.”).

82. 402 U.S. 137 (1971).

83. *Id.* at 138.

84. *Id.* (citing CAL. HEALTH & SAFETY CODE § 34240 (1951)).

85. *Id.* (citing CAL. CONST., Art. IV, § 1).

86. *Id.* (citing *Hous. Auth. for City of Eureka v. Superior Court*, 219 P.2d 457, 460–61 (Cal. 1950)).

87. *Id.* at 139.

88. *Id.*

89. *Id.*

90. *Id.* at 140 (“The first paragraph in the District Court’s decision stated simply: ‘We hold Article XXXIV to be unconstitutional.’”).

lying heavily upon *Hunter*.⁹¹ The *James* Court distinguished what was at issue before the *Hunter* Court and what was at issue in the instant case. The Court noted that “[u]nlike the Akron referendum provision, it cannot be said that California’s Article XXXIV rests on ‘distinctions based on race,’”⁹² because the “referendum requires [ratification] for any low-rent public housing project, not only for projects which will be occupied by a racial minority.”⁹³ Of course, facial neutrality does not establish the absence of invidious intent, but there was insufficient evidence in the record to “support any claim that a law seemingly neutral on its face [was] in fact aimed at a racial minority.”⁹⁴

Even if the law was not directed at burdening a minority,⁹⁵ it was nonetheless true that the amendment imposed a greater burden on those seeking low-cost public housing than on those seeking other goods.⁹⁶ However, the Court noted that “a lawmaking procedure that ‘disadvantages’ a particular group does not always deny equal protection.”⁹⁷ Otherwise, “a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group.”⁹⁸ Nor could it be claimed that this was the only issue subject to referendum approval.⁹⁹

The Court further worried that an extension of *Hunter*¹⁰⁰ might force the Court “to analyze governmental structures to determine whether a . . . rule is likely to ‘disadvantage’ any of the diverse and

91. *Id.* (“While the District Court cited several cases of this Court, its chief reliance plainly rested on *Hunter v. Erickson*, 393 U.S. 385 (1969).”).

92. *Id.* at 141 (citing *Hunter*, 393 U.S. at 391).

93. *Id.*

94. *Id.* (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)); *see also* Note, *supra* note 81, at 124–25 (“[I]n *Valtierra*, no racial impact was apparent on the face of the law, and the record yielded insufficient evidence that the California referendum in fact operated to burden blacks.”).

95. *But see James*, 402 U.S. at 144 (Marshall, J., dissenting) (“The article explicitly singles out low-income persons to bear its burden.”).

96. *Id.* at 142 (“[A]ppellees . . . suggest that the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage.”).

97. *Id.*

98. *Id.*

99. *Id.* (“[A]n examination of California law reveals that persons advocating low-income housing have not been singled out for mandatory referendums while no other group must face that obstacle. Mandatory referendums are required for approval of state constitutional amendments, for the issuance of general obligation long-term bonds by local governments, and for certain municipal territorial annexations.”).

100. *See id.* at 141 (“The present case could be affirmed only by extending *Hunter*, and this we decline to do.”).

shifting groups that make up the American people.”¹⁰¹ Such a comment suggests that the Court was reluctant to extend the electoral guarantees to “diverse and shifting groups,”¹⁰² perhaps because the malleability of the group would mean that individuals burdened at one point in time might not be burdened at a later point in time, since they would no longer be part of the group bearing the burden. But if indeed individuals could exit the class, then that would mean that the burdens borne by particular individuals might be less severe than would otherwise be thought—sometimes, the class burdened by a particular classification would be composed of certain individuals, whereas at other times it would be composed of different individuals.¹⁰³

The Court’s focus on the malleability of targeted groups was also addressed in *Gordon v. Lance*.¹⁰⁴ At issue was a constitutional and statutory requirement in West Virginia that “political subdivisions of the State may not incur bonded indebtedness or increase tax rates beyond those established by the Constitution without the approval of 60% of the voters in a referendum election.”¹⁰⁵ The case arose because the Roane County Board of Education sought voter approval of a bond issue and a tax levy “to support current expenditures and capital improvements.”¹⁰⁶ While both measures received majority approval,¹⁰⁷ neither measure garnered the 60% vote necessary for enactment.¹⁰⁸

Citizens who had voted in favor of the proposals challenged the 60% requirement as a violation of Fourteenth Amendment guarantees.¹⁰⁹ Their complaint was not only based on the recent election results alone but on similar results on a number of occasions—there had

101. *Id.* at 142.

102. *Id.*

103. A separate issue involves how easy it is for individuals to escape their economic class. Cf. Nicholas D. Kristof, *Now It's the Canadian Dream: Let's Make America the Land of Opportunity Again*, PITT. POST-GAZETTE, at A13, May 20, 2014, available at 2014 WLNR 13483483 (“‘Equality of opportunity—the ‘American Dream’—has always been a cherished American ideal,’ Joseph Stiglitz, the Nobel-winning economist at Columbia University, noted in a recent speech. ‘But data now show that this is a myth: America has become the advanced country not only with the highest level of inequality, but one of those with the least equality of opportunity.’”).

104. 403 U.S. 1 (1971).

105. *Id.* at 2.

106. *Id.* at 3.

107. *See id.* (“Of the total votes cast, 51.55% favored the bond issues and 51.51% favored the tax levy.”).

108. *See id.* (“Having failed to obtain the requisite 60% affirmative vote, the proposals were declared defeated.”).

109. *See id.* (“Respondents then brought this action, seeking a declaratory judgment that the 60% requirements were unconstitutional as violative of the Fourteenth Amendment.”).

been several votes in which a majority of the electorate had approved funding for education improvements but in each case the required 60% vote had not been reached.¹¹⁰ The West Virginia Supreme Court had held that the 60% requirement violated equal protection guarantees, because it in effect diluted the voting power of those in favor the measure.¹¹¹

When analyzing whether the West Virginia Supreme Court had correctly applied the law, the United States Supreme Court noted that the “West Virginia Constitution singles out no ‘discrete and insular minority’ for special treatment. The three-fifths requirement applied equally to all bond issues for any purpose, whether for schools, sewers, or highways.”¹¹² The Court explained that “any departure from strict majority rule gives disproportionate power to the minority,”¹¹³ but that “there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue.”¹¹⁴ As long as voting provisions “do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause.”¹¹⁵ Together, *James* and *Gordon* suggest that electoral process guarantees may be inapplicable when the groups targeted are not discrete and insular.¹¹⁶

D. Dueling Cases Help Establish Which Considerations Are Key in the Jurisprudence

*Washington v. Seattle School District*¹¹⁷ and *Crawford v. Los Angeles Board of Education*¹¹⁸ are helpfully contrasted, because each helps

110. *See id.* (“They further alleged that four similar proposals had been previously defeated, although each had received majorities of affirmative votes ranging from 52.51% to 55.84%.”).

111. *See id.* (“On appeal, the West Virginia Supreme Court of Appeals reversed, holding that the state constitutional and statutory 60% requirements violated the Equal Protection Clause of the Fourteenth Amendment.” (citing *Lance v. Bd. of Educ. of Cnty. of Roane*, 170 S.E.2d 783 (W. Va. 1969))); *see also id.* at 4 (“The court below relied heavily on two of our holdings dealing with limitations on the right to vote and dilution of voting power.”).

112. *Id.* at 5.

113. *Id.* at 6.

114. *Id.*

115. *Id.* at 7.

116. *Cf.* Mark Strasser, *From Colorado to Alaska by Way of Cincinnati: On Romer, Equality Foundation, and the Constitutionality of Referenda*, 36 HOUS. L. REV. 1193, 1211 (1999) (“The *Gordon* Court said that it would uphold the provision not because it could not identify a particular racial group that would be disadvantaged, but because no independently identifiable group would be disadvantaged. Thus, the better interpretation of the *Hunter* line of cases, including *James*, is that referenda which specifically target an identifiable group for adverse treatment will not pass constitutional muster.”).

117. 458 U.S. 457 (1982).

