Schuette, Electoral Process Guarantees, and the New Neutrality

Mark Strasser
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I. Introduction

Last term in Schuette v. Coalition to Defend Affirmative Action, 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 preferences—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 the 6th Circuit, which had taken the Court at its word, the plurality has now not only left open what electoral process guarantees mean and whether they have any force, but has also muddied equal protection jurisprudence. Both the ways in which the plurality is modifying equal protection jurisprudence and its doing so sub silentio will

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1 134 S. Ct. 1623 (2014).
3 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.”).
4 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.”).
5 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.”).
6 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
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.7

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 was claiming to follow, but misapplied settled equal protection principles, which will create chaos in the lower courts unless corrected or clarified.

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. 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.8 While the level playing field analogy is relatively straightforward, the Court has never adequately explained all aspects of the jurisprudence, for example, which groups were protected by the guarantees. Instead, the cases in which the guarantees were triggered often involved

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7 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 contravene constitutional protections long recognized in our precedents.”).
8 Id. 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.”).
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 Schuette 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\(^9\) spelled out some of the elements\(^{10}\) that would later be central in electoral process guarantees jurisprudence.\(^{11}\) 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.\(^{12}\)

The referendum nullified existing legislation precluding racial discrimination in the housing market.\(^{13}\) 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.”\(^{14}\) While the California court was


\(^{10}\) Cf. Schuette, 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.”).

\(^{11}\) 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”).

\(^{12}\) Reitman, 387 U.S. at 371.

\(^{13}\) See id. at 374 (discussing anti-discrimination statutes passed by the California Legislature).

\(^{14}\) Id.
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 [i]s not bound by the Federal Constitution to forbid them.”15 But that means that 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.16

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.”17 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”18 and, further, that the Proposition was designed “to forestall future state action that might circumscribe this right.”19 By forestalling future action that might limit the right to discriminate, the Proposition was not merely repealing existing law20 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 anti-discrimination legislation, perhaps after taking

15 Id. at 374-75.
16 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.”).
17 Reitman, 387 U.S. at 375 (citing Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)).
18 Id. at 376.
19 Id. at 374.
20 Id. at 376-77.
into account some of the objections that had swayed the electorate to enact a repeal. 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. The California high court “did not posit a constitutional violation on the mere repeal of the Unruh and Rumford Acts.” 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.” 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.” The Reitman Court noted that the challenged proposition “authorize[d] racial discrimination in the housing market, [making] [t]he right to discriminate … one of the basic policies of the State.” Because there were “no persuasive considerations indicating that [the California Supreme Court’s] judgments should be overturned,” 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.” The Court’s deferring on that point was important. States are constitutionally prohibited from

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21 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, 1537 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).
22 See Reitman, 387 U.S. at 389 (Harlan, J., dissenting).
23 Id. at 376.
24 Id. at 376-77.
25 Id. at 377.
26 Id. at 381.
27 Id.
28 Id.
supporting private discrimination, 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.

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.” Instead, it noted that “‘[o]nly by sifting facts and weighing circumstances' on a case-by-case basis can a ‘nonobvious involvement of the State in private conduct be attributed its true significance,’” 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 s 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.” 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.

In his dissent, Justice Harlan argued that the California “repeal of its prior statutes forbidding private discrimination” should not be treated any differently than would “California's failure to

29 Id. at 375 (“[A] significant state involvement in private discriminations could amount to unconstitutional state action.”) (citing Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)).
30 See id. at 375-76 (“The judgment of the California court was that s 26unconstitutionally involves the State in racial discriminations and is therefore invalid under the Fourteenth Amendment.”) and id. at 381 (“Affirmed.”).
31 Id. at 378 (citing Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961)).
32 Id. (citing Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961)).
33 See id. at 378-79.
34 Id. at 390-91 (Harlan, J., dissenting).
35 Id. at 389 (Harlan, J., dissenting).
pass any such antidiscrimination statutes in the first instance.”\textsuperscript{36} Yet, Proposition 14 was not a mere statutory repeal, because “the State's basic charter”\textsuperscript{37} 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.”\textsuperscript{38} 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 that 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.”\textsuperscript{39} 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.\textsuperscript{40} The same point was made about the conclusion that the intent behind the proposition was to promote discrimination.\textsuperscript{41} Thus, because Justice Harlan rejected that the state itself was promoting discrimination, he rejected that the California amendment was unconstitutional.\textsuperscript{42}