118. 458 U.S. 527 (1982).

establish the importance in the jurisprudence of the state's targeting identifiable minorities. *Seattle* involved a Fourteenth Amendment challenge to a statewide initiative providing that "no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . and which offers the course of study pursued by such student . . ." ¹¹⁹ However, the initiative included a number of exceptions, for example, when the student had special needs or when the nearby school was overcrowded or unsafe. ¹²⁰

The district court found that the purpose behind the initiative was to prevent busing to achieve racial desegregation. ¹²¹ The campaign in favor of the proposition "focused almost exclusively on the wisdom of 'forced busing' for integration." ¹²² While the district court found that "racial bias . . . [was] a factor in the opposition to the 'busing' of students to obtain racial balance," ¹²³ the court also found that voters supported the initiative "for 'a number of reasons,' so that '[i]t [was] impossible to ascertain all of those reasons [o]r to determine the relative impact of those reasons upon the electorate.'" ¹²⁴ The district court struck down the initiative. ¹²⁵

When reviewing whether the initiative violated equal protection guarantees, the *Seattle* Court noted that "the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action." ¹²⁶ However, "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." ¹²⁷ Here, the Court discussed the racial nature of the initiative because it understood that the initiative was designed to prevent busing as a

119. *Seattle*, 458 U.S. at 462 (citing WASH. REV. CODE § 28A.26.010 (1981)).

120. *Id.* ("The initiative then set out, however, a number of broad exceptions to this requirement: a student may be assigned beyond his neighborhood school if he 'requires special education, care or guidance,' or if 'there are health or safety hazards, either natural or man made, or physical barriers or obstacles . . . between the student's place of residence and the nearest or next nearest school,' or if 'the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities.'").

121. *Id.* at 463 ("At the same time, however, the court's findings demonstrate that the initiative was directed solely at desegregative busing in general, and at the Seattle Plan in particular.").

122. *Id.* (citing *Seattle Sch. Dist. No. 1 v. Washington*, 473 F. Supp. 996, 1009 (W.D. Wash. 1979)).

123. *Id.* at 465 (citing *Seattle*, 473 F. Supp. at 1009).

124. *Id.* (citing *Seattle*, 473 F. Supp. at 1010).

125. *See id.* (noting that the district court then held Initiative 350 unconstitutional for three independent reasons).

126. *Id.* at 470.

127. *Id.*

means of promoting racial integration of the schools, notwithstanding the initiative's facial neutrality in that it never expressly mentioned race.¹²⁸

The *Seattle* Court explained that “[s]tate action of this kind . . . ‘places *special* burdens on racial minorities within the governmental process.’”¹²⁹ Because the placement of such burdens “mak[es] it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest,”¹³⁰ that kind of “structuring of the political process . . . [is] ‘no more permissible than [is] denying [members of a racial minority] the vote, on an equal basis with others.’”¹³¹ The initiative at issue was unconstitutional because “it use[d] the racial nature of an issue to define the governmental decisionmaking structure, and thus impose[d] substantial and unique burdens on racial minorities.”¹³²

The supporters of the initiative claimed that it was racially neutral, “because the initiative simply permit[ted] busing for certain enumerated purposes while neutrally forbidding it for all other reasons.”¹³³ But the Court found such a contention unpersuasive,¹³⁴ “for despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes.”¹³⁵ The Court was also not persuaded that the initiative was neutral with respect to its allocation of burdens. “[D]esegregation of the public schools, like the Akron open housing ordinance, at bottom inures primarily to the benefit of the minority, and is designed for that purpose.”¹³⁶ The “initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests.”¹³⁷ Unlike other kinds of student assignment decisions which remained a matter of local control,¹³⁸ individuals “favoring the elimination of de facto school segregation now must seek relief from the state legislature, or from the statewide electorate.”¹³⁹ Thus, before the adoption of the initiative, certain student

128. *See id.* at 471 (“Initiative 350 nowhere mentions ‘race’ or ‘integration’ [D]espite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes.”).

129. *Id.* at 470 (citing *Hunter v. Erikson*, 393 U.S. 385, 391 (1969)).

130. *Id.* (citing *Hunter*, 393 U.S. at 395 (Hunter, J., concurring)).

131. *Id.* (citing *Hunter*, 393 U.S. at 391) (majority opinion).

132. *Id.*

133. *Id.* at 471.

134. *See id.* (“We find it difficult to believe that appellants’ analysis is seriously advanced.”).

135. *Id.*

136. *Id.* at 472.

137. *Id.* at 474.

138. *Id.* (“Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board.”).

139. *Id.*

assignment decisions were made on a local level, but after the initiative they would have to be made on the state level.¹⁴⁰ While reaffirming that the mere repeal of a law or policy was not enough to implicate Fourteenth Amendment concerns,¹⁴¹ the *Seattle* Court explained that the referendum “works something more than the ‘mere repeal’ of a desegregation law by the political entity that created it.”¹⁴² The initiative “burdens all future attempts to integrate Washington schools in districts throughout the State, by lodging decisionmaking authority over the question at a new and remote level of government.”¹⁴³

The Court had no doubt that the initiative at issue was both intended to and did impose burdens on the basis of race. “[W]hen the political process or the decisionmaking mechanism used to address racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly ‘rests on distinctions based on race.’”¹⁴⁴ But the Court reached a very different conclusion about whether race was the focus of the referendum at issue in *Crawford v. Los Angeles Board of Education*.¹⁴⁵

Crawford involved a challenge to a state constitutional amendment providing that “state courts shall not order mandatory pupil assignment or transportation unless a federal court would do so to remedy a violation of the Equal Protection Clause of the Fourteenth Amendment.”¹⁴⁶ Although this meant that busing to achieve goals of racial integration could not be used as extensively post-referendum as it had been used pre-referendum,¹⁴⁷ the *Crawford* Court “reject[ed] the contention that once a State chooses to do ‘more’ than the Fourteenth Amendment requires, it may never recede.”¹⁴⁸ Such an “interpretation of the Fourteenth Amendment . . . [would be] destructive of

140. *Id.* at 479–80 (“Before adoption of the initiative, the power to determine what programs would most appropriately fill a school district’s educational needs—including programs involving student assignment and desegregation—was firmly committed to the local board’s discretion.”).

141. *Id.* at 483 (“To be sure, ‘the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.’” (citing *Crawford v. L.A. Bd. of Educ.*, 458 U.S. 527, 539 (1982))).

142. *Id.*

143. *Id.*

144. *Id.* at 485 (citing *James v. Valtierra*, 402 U.S. 137, 141 (1971)).

145. 458 U.S. 527 (1982).

146. *Id.* at 529.

147. A not entirely successful busing plan had been implemented prior to the adoption of the referendum. *See id.* at 531 (“[T]he trial court . . . ultimately approved a second plan that included substantial mandatory school reassignment and transportation—“busing”—on a racial and ethnic basis. The plan was put into effect in the fall of 1978, but after one year’s experience, all parties to the litigation were dissatisfied.”).

148. *Id.* at 535.

a State's democratic processes and of its ability to experiment."¹⁴⁹ Adoption of the amendment did not alter the obligation of state courts "under state law to order segregated school districts to use voluntary desegregation techniques, whether or not there has been a finding of intentional segregation."¹⁵⁰ Nor did it override the obligation of the school districts themselves "to take reasonably feasible steps to desegregate."¹⁵¹

The petitioners argued that the amendment was facially unconstitutional because it "employs an 'explicit racial classification' and imposes a 'race-specific' burden on minorities seeking to vindicate state-created rights."¹⁵² They noted that "other state-created rights may be vindicated by the state courts without limitation on remedies."¹⁵³ While the Court agreed that if the Proposition had "employed a racial classification it would be unconstitutional unless necessary to further a compelling state interest,"¹⁵⁴ the Court denied that the measure at issue classified on the basis of race.¹⁵⁵ Because the Proposition "neither says nor implies that persons are to be treated differently on account of their race,"¹⁵⁶ the Court interpreted the proposition to be neutrally "forbid[ding] state courts to order pupil school assignment or transportation in the absence of a Fourteenth Amendment violation."¹⁵⁷

Not only did the Court reject that the proposition was of a racial nature, but it also rejected that the proposition was "enacted with a discriminatory purpose,"¹⁵⁸ instead accepting that the voters were likely motivated by the "the educational benefits of neighborhood schooling."¹⁵⁹ Finally, the Court even expressed its uncertainty about which groups would be adversely affected by the measure.¹⁶⁰ But its decision was not predicated on uncertainty regarding the measure's effects, since even were the measure to have a discriminatory impact

149. *Id.*

150. *Id.*

151. *Id.* at 535–36.

152. *Id.* at 536.

153. *Id.*

154. *Id.* at 536–37.

155. *See id.* at 537 ("But Proposition I does not embody a racial classification.").

156. *Id.*

157. *Id.*

158. *Id.* at 543; *see also id.* at 545 ("Even if we could assume that Proposition I had a disproportionate adverse effect on racial minorities, we see no reason to challenge the Court of Appeal's conclusion that the voters of the State were not motivated by a discriminatory purpose.").

159. *Id.* at 543.

160. *See id.* at 537 ("[E]ven 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.").

upon a racial minority, there at most would have been a showing of disparate impact without a showing of invidious intent.¹⁶¹

Perhaps *Seattle* and *Crawford* should have been decided the same way, because they both involved electoral restrictions on busing as a method of achieving racial integration in the schools.¹⁶² For purposes here, the important point involves how the Court differentiated between the two cases. While neither case involved a referendum expressly distinguishing on the basis of race,¹⁶³ one but not the other was construed as being of a racial nature.¹⁶⁴ Further, the *Crawford* Court expressly noted that if the Proposition had employed a racial classification, strict scrutiny would have been triggered.¹⁶⁵ Thus, *Seattle* and *Crawford* both suggest that where a proposition expressly or impliedly imposes an extra electoral burden on the basis of race, it will be struck down unless it passes strict scrutiny.¹⁶⁶

E. An Apparent (but Not Actual) Electoral Process Guarantees Case?

*Romer v. Evans*¹⁶⁷ would seem to be a good candidate for an electoral process guarantees analysis,¹⁶⁸ if only because the Colorado Supreme Court had struck down the referendum at issue in that case as a violation of Fourteenth Amendment electoral process rights.¹⁶⁹ The referendum, whose passage amended the Colorado Constitution, stated:

161. *See id.* at 537–38 (“[E]ven when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown.”).

162. *Id.* at 548 (Marshall, J., dissenting) (“Because I fail to see how a fundamental redefinition of the governmental decisionmaking structure with respect to the same racial issue can be unconstitutional when the State seeks to remove the authority from local school boards, yet constitutional when the State attempts to achieve the same result by limiting the power of its courts, I must dissent from the Court’s decision to uphold Proposition I.”).

163. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) (discussing the proposition’s “facial neutrality”); *Crawford*, 458 U.S. at 537 (“Proposition I does not embody a racial classification.”).

164. *Compare Seattle*, 458 U.S. at 470 (deciding that the initiative created unconstitutional distinctions based on racial classifications), *with Crawford*, 458 U.S. at 537 (upholding an amendment found not employ racial classifications).

165. *Crawford*, 458 U.S. at 536–37.

166. *Id.*; *Seattle*, 458 U.S. at 471.

167. 517 U.S. 620 (1996).

168. *See Schuette v. BAMN*, 134 S. Ct. 1623, 1670 (Sotomayor, J., dissenting) (describing it as “involving discriminatory restructurings of the political process . . . also worthy of mention”).

169. *Evans v. Romer*, 882 P.2d 1335, 1350 (Colo. 1994), *aff’d on other grounds*, *Romer*, 517 U.S. 620 (striking Amendment 2 because it “den[ie]d the right of an identifiable group (who may or may not engage in homosexual sodomy) to participate equally in the political process”).

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.¹⁷⁰

At the time the referendum was passed, three municipalities already prohibited orientation discrimination.¹⁷¹ The *Romer* Court explained: “The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.”¹⁷²

The Amendment reached both state and private action. “Not confined to the private sphere, Amendment 2 also operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government.”¹⁷³

Precluding the enactment of protective legislation on all levels of government for one particular group would seem to be exactly the kind of harm that electoral process guarantees seek to prevent. Presumably, this is why the Colorado Supreme Court struck down the amendment as a violation of Fourteenth Amendment electoral process guarantees.¹⁷⁴ That court noted, “prior to the passage of this amendment, gay men, lesbians, and bisexuals were, of course, free to appeal to state and local government for protection against discrimination based on their sexual orientation.”¹⁷⁵ After the passage of Amendment 2, however, “the sole political avenue by which this class could seek such protection would be through the constitutional amendment process.”¹⁷⁶

The United States Supreme Court agreed with the Colorado Supreme Court that Amendment 2 was unconstitutional,¹⁷⁷ although not because of electoral process guarantees. Instead, the Court discussed rational basis review, explaining that “if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”¹⁷⁸ But, the Court suggested, Amendment 2 could not

170. *Romer*, 517 U.S. at 624 (citing COLO. CONST. art. II, § 30b).

171. *See id.* at 626.

172. *Id.* at 627.

173. *Id.* at 629.

174. *Evans*, 854 P.2d at 1285 (“Amendment 2 singles out and prohibits this class of persons from seeking governmental action favorable to it and thus, from participating equally in the political process.”).

175. *Id.* at 1286.

176. *Id.*

177. *Romer*, 517 U.S. at 635–36 (“Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.”).

178. *Id.* at 631.

even pass this deferential standard.¹⁷⁹ Not only did the measure have “the peculiar property of imposing a broad and undifferentiated disability on a single named group,”¹⁸⁰ but its “sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus toward the class it affect[ed]; it lack[ed] a rational relationship to legitimate state interests.”¹⁸¹

By holding that the Amendment 2 failed to pass rational basis review, the Court did not need to address other issues, for example, whether statutes targeting sexual orientation trigger closer constitutional scrutiny.¹⁸² Nor did it need to address whether the Colorado Supreme Court was correct that the amendment violated electoral process guarantees.¹⁸³ By “affirm[ing] the judgment, but on a rationale different from that adopted by the State Supreme Court,”¹⁸⁴ the Court left open whether the Colorado Supreme Court’s rationale was also correct or, instead, was incorrect. So, too, for example, when the Court held in *Lawrence v. Texas* that the state’s same-sex sodomy prohibition violated due process guarantees,¹⁸⁵ the Court did not thereby preclude that the statute might have been challenged successfully on equal protection grounds as well.¹⁸⁶

Up until *Schuette*, the electoral process guarantees jurisprudence incorporated the following rule: A state cannot impose additional electoral burdens on minorities insofar as they wish to secure benefits or

179. *Id.* at 632 (“Amendment 2 fails, indeed defies, even this conventional inquiry.”).

180. *Id.*

181. *Id.*

182. *Cf.* Catherine Jean Archibald, *Two Wrongs Don’t Make a Right: Implications of the Sex Discrimination Present in Same-Sex Marriage Exclusions for the Next Supreme Court Same-Sex Marriage Case*, 34 N. ILL. U. L. REV. 1, 8 n.28 (2013) (“The Supreme Court is not precluded by its prior cases from finding that sexual orientation discrimination merits heightened scrutiny.”); Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL’Y 983, 1054 n.445 (2013) (“Although *Romer* ostensibly applied rational basis review, commentators widely agree that the Court in fact applied, without acknowledging that it was doing so, a developing form of heightened scrutiny that applies to sexual orientation-based classifications.”).

183. *Romer*, 517 U.S. at 625 (“[T]he State Supreme Court held that Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process.”).

184. *Id.* at 626.

185. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. . . . Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).

186. *See id.* at 574–75 (“[C]ounsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument.”).

protections.¹⁸⁷ There was some question as to which groups were protected under this jurisprudence, but imposing electoral burdens on the basis of race was clearly unconstitutional.

III. *SCHUETTE*

At the very least, *Schuette* modifies electoral process guarantees jurisprudence. It may in addition modify equal protection jurisprudence more generally, although that will depend upon whether some of the approaches implicitly adopted in *Schuette* later receive explicit endorsement by the Court. What is clear is that the *Schuette* approach involves a mode of analysis that is inconsistent with the previous jurisprudence. Subsequent cases will make clear how many aspects of settled law have been changed.