\textsuperscript{36} Id. (Harlan, J., dissenting).
\textsuperscript{37} Id. at 377.
\textsuperscript{38} Id. at 389 (Harlan, J. dissenting).
\textsuperscript{39} Id. at 391 (Harlan, J., dissenting).
\textsuperscript{40} See id. at 390 (Harlan, J., dissenting) (“There were no findings as to the general effect of s 26.”).
\textsuperscript{41} Id. (Harlan, J., dissenting) (“The Court declares that the California court ‘held the intent of s 26 was to authorize private racial discriminations in the housing market,’ … but there is no supporting fact in the record for this characterization.”)
\textsuperscript{42} See id. at 395 (Harlan, J., dissenting) (“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 s 26, on the showing made here, falls within this class of cases.”).
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. 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.

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. 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” 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.” The referendum, which passed by majority vote, made the City Council housing antidiscrimination laws ineffective unless ratified by the Akron electorate.

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43 See infra notes 53-55 and accompanying text.
44 See infra notes 50-69 and accompanying text. But see infra notes 205-08 and accompanying text (discussing the Schuette plurality alluding to Harlan’s Reitman dissent).
46 Id. at 386.
47 Id.
48 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
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.” 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.” 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.” Because the referendum imposed this additional

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49 *Id.* at 389.
50 *Id.* at 389-90.
51 *Id.* at 390.
condition for certain antidiscrimination measures, the Court rejected that the Akron referendum was a mere repeal of the antidiscrimination ordinance.  

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 s 137's gantlet.” 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.” It was at least in part because the Akron electorate distinguished among the types of referenda requiring ratification that the referendum was constitutionally suspect.

Yet, legislation by its very nature distinguishes among groups or categories, subjecting some to regulations to which others are not subject, so the mere fact that some categories or groups are comparatively disadvantaged does not establish that legislation is constitutional infirm. The

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52 Id. at 390 n.5 (“Thus we do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment.”).
53 Id. at 390.
54 Id. at 391.
55 See id. at 392-93 (noting that “Akron might have proceeded by majority vote at town meeting on all its municipal legislation”).
56 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).”).
57 See Katzenbach v. Morgan, 384 U.S. 641, 657 (1966) (discussing “the familiar principles that a ‘statute is not invalid under the Constitution because it might have gone farther than it did,’ Roschen v. Ward, 279 U.S. 337, 339 (1929), that a legislature need not ‘strike at all evils at the same time.’ Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 610 (1935), 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,’ Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).”).
reason that Akron’s referendum was unconstitutional was due to the types of groups chosen to bear this greater electoral burden.\textsuperscript{58}

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”\textsuperscript{59}—each of the classifications would currently be recognized as triggering strict scrutiny.\textsuperscript{60} Second, not only were suspect classifications being targeted, but the 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.”\textsuperscript{61} 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.”\textsuperscript{62} 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.”\textsuperscript{63}

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\item\textsuperscript{58} See infra notes 59-63 and accompanying text.
\item\textsuperscript{59} Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 873 (1994).
\item\textsuperscript{60} 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 generally believed to require under the federal constitution this most exacting judicial review of strict scrutiny.").
\item\textsuperscript{61} Hunter, 393 U.S. at 390.
\item\textsuperscript{62} Id. at 391.
\item\textsuperscript{63} Id. at 393.
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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.”64 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.”65

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.66 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.”67 For present purposes, though, the more important issue is why he thought the “charter amendment … discriminatory on its face”68 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.”69 The facial discrimination involved expressly focusing on the category of race rather than on expressly focusing on a particular race.

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.”70 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

64 Id. at 395 (Harlan, J., concurring).
65 Id. (Harlan, J., concurring) (citing McLaughlin v. Florida, 379 U.S. 184, 194 (1964)).
66 Id. (Harlan, J., concurring).
67 Id. at 393.
68 Id. at 395 (Harlan, J., concurring).
69 Id. at 389.
70 Schuette, 134 S. Ct. at 1632.
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’”\textsuperscript{71} was private.\textsuperscript{72} 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.\textsuperscript{73} 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.”\textsuperscript{74} 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.\textsuperscript{75} 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.”\textsuperscript{76} Indeed, the Hunter Court noted that the electorate could simply have repealed the Council measure,\textsuperscript{77} but instead chose to add an additional hurdle by requiring additional ratification of certain antidiscrimination measures.\textsuperscript{78}

\textsuperscript{71} Id. (citing Hunter, 393 U.S. at 391).
\textsuperscript{73} 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.’”).
\textsuperscript{74} Schuette, 134 S. Ct. at 1624 (emphasis added).
\textsuperscript{75} Hunter, 393 U.S. at 390 n.5 (“[W]e do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment.”)
\textsuperscript{76} Id. at 393.
\textsuperscript{77} 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”).
\textsuperscript{78} 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. In James v. Valtierra, 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.” 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.” 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.”

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.” 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.” Basically, this provision imposed a

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79 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 byproduct of a salutary vehicle for popular decisionmaking.”)
81 Id. at 138.
82 Id. (citing Cal. Health & Safety Code § 34240).
83 Id. (citing Cal. Const., Art. IV, § 1.)
84 Id. (citing Housing Authority for City of Eureka v. Superior Court, 219 P.2d 457, 460-61 (Cal. 1950)).
85 Id. at 139.
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. In those localities, “housing authorities could not apply for federal funds because low-cost housing proposals had been defeated in referendums.” The district court struck down the amendment, relying heavily upon Hunter.

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,’” because the “referendum requires [ratification] for any low-rent public housing project, not only for projects which will be occupied by a racial minority.” 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.”

Even if the law was not directed at burdening a minority, it was nonetheless true that the amendment imposed a greater burden on those seeking low-cost public housing than on those seeking other goods. However, the Court noted that “a lawmaking procedure that

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86 Id.
87 Id.
88 Id. at 140 (“The first paragraph in the District Court's decision stated simply: ‘We hold Article XXXIV to be unconstitutional.’”)
89 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).”).
90 Id. at 141 (citing Hunter, 393 U.S. at 391).
91 Id.
93 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.”).
‘disadvantages' a particular group does not always deny equal protection.”

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.” Nor could it be claimed that this was the only issue subject to referendum approval.

The Court further worried that an extension of Hunter might force the Court “to analyze governmental structures to determine whether a … rule is likely to ‘disadvantage’ any of the diverse and shifting groups that make up the American people.” Such a comment suggests that the Court was reluctant to extend the electoral guarantees to “diverse and shifting groups,” 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.

The Court’s focus on the malleability of targeted groups was also addressed in Gordon v. Lance. 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.”103 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.”104 While both measures received majority approval,105 neither measure garnered the 60% vote necessary for enactment.106

Citizens who had voted in favor of the proposals challenged the 60% requirement as a violation of 14th Amendment guarantees.107 Their complaint was not only based on the recent election results alone but on similar results on a number of occasions—there had 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.108 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.109

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.”110 The Court explained

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103 Id. at 2.
104 Id. at 3.
105 Id. (“Of the total votes cast, 51.55% favored the bond issues and 51.51% favored the tax levy.”).
106 Id. (“Having failed to obtain the requisite 60% affirmative vote, the proposals were declared defeated.”).
107 Id. (“Respondents then brought this action, seeking a declaratory judgment that the 60% requirements were unconstitutional as violative of the Fourteenth Amendment.”).
108 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%.”).
109 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. The Board of Education of County 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.”).
110 Id. at 5.
that “any departure from strict majority rule gives disproportionate power to the minority,” 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.” As long as voting “provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause.” Together, James and Gordon suggest that electoral process guarantees may be inapplicable when the groups targeted are not discrete and insular.