A. Background Changes in Equal Protection Jurisprudence

To understand what *Schuette* is and is not doing, it is necessary to appreciate some of the changes in equal protection jurisprudence that have occurred since *Reitman* and *Hunter* were decided. At that time, members of the Court were confident that they could discern whether express consideration of race was invidious or, instead, benign.¹⁸⁸ However, at least in part because of a change in attitude with respect to whether members of the Court can discern which classifications are invidious and which are not,¹⁸⁹ the Court has modified its approach to racial classification and will examine all such classifications with strict scrutiny.¹⁹⁰ At least one question raised by *Schuette* is whether the Court has modified its approach yet again.¹⁹¹

State use of racial preferences in the context of education has itself received much attention. The Court has made clear that whether on the elementary or secondary school level on the one hand¹⁹² or on the

187. See *supra* notes 52–71, 125–30 and accompanying text.

188. See *Hunter v. Erickson*, 393 U.S. 385, 391 (1969) (“[A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law’s impact falls on the minority.”).

189. See *Adarand Consts., Inc. v. Pena*, 515 U.S. 200, 226 (1995) (“[D]espite the surface appeal of holding ‘benign’ racial classifications to a lower standard . . . ‘it may not always be clear that a so-called preference is in fact benign.’” (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (plurality opinion))).

190. See *id.* at 224 (“[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”).

191. See *infra* notes 244–96 and accompanying text.

192. *Parents Involved in Cmty Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 710 (2007) (“The Seattle school district classifies children as white or nonwhite; the Jefferson County school district as black or ‘other.’ In Seattle, this racial classification is used to allocate slots in oversubscribed high schools. In Jefferson County, it is

college¹⁹³ or university¹⁹⁴ level on the other, a state's according racial preferences in public education is only permissible if narrowly tailored to promote compelling state interests.¹⁹⁵

One of the reasons that it is important to understand that the Court's position has changed over the years with respect to the conditions under which the state can engage in race-conscious actions is that some of the previously permissible remedies are no longer permissible. For example, the busing program that was the subject of the referendum in *Seattle* would now be viewed as unconstitutional absent a showing that the state had been involved in promoting the segregated conditions requiring a remedy.¹⁹⁶ The *Schuette* plurality cautioned that "we must understand *Seattle* as *Seattle* understood itself, as a case in which neither the State nor the United States 'challenge[d] the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation.'"¹⁹⁷ Indeed, the existing electoral process guarantees jurisprudence can only be understood in terms of some of the equal protection developments that have occurred since *Seattle* and *Crawford* were decided,¹⁹⁸ and it is only when *Schuette* is viewed in light of the Court's current equal protection jurisprudence that one can understand the respects in which *Schuette* has muddied the waters.

used to make certain elementary school assignments and to rule on transfer requests.").

193. See *Gratz v. Bollinger*, 539 U.S. 244 (2003).

194. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); see also *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013) ("[R]acial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.'" (citing *Grutter*, 539 U.S. at 326)).

195. See *Parents Involved*, 551 U.S. at 720 ("In order to satisfy this searching standard of review, the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is 'narrowly tailored' to achieve a 'compelling' government interest." (citing *Adarand*, 515 U.S. at 227)); *Gratz*, 539 U.S. at 270 ("To withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its current admissions program employs 'narrowly tailored measures that further compelling governmental interests.'" citing *Adarand*, 515 U.S. at 227)); *Grutter*, 539 U.S. at 326 ("[A]ll racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.' This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." (citing *Adarand*, 515 U.S. at 227)).

196. See *Schuette v. BAMN*, 134 S. Ct. 1623, 1633 (2014) ("[T]he [Seattle] school board's purported remedial action would not be permissible today absent a showing of *de jure* segregation." (citing *Parents Involved*, 551 U.S. at 720–21)).

197. *Id.* (citing *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472 (1982)).

198. For a discussion of these cases, see *supra* notes 117–66 and accompanying text.

B. *Schuette*

At issue in *Schuette* was the following Michigan constitutional amendment:

(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(3) For the purposes of this section 'state' includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.199

The Court noted that the case was “not about the constitutionality, or the merits, of race-conscious admissions policies in higher education,”²⁰⁰ reaffirming that “the consideration of race in admissions is permissible, provided that certain conditions are met.”²⁰¹ Instead, what was at issue was “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.”²⁰² Thus, *Schuette* did not address whether the Michigan electorate was permitted to incorporate within the state constitution a prohibition that was already included within the Federal Constitution. Rather, the plurality addressed the permissibility of the electorate’s decision to include a prohibition within the state constitution of some measures that are permissible under the United States Constitution.²⁰³

The *Schuette* plurality traced the development of the electoral process guarantees jurisprudence, beginning with *Reitman*, explaining that the *Reitman* Court had held that “the state constitutional provision was a denial of equal protection. . . . [It] [a]greed with the California Supreme Court that the amendment operated to insinuate the State into the decision to discriminate by encouraging that practice.”²⁰⁴ After mentioning Justice Harlan’s *Reitman* dissent in which

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

200. *Id.* at 1630.

201. *Id.*

202. *Id.*

203. Justice Scalia implied that the remedies that were the subject of the referendum were barely constitutionally permissible. *See id.* at 1639 (Scalia, J. concurring in the judgment) (“Does the Equal Protection Clause forbid a State from banning a practice that the Clause barely—and only provisionally—permits?”).

204. *Id.* at 1631 (majority opinion).

he had argued that “California, by the action of its voters, simply wanted the State to remain neutral in this area, so that the State was not a party to discrimination,”²⁰⁵ the plurality commented that the “dissenting voice did not prevail against the majority’s conclusion that the state action in question encouraged discrimination, causing real and specific injury.”²⁰⁶ While correct that Harlan’s dissent did not win the day, the plurality’s noting Harlan’s claims about neutrality is both regrettable and misleading, because the neutral position Harlan was discussing was between preventing discrimination on the one hand and promoting discrimination on the other. That factor has *not* been one of the criteria in the developing electoral process guarantees jurisprudence preceding *Schuette*, so it is at least curious that the plurality went out of its way to mention this claim about state neutrality.²⁰⁷ It may well be that the *Schuette* plurality’s failure to closely attend to how Harlan’s point fits into the jurisprudence more generally helps illustrate how the plurality has changed the jurisprudence, “unwittingly or otherwise.”²⁰⁸

The misdirection about the prevailing jurisprudence continued in the *Schuette* plurality’s *Hunter* discussion: “Central to the Court’s reasoning in *Hunter* was that the charter amendment was enacted in circumstances where widespread racial discrimination in the sale and rental of housing led to segregated housing, forcing many to live in ‘unhealthful, unsafe, unsanitary and overcrowded conditions.’”²⁰⁹ While those conditions did provide the impetus for the Akron City Council to take action, at least two points might be made to prevent incorrect inferences about the role that those conditions played in the constitutional analysis. First, the *Hunter* Court nowhere stated or implied that a different result would have been reached if the discrimination had been less widespread or if it had not resulted in those unhealthy or unsanitary conditions. Second, the *Hunter* Court nowhere stated or implied that the creation of that need was in any way attributable to the state.²¹⁰

One of the militating factors in finding the Akron referendum constitutionally offensive was that it was unnecessary and went beyond

205. *Id.*

206. *Id.*

207. Justice Scalia also claimed that Michigan had adopted a neutral position with respect to race. *See id.* at 1648 (Scalia, J., concurring) (“[T]he question in this case, as in every case in which neutral state action is said to deny equal protection on account of race, is whether the action reflects a racially discriminatory purpose.”).

208. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

209. *Schuette*, 134 S. Ct. at 1632 (citing *Hunter v. Erickson*, 393 U.S. 385, 391 (1969)).

210. *See supra* notes 73–75 and accompanying text (noting that the Akron ordinance was designed to eradicate private discrimination).

merely repealing the city council antidiscrimination measure.²¹¹ The *Schuette* plurality emphasized that “the city charter amendment, by singling out antidiscrimination ordinances, ‘places special burden on racial minorities within the governmental process,’ thus becoming as impermissible as any other government action taken with the invidious intent to injure a racial minority.”²¹² Characterizing *Hunter* in this way permitted the plurality to conclude that “*Hunter* rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities.”²¹³ Indeed, *Reitman* and *Hunter* were summed up as standing for the proposition that “there was a demonstrated injury on the basis of race that, by reasons of state encouragement or participation, became more aggravated.”²¹⁴ Yet, such a description might lead the reader to misunderstand what was unconstitutional about the state action at issue in *Hunter*.

In the preamble to the open housing ordinance, the Akron City Council had “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.’”²¹⁵ Here, the Council was suggesting that minorities were being forced to live in unhealthy and unsafe conditions because of the consistent refusal of the majority to sell lease, rent, or finance minority housing. What was meant when the plurality suggested that it “is against this background that the referendum required by § 137 must be assessed?”²¹⁶

First, it may be helpful to consider what would have been constitutionally permissible for the Akron electorate to have done. For example, the *Hunter* Court noted that local law provided that “measures enacted by the council [may be] repealed through a referendum which may be obtained on petition of 10% of the voters.”²¹⁷ Suppose that the electorate had merely repealed the council measure. In that event, the protective measure would no longer be in place. The unhealthy and unsafe living conditions for the Akron minority population would continue, although the responsibility for that would be attributed to private citizens rather than the state.

211. *Schuette*, 134 S. Ct. at 1632 (“[T]he charter amendment was unnecessary as a general means of public control over the city council; for the people of Akron already were empowered to overturn ordinances by referendum.” (citing *Hunter*, 393 U.S. at 390, n.6)).

212. *Id.* (quoting *Hunter*, 393 U.S. at 391).

213. *Id.*

214. *Id.*

215. *Hunter*, 393 U.S. at 391.

216. *Id.*

217. *Id.* at 390 n.6.

The *Hunter* Court noted that “Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system.”²¹⁸ Presumably, Akron could also have decided to require a majority vote at town meeting on all its municipal legislation involving the *sale, lease, or rental of housing*.²¹⁹ But Akron did not even do that.²²⁰ Instead, it only required ratification of housing antidiscrimination measures. The injury in *Hunter* imposed by the State was not the unhealthy living conditions but, instead, having electoral burdens on certain groups seeking antidiscrimination measures.²²¹ Further, the only evidence of the Akron electorate’s having, in the words of the *Schuetz* plurality, an “invidious intent to injure a racial minority”²²² was in the electorate’s having voted for required ratification for certain kinds of antidiscrimination measures and in not having done so for other kinds of housing measures.²²³

An analogous point might be made about *Reitman*. The California Legislature had passed several acts that prohibited housing discrimination.²²⁴ The California Supreme Court had “conceded that the State was permitted a neutral position with respect to private racial discriminations and that the State was not bound by the Federal Constitution to forbid them.”²²⁵ This means that a mere repeal of the housing discrimination acts would not have offended constitutional

218. *Id.* at 392–93.

219. Such a method would have been facially neutral. The question would be whether the Court would have found that this was a clear attempt to bypass equal protection guarantees. But the *Crawford* reading of the pupil assignment/transportation measure at issue in Los Angeles, *see supra* notes 145–61 and accompanying text, suggests that the *Hunter* Court might well not have read between the lines when looking at such a facially neutral housing statute. *See also supra* notes 82–103 and accompanying text (discussing the *James* Court’s treatment of the extra burden imposed on low-income housing).

220. *See Hunter*, 393 U.S. at 391 (“The automatic referendum system does not reach housing discrimination on sexual or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes.”).

221. *See id.* at 393 (“[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.” (citing *Reynolds v. Sims*, 377 U.S. 533 (1964))).

222. *Schuetz v. BAMN*, 134 S. Ct. 1623, 1632 (2014).

223. *See Hunter*, 393 U.S. at 389–90; *see also Schuetz*, 134 S. Ct. at 1663 (Sotomayor, J., dissenting) (“The *Hunter* Court was clear about why it invalidated the Akron charter amendment: It was impermissible as a restructuring of the political process, not as an action motivated by discriminatory intent.” (citing *Hunter*, 393 U.S. at 391)).

224. *See Reitman v. Mulkey*, 387 U.S. 369, 374 (1967) (discussing the Unruh Act, the Hawkins Act, and the Rumford Fair Housing Act).

225. *Id.* at 374–75.

guarantees.²²⁶ But if that is so, then the injury imposed by the State was not its having forced minorities to live in poor housing; instead, the injury imposed by the state was in its having encouraged discrimination and “involv[ing] the State in private racial discriminations to an unconstitutional degree.”²²⁷

While the referenda in both cases resulted in minorities being subject to discriminatory housing practices, those invidious practices were performed by private citizens rather than the State. Because those practices would presumably have taken place even had the state merely repealed the protective legislation, the state’s discriminatory action was not in its permitting the discrimination but in its doing something in addition, either in encouraging private discrimination or in imposing additional electoral burdens before antidiscrimination measures could be implemented.

The *Schuette* plurality addressed *Seattle*, which was “best understood as a case in which the state action in question (the bar on busing enacted by the State’s voters) had the serious risk, if not purpose, of causing specific injuries on account of race, just as had been the case in *Mulkey* [i.e., *Reitman*] and *Hunter*.”²²⁸ Although “there had been no judicial finding of de jure segregation with respect to Seattle’s school district,”²²⁹ the plurality noted that de jure segregation might in fact have taken place.²³⁰

Ironically, when the *Schuette* plurality suggested that *Seattle* had to be understood as the *Seattle* Court had understood it,²³¹ the *Schuette* plurality only focused on the *Seattle* Court’s willingness to countenance ordered busing even absent a finding of de jure discrimination,²³² not on the *Seattle* Court’s understanding of the prevailing electoral process jurisprudence. But that myopic focus prevented the *Schuette* plurality from seeing how the *Seattle* approach, understood

226. *See id.* at 376 (“[A]s we understand the California court, it did not posit a constitutional violation on the mere repeal of the Unruh and Rumford Acts. It did not read either our cases or the Fourteenth Amendment as establishing an automatic constitutional barrier to the repeal of an existing law prohibiting racial discriminations in housing; nor did the court rule that a State may never put in statutory form an existing policy of neutrality with respect to private discriminations.”).

227. *Id.* at 378–79.

228. *Schuette*, 134 S. Ct. at 1633.

229. *Id.*

230. *See id.* (“[I]t appears as though school segregation in the district in the 1940’s and 1950’s may have been the partial result of school board policies that ‘permitted white students to transfer out of black schools while restricting the transfer of black students into white schools.’” (citing *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 807–08 (2007) (Breyer, J., dissenting))).

231. *Id.* (citing *Washington vs. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472 n.15).

232. *See id.*

in light of the current interpretation of equal protection guarantees, establishes the Michigan amendment's unconstitutionality.²³³

The *Schuette* plurality focused on language in the *Seattle* opinion suggesting that “where a government policy ‘inures primarily to the benefit of the minority’ and ‘minorities . . . consider’ the policy to be ‘in their interest,’ then any state action that ‘place[s] effective decision-making authority over’ that policy ‘at a different level of government’ must be reviewed under strict scrutiny.”²³⁴ This was interpreted to mean that “any state action with a ‘racial focus’ that makes it ‘more difficult for certain racial minorities than for other groups’ to ‘achieve legislation that is in their interest’ is subject to strict scrutiny.”²³⁵ But such a broad reading was rejected as incompatible with current constitutional guarantees,²³⁶ at least in part, because of the Court’s current unwillingness to decide which policies promote minority interests.²³⁷ The plurality explained: “To the extent *Seattle* is read to require the Court to determine and declare which political policies serve the ‘interest’ of a group defined in racial terms, that rationale was unnecessary to the decision in *Seattle* . . . [and] raises serious constitutional concerns.”²³⁸ Such “expansive language does not provide a proper guide for decisions and should not be deemed authoritative or controlling.”²³⁹

One reason that such a view must be rejected is that it “cannot be entertained as a serious proposition that all individuals of the same race think alike.”²⁴⁰ Thus, something viewed by one individual as promoting minority interests might be viewed by another individual as undermining those same interests. Perhaps one could poll minority members to find out whether they were generally supportive of a particular policy,²⁴¹ although that would require some method of deter-

233. *See infra* notes 234–96 and accompanying text.

234. *Schuette*, 134 S. Ct. at 1634 (quoting *Seattle*, 458 U.S. at 472, 474).

235. *Id.* (quoting *Seattle*, 458 U.S. at 472, 474).