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

Washington v. Seattle School District and Crawford v. Los Angeles Board of Education are helpfully contrasted, because each helps 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 ...” 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.
The district court found that the purpose behind the initiative was to prevent busing to achieve racial desegregation.\textsuperscript{119} The campaign in favor of the proposition “focused almost exclusively on the wisdom of ‘forced busing’ for integration.”\textsuperscript{120} While the district court found that “racial bias ... [was] a factor in the opposition to the ‘busing’ of students to obtain racial balance,”\textsuperscript{121} 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.’”\textsuperscript{122} The district court struck down the initiative.\textsuperscript{123}

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.”\textsuperscript{124} 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.”\textsuperscript{125} Here, the Court discussed the racial nature of the Proposition because it understood that the Proposition was designed to prevent busing as a means of promoting racial integration of the schools, notwithstanding the Proposition’s facial neutrality in that it never expressly mentioned race.\textsuperscript{126}

The Seattle Court explained that “[s]tate action of this kind ... ‘places special burdens on racial minorities within the governmental process.’”\textsuperscript{127} Because the placement of such burdens

\textsuperscript{119} 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.”).
\textsuperscript{120} Id. (citing Seattle School District No. 1 v. State, 473 F. Supp. 996, 1009 (W. D. Wash. 1979)).
\textsuperscript{121} Id. at 465 (citing Seattle School District No. 1 v. State, 473 F. Supp. 996, 1001 (W. D. Wash. 1979)).
\textsuperscript{122} Id. (citing Seattle School District No. 1 v. State, 473 F. Supp. 996, 1010 (W. D. Wash., 1979)).
\textsuperscript{123} Id. ("The District Court then held Initiative 350 unconstitutional for three independent reasons.").
\textsuperscript{124} Id. at 470.
\textsuperscript{125} Id.
\textsuperscript{126} 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.").
\textsuperscript{127} Id. at 470 (citing Hunter, 393 U.S. at 391) (emphasis in Seattle opinion).
“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,”\textsuperscript{128} 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.’”\textsuperscript{129} The initiative at issue was unconstitutional because “it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities.”\textsuperscript{130}

The supporters of the initiative had claimed that it was racially neutral, “because the initiative simply permits busing for certain enumerated purposes while neutrally forbidding it for all other reasons.”\textsuperscript{131} But the Court found such a contention unpersuasive,\textsuperscript{132} “for despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes.”\textsuperscript{133} The Court was also unpersuaded 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.”\textsuperscript{134} 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.”\textsuperscript{135} Unlike other kinds of student assignment decisions which remained a matter of local control,\textsuperscript{136} individuals “favoring the elimination of \textit{de facto} school segregation now must seek relief from the state legislature, or from the statewide electorate.”\textsuperscript{137} Thus, before the adoption of the initiative,

\begin{itemize}
  \item \textsuperscript{128} Id. (citing \textit{Hunter}, 393 U.S. at 395 (Hunter, J., concurring) (emphasis added in \textit{Seattle}).
  \item \textsuperscript{129} Id. (citing \textit{Hunter}, 393 U.S. at 391).
  \item \textsuperscript{130} Id.
  \item \textsuperscript{131} Id. at 471.
  \item \textsuperscript{132} Id. (“We find it difficult to believe that appellants' analysis is seriously advanced.”).
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} Id. at 472.
  \item \textsuperscript{135} Id. at 474.
  \item \textsuperscript{136} 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.”).
  \item \textsuperscript{137} Id.
\end{itemize}
certain student assignment decisions were made on a local level, but after the initiative they would have to be made on the state level.\textsuperscript{138} While reaffirming that the mere repeal of a law or policy was not enough to implicate \textit{14}th Amendment concerns,\textsuperscript{139} 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.”\textsuperscript{140} 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.”\textsuperscript{141}

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.’”\textsuperscript{142} But the Court reached a very different conclusion about whether race was the focus of the referendum at issue in \textbf{Crawford v. Los Angeles Board of Education.}\textsuperscript{143}

\textbf{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 of the United States Constitution.”\textsuperscript{144} 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-

\textsuperscript{138} \textit{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.”).

\textsuperscript{139} \textit{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. Los Angeles Board of Education, 458 U.S. 527, 539 (1982)).