236. *Id.* (“It is this reading of *Seattle* that the Court of Appeals found to be controlling here. And that reading must be rejected.”); *see also id.* (“The expansive reading of *Seattle* has no principled limitation and raises serious questions of compatibility with the Court’s settled equal protection jurisprudence.”).

237. *See supra* notes 196–98 and accompanying text.

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

239. *Id.*

240. *Id.*

241. *Cf.* Michael Selmi, *The Facts of Affirmative Action*, 85 VA. L. REV. 697, 711 n.66 (1999) (reviewing WILLIAM G. BOWEN AND DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (Princeton University Press 1998)) (“[P]olls have long indicated that as a group, African-Americans tend to support affirmative action policies.”).

mining which individuals belong to which race, which itself is problematic.²⁴²

The difficulty here is not in the plurality's pointing out that the *Seattle* view concerning what is constitutionally permissible is incompatible with the current approach to equal protection jurisprudence, but in the implications to be drawn from that point. The *Schuette* plurality implies that the difference between the *Seattle* view and the current view requires reversal of the Sixth Circuit decision, whereas in fact the Sixth Circuit opinion better accounts for the jurisprudence that prevailed until *Schuette* was issued.²⁴³

Precisely because equal protection jurisprudence no longer permits courts to attempt to distinguish between beneficial and invidious racial classifications, *all* racial classification must be examined with strict scrutiny.²⁴⁴ Because that is so, there is no need for a court to determine if a particular program is beneficial for or harmful to minorities—the program will only be upheld if it passes muster under strict scrutiny.

How should the *Reitman-Hunter-Seattle* line of cases be understood in light of the current interpretation of equal protection guarantees? Where members of a particular discrete and insular class (race is a paradigmatic example) are subject to extra electoral burdens before they can secure a change in the law, those electoral burdens will be struck down unless narrowly tailored to promote compelling state interests. The Court has rejected the *Seattle* approach that took into account whether the challenged legislation involved matters that inured to the benefit of the minority.²⁴⁵ But the current approach, which rejects employing a lower level of scrutiny for programs benefiting minorities, increases rather than decreases the kinds of race-based classifications subject to strict scrutiny, because preferential programs that might previously have triggered intermediate scrutiny²⁴⁶ now will trigger strict scrutiny.

242. *Schuette*, 134 S. Ct. at 1634 (“And if it were deemed necessary to probe how some races define their own interest in political matters, still another beginning point would be to define individuals according to race.”); *see also id.* at 1635–36 (“But a number of problems raised by *Seattle*, such as racial definitions, still apply.”).

243. *See infra* notes 244–303 and accompanying text.

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

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

246. *See Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 564–65 (1990) (“We hold that benign race-conscious measures mandated by Congress—even if those measures are not ‘remedial’ in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.”), *overruled by Adarand Constrs.*, 515 U.S. at 227.

Suppose that the Michigan amendment had required using race-conscious criteria in admissions even when there was no compelling need to do so. In that event, the plurality's discussion of whether race-conscious remedies are permissible absent a showing of invidious state action would have been relevant. But the Michigan amendment did not advocate the use of race-conscious measures even when the Federal Constitution barred their use. On the contrary, the Michigan amendment precluded the use of race-conscious measures even when the Federal Constitution permitted their use. Ironically, the Michigan amendment included an express racial classification, which should have been examined with strict scrutiny. It simply is not relevant whether, as Chief Justice Roberts believes, racial "preferences do more harm than good."²⁴⁷ The current jurisprudence does not permit the courts to act differently even if they believe that an express racial classification would be beneficial.

Why did the plurality fail to examine the Michigan amendment with strict scrutiny? That explanation requires consideration of another way in which the plurality modified the existing jurisprudence. The plurality explained that because "there was no infliction of a specific injury of the kind at issue in *Mulkey* and *Hunter* and in the history of the Seattle schools,"²⁴⁸ the electoral process jurisprudence was inapplicable to the Michigan referendum. The Michigan referendum instead involved "the right of Michigan voters to determine that race-based preferences granted by Michigan governmental entities should be ended."²⁴⁹

There are two distinct reasons that the plurality's analysis is unpersuasive. First, the injury at issue in *Schuette* is of the same kind as the injuries at issue in *Reitman*, *Hunter*, and *Seattle*. While *Reitman* and *Hunter* both involved antidiscrimination measures that had been repealed, the injury was not in the repeal of those measures, since a mere repeal would have been permissible.²⁵⁰ Nor was it in the invidious denial of housing, since that would have been done by private individuals. Rather, the invidious harm imposed by the state was in its imposition of extra electoral burdens on the basis of race.

Suppose that the *Schuette* plurality's recommendation is followed²⁵¹ and the issues in *Seattle* are understood as the *Seattle* Court itself understood them. The injury was not in being forced to attend segregated schools, since that de facto segregation was attributed to

247. *Schuette*, 134 S. Ct. at 1639 (Roberts, C.J., concurring).

248. *Id.* at 1636.

249. *Id.* at 1635.

250. See *Reitman v. Mulkey*, 387 U.S. 369, 376 (1967) (noting that "the [mere] repeal of any statute prohibiting racial discrimination . . . is constitutionally permissible"); *Hunter v. Erickson*, 393 U.S. 385, 390 n.5 (1968) ("[W]e do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment").

251. See *supra* note 197 and accompanying text.

private rather than state action.²⁵² The injury was in having increased electoral burdens imposed with respect to matters of a racial nature. But *Schuette* also involved the imposition of electoral burdens on matters of a racial nature.²⁵³ Further, it does not matter whether permitting minority preferences is thought to advance minority interests, because creating more opportunity,²⁵⁴ or instead to undermine minority interests, because causing some to undervalue or underestimate the degree to which minorities succeed on the “merits.”²⁵⁵ Either way, the classification triggers strict scrutiny.

When distinguishing between the type of injury at issue in *Reitman* and *Hunter* and the type of benefit at issue in *Schuette*, the plurality seemed to contrast specific harms on the one hand and mere preferences on the other.²⁵⁶ The plurality suggested that those who gain by virtue of a preference are merely being accorded a benefit on a basis other than its having been deserved or earned. Yet, the clear distinction between harm and benefit has been especially slippery in the context of school admissions.

Consider an individual, Jones, who is competing for one of a limited number of spots in a first-year class at a state university. Jones is denied admission. Suppose that someone else, Smith, is offered a place in the first-year class. Has Jones been injured by Smith’s having been admitted? That is unclear, because Jones might have been denied admission even if Smith had not been offered that spot. Suppose further that Smith is a member of a racial minority and Jones is

252. See *Schuette*, 134 S. Ct. at 1642 (Scalia, J., concurring in the judgment) (“The [Seattle] opinion assumes throughout that Seattle’s schools suffered at most from *de facto* segregation.”); *id.* at 1664 (Sotomayor, J., dissenting) (“[T]he plurality might prefer that the *Seattle* Court had said that, but it plainly did not. Not once did the Court suggest the presence of *de jure* segregation in Seattle. Quite the opposite: The opinion explicitly suggested the desegregation plan was adopted to remedy *de facto* rather than *de jure* segregation.” (citing *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472, n.15 (1982))).

253. See *id.* at 1653 (Sotomayor, J., dissenting) (“[T]here are now two very different processes through which a Michigan citizen is permitted to influence the admissions policies of the State’s universities: one for persons interested in race-sensitive admissions policies and one for everyone else.”).

254. See Lorin J. Lapidus, *Diversity’s Divergence: A Post-Grutter Examination of Racial Preferences in Public Employment*, 28 W. NEW ENG. L. REV. 199, 204 (2006) (“Racial preferences were seen as a way to level the field of competition and create new educational opportunities for minorities.”).

255. Cf. *Adarand Constrs. v. Pena*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment) (“These programs stamp minorities with a badge of inferiority.”).

256. Cf. *Schuette*, 134 S. Ct. at 1637 (majority opinion) (discussing “the well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts” (citing *Johnson v. California*, 543 U.S. 499, 511–12 (2005))).

not. Has Jones been injured? It is still true that Jones might not have gotten the spot, even if Smith had also been denied admission.²⁵⁷

Suppose that Smith and Jones are applying to a state university that places an inordinate weight on race in its admissions decisions.²⁵⁸ The Court would likely say that Jones had been injured in the sense that he had been denied the opportunity to compete without having racial factors play an inappropriate role, even if Jones could not establish that he had been denied a spot that he otherwise would have gotten. As the Court explained in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*:²⁵⁹

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The “injury in fact” in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.²⁶⁰

The amendment at issue in *Schuette* is vulnerable under the *Jacksonville* analysis because “the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit,”²⁶¹ is what makes the amendment unconstitutional. Thus, because the state constitutional amendment makes it more difficult for members of racial groups than members of other groups to obtain a benefit that the Federal Constitution permits them to obtain, the amendment does not pass muster. But the plurality obviously had a much different understanding of the amendment’s constitutionality, notwithstanding the plurality’s admission that “race was an undoubted subject of the ballot issue.”²⁶²

Why wasn’t the amendment subjected to strict scrutiny? Part of the explanation is likely that the plurality did not believe the amend-

257. See Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1078 (2002) (“In any highly selective competition where white applicants greatly outnumber minority applicants, and where multiple objective and nonobjective criteria are relevant, the average white applicant will not fare significantly worse under a selection process that is race-conscious than under a process that is race-neutral.”).

258. Cf. *Gratz v. Bollinger*, 539 U.S. 244, 274 (2003) (striking down an admissions policy because it made “race a decisive factor for virtually every minimally qualified underrepresented minority applicant”).

259. 508 U.S. 656 (1993).

260. *Id.* at 666; see also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. at 719 (“As we have held, one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff.”).

261. *Jacksonville*, 508 U.S. at 666.

262. *Schuette v. BAMN*, 134 S. Ct. 1623, 1635 (2014).

ment invidiously motivated²⁶³ but, instead, adopted to reduce divisiveness.²⁶⁴

The electorate's instruction to governmental entities not to embark upon the course of race-defined and race-based preferences was adopted, we must assume, because the voters deemed a preference system to be unwise, on account of what voters may deem its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it.²⁶⁵

Unwilling to presume bias on the electorate's part,²⁶⁶ the plurality believed its position consistent with preventing injury to minority interests.²⁶⁷ "What is at stake here is not whether injury will be inflicted but whether government can be instructed not to follow a course that entails, first, the definition of racial categories and, second, the grant of favored status to persons in some racial categories and not others."²⁶⁸

Yet, at least two points must be made. First, the amendment itself expressly employs a racial classification, so the plurality's point about the importance of avoiding the need to define racial categories is not supported by the opinion. Racial categories were put into play by the amendment itself,²⁶⁹ so the plurality should not pretend that the responsibility for creating the need to define racial categories should be laid at the feet of those challenging the amendment. Thus, going forward, it will be difficult to avoid the problems inherent in defining racial categories if only because such definitions will be required in order to know what the amendment precludes. Second, the plurality's worry about favoring some racial classes over others is already addressed by the prevailing equal protection jurisprudence, because racial preferences cannot be accorded unless surviving review under strict scrutiny.²⁷⁰ As the Court explained in *Johnson v. California*,²⁷¹ "We have insisted on strict scrutiny in every context, even for so-called

263. *Cf. id.* at 1637 ("It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.").

264. *Id.* at 1635 ("Racial division would be validated, not discouraged, were the *Seattle* formulation, and the reasoning of the Court of Appeals in this case, to remain in force.").

265. *Id.* at 1638.

266. *Id.* at 1637.

267. *Id.* ("These precepts are not inconsistent with the well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts." (citing *Johnson v. California*, 543 U.S. 499, 511–12 (2005))).

268. *Id.* at 1638.

269. *See id.* at 1629.

270. *Cf. id.* at 1630 (suggesting that this decision follows *Fisher*, which "did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met").

271. 543 U.S. 499 (2005).

'benign' racial classifications, such as race-conscious university admissions policies."²⁷²

C. On Neutrality

Justice Scalia's opinion concurring in the judgment may make something explicit that implicitly undergirds the *Schuetz* plurality opinion, namely, why the Michigan amendment is "neutral," notwithstanding its expressly precluding according preferences on the basis of race. He criticized both the *Schuetz* plurality and the *Schuetz* dissent because, allegedly, "each endorses a version of the proposition that a facially neutral law may deny equal protection solely because it has a disparate racial impact."²⁷³ Justice Scalia chides the other members of the Court for not having paid close enough attention to *Crawford*, decided the same day as *Seattle*, which affirms the following principle: "[E]ven when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown."²⁷⁴

How is it that an amendment expressly employing the term "race" can nonetheless be neutral? Justice Scalia explained that a "law that 'neither says nor implies that persons are to be treated differently on account of their race' is not a racial classification," citing *Crawford*.²⁷⁵ Why? Because "statutes mandating equal treatment"²⁷⁶ preclude treating individuals differently on account of race. Basically, by prohibiting both discrimination and according preferences, there is a sense in which the state is requiring that race be treated "neutrally."

The question then becomes whether this sense of neutrality is the sense of neutrality currently required by the Constitution. First, though, it is important to see why Justice Scalia is misrepresenting *Crawford*. *Crawford* explained that the proposition at issue in that case "neither says nor implies that persons are to be treated differently on account of their race."²⁷⁷ To what was the *Crawford* proposition being compared? To the propositions at issue in *Hunter* and in *Seattle*. The *Hunter* proposition expressly classified on the basis of race—"there was an explicitly racial classification treating racial housing matters differently from other racial and housing matters."²⁷⁸ The *Seattle* proposition did not expressly discriminate on the basis of race, but the Court found that it implicitly discriminated, because the ordinance "use[d] the racial nature of an issue to define the govern-

272. *Id.* at 505 (citing *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)).

273. *Schuetz*, 134 S. Ct. at 1647 (Scalia, J., concurring in the judgment).

274. *Id.* (citing *Crawford v. Bd. of Educ. of City of L.A.*, 458 U.S. 527, 537–38 (1982)).

275. *Id.* at 1648 (citing *Crawford*, 458 U.S. at 537).

276. *Id.* (Scalia, J., concurring in the judgment).

277. *Crawford*, 458 U.S. at 537.

278. *Hunter v. Erickson*, 393 U.S. 385, 389 (1969).

mental decisionmaking structure, and thus impose[d] substantial and unique burdens on racial minorities.²⁷⁹ Because *Crawford* neither expressly nor implicitly targeted race, the amendment was upheld. However, the *Crawford* Court made clear that “if Proposition I [had] employed a racial classification it would be unconstitutional unless necessary to further a compelling state interest.”²⁸⁰ But the *Schuette* plurality admitted that race was a subject of the amendment,²⁸¹ which should have triggered strict scrutiny according to both *Seattle* and *Crawford*.²⁸²

Suppose that the Michigan amendment had simply said that no preferences could be accorded on the basis of race or sex. Would such an amendment have been neutral? Presumably, it would not be thought as neutral as an amendment precluding both invidious discrimination and preferences, because the latter but not the former is neutral between hindering and helping.²⁸³ But the Michigan amendment was not neutral between hindering and helping in that sense because the hindering it precluded was already precluded anyway, so its only effect was to preclude according preferences on the basis of race.

Consider the Akron referendum:

Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective.²⁸⁴

This ordinance is neutral in the sense that it would apply to all housing measures targeting race, whether trying to promote or prevent discrimination. Yet, the *Hunter* Court did not characterize this ordinance as race-neutral but, instead, as targeting on the basis of race.²⁸⁵ When considering whether an amendment is neutral, it may be helpful to consider the context in which an amendment is passed. The *Hunter* Court treated this “neutral” treatment of race as disadvantaging minorities because it understood that the amendment

279. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470 (1982).

280. *Crawford*, 458 U.S. at 536.

281. *See Schuette*, 134 S. Ct. at 1635.

282. *See Seattle*, 458 U.S. at 470; *Crawford*, 458 U.S. at 536.

283. *Cf. Coal. for Econ. Equity v. Wilson* 122 F.3d 692, 702 (9th Cir. 1997) (“Proposition 209 provides that the State of California shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race or gender. Rather than classifying individuals by race or gender, Proposition 209 prohibits the State from classifying individuals by race or gender. A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender.”).

284. *Hunter v. Erickson*, 393 U.S. 385, 387 (1969).