\textsuperscript{140} \textit{Id.}

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} \textit{Id.} at 485 (citing \textbf{James}, 402 U.S. at 141).

\textsuperscript{143} 458 U.S. 527 (1982).

\textsuperscript{144} \textit{Id.} at 529.
referendum,\textsuperscript{145} the Crawford Court “reject[ed] the contention that once a State chooses to do ‘more’ than the Fourteenth Amendment requires, it may never recede.”\textsuperscript{146} Such an “interpretation of the Fourteenth Amendment … [would be] destructive of a State's democratic processes and of its ability to experiment.”\textsuperscript{147} 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.”\textsuperscript{148} Nor did it override the obligation of the school districts themselves “to take reasonably feasible steps to desegregate.”\textsuperscript{149}

The petitioners had 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.”\textsuperscript{150} They noted that “other state-created rights may be vindicated by the state courts without limitation on remedies.”\textsuperscript{151} 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,”\textsuperscript{152} the Court denied that the measure at issue classified on the basis of race.\textsuperscript{153} Because the Proposition “neither says nor implies that persons are to be treated differently on account of their race,”\textsuperscript{154} the Court interpreted the proposition to

\textsuperscript{145}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.”).

\textsuperscript{146}Id. at 535.
\textsuperscript{147}Id.
\textsuperscript{148}Id.
\textsuperscript{149}Id. at 535-36.
\textsuperscript{150}Id. at 536.
\textsuperscript{151}Id.
\textsuperscript{152}Id. at 536-37.
\textsuperscript{153}See id. at 537 (“But Proposition I does not embody a racial classification.”).
\textsuperscript{154}Id.
be neutrally “forbid[ding] state courts to order pupil school assignment or transportation in the absence of a Fourteenth Amendment violation.”\textsuperscript{155}

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,”\textsuperscript{156} instead accepting that the voters were likely motivated by the “the educational benefits of neighborhood schooling.”\textsuperscript{157} Finally, the Court even expressed its uncertainty about which groups would be adversely affected by the measure.\textsuperscript{158} But its decision was not predicated on uncertainty regarding the measure’s effects, since even were the measure to have a discriminatory impact upon a racial minority, there at most would have been a showing of disparate impact without a showing of invidious intent.\textsuperscript{159}

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.\textsuperscript{160} 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,\textsuperscript{161} one but not the other was construed as being of a racial nature.\textsuperscript{162} Further, the Crawford Court had expressly noted that if the Proposition had employed a racial classification, strict

\begin{itemize}
\item \textsuperscript{155} Id.
\item \textsuperscript{156} Id. at 543. \textit{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.”).
\item \textsuperscript{157} Id. at 543.
\item \textsuperscript{158} \textit{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.”).
\item \textsuperscript{159} 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.”).
\item \textsuperscript{160} 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.”).
\item \textsuperscript{161} Seattle, 458 U.S. at 471 (discussing the proposition’s “facial neutrality”) and Crawford, 458 U.S. at 537 (“But Proposition I does not embody a racial classification.”).
\item \textsuperscript{162} \textit{Compare} Seattle, 458 U.S. at 470, with Crawford, 458 U.S. at 537.
\end{itemize}
scrutiny would have been triggered.\textsuperscript{163} 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 passing strict scrutiny.\textsuperscript{164}

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

Romer v. Evans\textsuperscript{165} would seem to be a good candidate for an electoral process guarantees analysis,\textsuperscript{166} 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.\textsuperscript{167} The referendum, whose passage amended the Colorado Constitution, stated:

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.\textsuperscript{168}

At the time the referendum was passed, three municipalities already prohibited orientation discrimination\textsuperscript{169} 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.”\textsuperscript{170}

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.”\textsuperscript{171}

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 14\textsuperscript{th} Amendment electoral process guarantees.\textsuperscript{172} That court noted, “[P]rior to the passage of this amendment, gay men, lesbians, and bissexuals were, of course, free to appeal to state and local government for protection against discrimination based on their sexual orientation.”\textsuperscript{173} 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.”\textsuperscript{174}

The United States Supreme Court agreed with the Colorado Supreme Court that Amendment 2 was unconstitutional,\textsuperscript{175} 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.”\textsuperscript{176} But, the Court suggested, Amendment 2 could not

\textsuperscript{170}Id. at 627.  
\textsuperscript{171}Id. at 629.  
\textsuperscript{172}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.”).  
\textsuperscript{173}Id. at 1286.  
\textsuperscript{174}Id.  
\textsuperscript{175}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.”).  
\textsuperscript{176}Id. at 631.
even pass this deferential standard. Not only did the measure have “the peculiar property of imposing a broad and undifferentiated disability on a single named group,” 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.”