285. *Id.* at 389.

had been adopted in response to the Akron City Council's passage of an antidiscrimination measure. The Court noted that the Fourteenth Amendment precludes state discrimination on the basis of race,²⁸⁶ so the City Council could not have adopted measures that encouraged racial discrimination without offending equal protection guarantees contained in the Federal Constitution.²⁸⁷ But given the context in which the amendment was passed—invidious discrimination was already prohibited by the Federal Constitution in any event—the Proposition would not have been thought more “neutral” even were it to have precluded the City Council from doing something that the Federal Constitution prohibited the council from doing anyway.²⁸⁸

Analogous reasoning should be applied to the Michigan amendment, which was passed in response to the Court's upholding racial preferences in University admissions under certain circumstances.²⁸⁹ Just as the Akron amendment was aimed at making it more difficult for minorities to secure certain benefits, the Michigan amendment was as well. Further, when precluding discrimination “against . . . individuals or groups on the basis of race,”²⁹⁰ the Michigan amendment was presumably merely precluding what the Federal Constitution already precludes.²⁹¹ But that means that the Michigan amendment should be treated as if it had merely precluded affording racial preferences without in addition precluding racial discrimination.

Perhaps an amendment precluding racial preferences might also be viewed as neutral *within* the category of race in the sense that no race can be preferred over any other.²⁹² But *Hunter* was facially neutral with respect to the differing groups composing the category of race, and the Court had no difficulty in subjecting that referendum to

286. *Id.* at 391 (“[T]he core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race . . .”).

287. *See* *Reitman v. Mulkey*, 387 U.S. 369, 378–79 (1967).

288. Lest it be thought that the City Council was merely prohibiting what state law prohibited, the Court noted that that, unlike the state law, the local antidiscrimination measure did not merely target commercial housing. *See Hunter*, 393 U.S. at 389 n.3.

289. David E. Bernstein, *Schuetz v. Coalition to Defend Affirmative Action and the Failed Attempt to Square a Circle*, 8 NYU J. L. & LIBERTY 210, 211 (2013) (“The amendment was a reaction to the Supreme Court’s decisions on the constitutionality of affirmative action preferences in *Grutter v. Bollinger* and *Gratz v. University of Michigan* in 2003.”).

290. *Schuetz v. BAMN*, 134 S. Ct. 1623, 1629 (2014) (quoting the text of the amendment).

291. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150–51 (1970) (“Few principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race.”).

292. *Cf. Schuetz*, 134 S. Ct. at 1638 (“What is at stake here is . . . the grant of favored status to persons in some racial categories and not others.”).

close scrutiny because of its presumed impact on racial minorities.²⁹³ Whether or not the *Schuette* plurality believed that the Michigan amendment was designed to preclude benefiting minorities,²⁹⁴ the amendment clearly focused on race to the exclusion of other possible points of focus.

When discussing neutrality, one might be concerned about neutrality within a category or neutrality across categories. The *Hunter* Court noted that the Akron ordinance “disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor.”²⁹⁵ The Court explained that other kinds of private discrimination could be precluded by the City Council without requiring electoral ratification.²⁹⁶ But an analogous analysis should be made regarding the Michigan amendment, which requires a constitutional amendment (i.e., one that would repeal the amendment that had been passed banning racial preferences) in order for certain kinds of preferences to be accorded, but does not impose such a requirement with respect to other kinds of preferences, e.g., with respect to legacy candidates or candidates preferred because they are from underrepresented geographical locations. *Schuette* is simply irreconcilable with the *Hunter* line of cases insofar as that line precludes imposing greater electoral burdens on the category of race than are imposed upon other categories.

IV. CONCLUSION

The *Schuette* plurality sought to provide a kind of compromise position in that it did not wish to hold that racial classifications are per se invalid,²⁹⁷ as Justice Scalia presumably would have held.²⁹⁸ For that,

293. *Hunter*, 393 U.S. at 393.

294. *See supra* note 292 and accompanying text.

295. *Hunter*, 393 U.S. at 391.

296. *See id.* (“The automatic referendum system does not reach housing discrimination on sexual or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes.”).

297. *Schuette*, 134 S. Ct. at 1630 (“[I]t is important to note what this case is not about. It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. The consideration of race in admissions presents complex questions, in part addressed last Term in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013). In *Fisher*, the Court did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met.”).

298. *Id.* at 1639 (Scalia, J., concurring in the judgment) (“Does the Equal Protection Clause of the Fourteenth Amendment *forbid* what its text plainly *requires*?”). Here, Justice Scalia was suggesting that the Fourteenth Amendment requires

it should be applauded. But the costs incurred by adopting this compromise position should not be ignored. First, the plurality claims to have applied the *Hunter-Seattle* Doctrine, but did so in a way that is unfathomable. While resisting Justice Scalia's call to overrule the doctrine,²⁹⁹ the plurality applied a doctrine without explaining what it is or how it works. Certainly, *Hunter's* striking down a referendum because electoral burdens were placed on the basis of race when other classifications were not so encumbered is difficult, if not impossible, to reconcile with the *Schuette* approach.

Implicit in *Schuette* is that a law that prohibits both preferential and detrimental treatment of the basis of race is race-neutral, since otherwise the Michigan amendment would have been subjected to strict scrutiny. But this understanding of neutrality focuses on evenhandedness within a category without even considering evenhandedness across categories. Such an approach makes no sense in the context of electoral process guarantees jurisprudence, because the focus of that jurisprudence has been on whether electoral burdens have been imposed upon a discrete and insular class (paradigmatically race) that has not been imposed on other classes³⁰⁰—the focus has been on treatment across classes rather than within a class.

If Justice Scalia were correct that states are prohibited from imposing benefits or burdens on the basis of race,³⁰¹ then the Michigan amendment would be constitutional—it would simply be including requirements within the state constitution that are already required within the Federal Constitution. But the *Schuette* plurality reaffirmed that racial preferences can be constitutional,³⁰² i.e., if narrowly tailored to promote a compelling state interest.³⁰³ But one must wonder what compelling state interest would be promoted by prohibiting a policy that itself was narrowly tailored to promote a compelling state interest (as a policy affording racial preferences would have to be in order for such a policy to pass constitutional muster).

states to be race-neutral, i.e., afford neither benefits nor burdens on the basis of race. Cf. *id.* at 1648 (“As Justice Harlan observed over a century ago, “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.” (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))).

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

300. See, e.g., *Hunter*, 393 U.S. at 390–91 (“But § 137 nevertheless disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor.”).

301. *Schuette*, 134 S. Ct. at 1639 (Scalia, J., concurring in the judgment) (“Does the Equal Protection Clause of the Fourteenth Amendment *forbid* what its text plainly *requires*?”).

302. *Id.* at 1630.

303. See *Johnson v. California*, 543 U.S. 499, 505 (2005).

Current equal protection jurisprudence requires that whenever the state classifies on the basis of race, regardless of motivation, the classification must be examined with strict scrutiny. Up until *Schuette*, that had meant that employing a racial classification in a way that would affect the ability to secure benefits would itself trigger strict scrutiny. But *Schuette* undermines that understanding, and it is now an open question whether there will be additional contexts in which the use of race in a way that affects the distribution of benefits and burdens will nonetheless not trigger strict scrutiny.

Schuette is regrettable for a number of reasons including that it muddles electoral process guarantees jurisprudence and, perhaps, equal protection jurisprudence as well. At a time when the Court has doubted its own ability to discern whether racial classifications help or hurt minorities and thus has required that all such classifications be subjected to strict scrutiny, the *Schuette* plurality has nonetheless created an exception to that rule. States are permitted to ban narrowly tailored programs benefiting racial minorities without triggering the kind of scrutiny normally associated with programs targeting on the basis of race. Such an exception cannot help but reinforce the view of some that the Court is renegeing on its commitment to promote racial justice and fairness,³⁰⁴ protestations to the contrary notwithstanding,³⁰⁵ and the Court must do something to dispel the suspicions that *Schuette* is almost certain to aggravate.

304. *Cf. Schuette*, 134 S. Ct. at 1654 (Sotomayor, J., dissenting) (“The plurality’s decision fundamentally misunderstands the nature of the injustice worked by § 26.”).

305. *Cf. id.* at 1639 (Roberts, C.J., concurring) (“People can disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate.”).