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. Nor did it need to address whether the Colorado Supreme Court was correct that the amendment violated electoral process guarantees. By “affirm[ing] the judgment, but on a rationale different from that adopted by the State Supreme Court,” 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, the Court did not thereby preclude that the statute might have been challenged successfully on equal protection grounds as well.

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177 Id. at 632 (“Amendment 2 fails, indeed defies, even this conventional inquiry.”).
178 Id.
179 Id.
180 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, 1097 (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.”).
181 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”).
182 Id. at 626.
183 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.”)
184 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.”).
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 protections.\textsuperscript{185} 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.

\textbf{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.

\textbf{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.\textsuperscript{186} 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 not,\textsuperscript{187} the Court has modified its approach to racial

\textsuperscript{185} See supra notes 50-69; 125-30, and accompanying text.
\textsuperscript{186} See Hunter, 393 U.S. at 391 (noting that “although 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”).
\textsuperscript{187} See Adarand Constructors, 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 University of California v. Bakke, 438 U.S. 265, 298 (1978) (opinion of Powell, J)).
classification and will examine all such classifications with strict scrutiny. At least one question raised by Schuette is whether the Court has modified its approach yet again.

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 hand or on the college or university level on the other, a state’s according racial preferences in public education is only permissible if narrowly tailored to promote compelling state interests.

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. The Schuette plurality cautioned that “we must understand Seattle as Seattle understood itself, as a case in which neither the State nor the United

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188 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.”).
189 See infra notes 242-94 and accompanying text.
190 Parents Involved in Community Schools v. Seattle School 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 used to make certain elementary school assignments and to rule on transfer requests.”).
192 See Grutter v. Bollinger, 539 U.S. 306 (2003). See also Fisher v. University 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).
193 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).
194 See Schuette, 134 S. Ct. at 1633 (“[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).
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.”\(^{195}\) 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,\(^ {196}\) 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.

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.\(^ {197}\)

\(^ {195}\) Id. (citing Seattle, 458 U.S. at 472).

\(^ {196}\) For a discussion of these cases, see supra notes 115-64 and accompanying text.

\(^ {197}\) Schuette, 134 S. Ct. at 1629.
The Court noted that the case “is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education,” reaffirming that “the consideration of race in admissions is permissible, provided that certain conditions are met.” 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.” Thus, Schuette was not addressing 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 was addressing the permissibility of the electorate’s including a prohibition within the state constitution of some measures that are permissible under the United States Constitution.

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, … agree[ing] with the California Supreme Court that the amendment operated to insinuate the State into the decision to discriminate by encouraging that practice.” After mentioning Justice Harlan’s Reitman dissent in which 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,” 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.”

198 Id. at 1630.
199 Id.
200 Id.
201 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?”).
202 Id. at 1631.
203 Id.
204 Id.
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.\textsuperscript{205} 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.”\textsuperscript{206}

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.’”\textsuperscript{207} 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.\textsuperscript{208}

\textsuperscript{205} Justice Scalia also claimed that Michigan had adopted a neutral position with respect to race. See id. at 1648 (Scalia, J., concurring in the judgment) (“[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.


\textsuperscript{207} Schuette, 134 S. Ct. at 1632 (citing Hunter, 393 U.S. at 391).

\textsuperscript{208} See supra notes 71-73 and accompanying text (noting that the Akron ordinance was designed to eradicate private discrimination).
One of the militating factors in finding the Akron referendum constitutionally offensive was that it was unnecessary and went beyond merely repealing the city council antidiscrimination measure.\textsuperscript{209} The \textit{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.”\textsuperscript{210} Characterizing \textit{Hunter} in this way permitted the plurality to conclude that “\textit{Hunter} rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities.”\textsuperscript{211} Indeed, \textit{Reitman} and \textit{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.”\textsuperscript{212} Yet, such a description might lead the reader to misunderstand what was unconstitutional about the state action at issue in \textit{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.’”\textsuperscript{213} 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

\textsuperscript{209} \textit{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 \textit{Hunter}, 393 U.S. at 390, n. 6).
\textsuperscript{210} \textit{Id.} (citing \textit{Hunter}, 393 U.S. at 391).
\textsuperscript{211} \textit{Id.}
\textsuperscript{212} \textit{Id.}
\textsuperscript{213} \textit{Hunter}, 393 U.S. at 391.
suggested that it “is against this background that the referendum required by s 137 must be assessed.”

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 repealed through a referendum which may be obtained on petition of 10% of the voters.” 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.

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.” 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. But Akron did not even do that. 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, in having imposed electoral burdens on certain groups seeking antidiscrimination measures. Further, the only

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214 Id.
215 Id. at 390 n.6.
216 Id. at 392-93.
217 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 143-59 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 80-101 and accompanying text (discussing the James Court’s treatment of the extra burden imposed on low-income housing).
218 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.”).
219 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)).
evidence of the Akron electorate’s having, in the words of the Schuette plurality, an “invidious intent to injure a racial minority” 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.

An analogous point might be made about Reitman. The California Legislature had passed several acts prohibited housing discrimination. 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.” This means that a mere repeal of the housing discrimination acts would not have offended constitutional guarantees. 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 as having “involve[d] the State in private racial discriminations to an unconstitutional degree.” 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

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220 Schuette, 134 S. Ct. at 1632.
221 See Hunter, 393 U.S. at 389-90. See also Schuette, 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).
222 See Reitman, 387 U.S. at 374 (discussing the Unruh Act, the Hawkins Act, and the Rumford Fair Housing Act).
223 Id. at 374-75.
224 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.”).
225 Id. at 378-79.
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.” Although “there had been no judicial finding of de jure segregation with respect to Seattle's school district,” the plurality noted that de jure segregation might in fact have taken place.

Ironically, when the Schuette plurality suggested that Seattle had to be understood as the Seattle Court had understood it, the Schuette plurality only focused on the Seattle Court’s willingness to countenance ordered busing even absent a finding of de jure discrimination, 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 in light of the current interpretation of equal protection guarantees, establishes the Michigan amendment’s unconstitutionality.

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 decisionmaking authority over’ that policy ‘at a different level of government’ must be reviewed under strict

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226 Schuette, 134 S. Ct. at 1633.
227 Id.
228 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, 551 U.S. at 807–08 (Breyer, J., dissenting)).
229 Id. (citing Seattle, 458 U.S. at 472 n. 15.)
230 See id.
231 See infra notes 232-94 and accompanying text.
That 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.” But such a broad reading was rejected as incompatible with current constitutional guarantees, at least in part, because of the Court’s current unwillingness to decide which policies promote minority interests. 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.” Such “expansive language does not provide a proper guide for decisions and should not be deemed authoritative or controlling.”

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.” 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, although that would require some method of determining which individuals belong to which race, which itself is problematic.

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232 Schuette, 134 S. Ct. at 1634 (citing Seattle, 458 U.S. at 472, 474).
233 Id.
234 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.”).
235 See supra notes 194-96 and accompanying text.
236 Schuette, 134 S. Ct. at 1634.
237 Id.
238 Id.
240 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.”).
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.\(^{241}\)

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.\(^{242}\) 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 passing 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 will be able to 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 which took into account whether the challenged legislation involved matters that inured to the benefit of the minority.\(^{243}\) 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

\(^{241}\) See infra notes 242-301 and accompanying text.

\(^{242}\) Adarand, 515 U.S. at 227 (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”).

\(^{243}\) Schuette, 134 S. Ct. at 1634.
classifications subject to strict scrutiny, because preferential programs that might previously have triggered intermediate scrutiny\textsuperscript{244} now will trigger strict scrutiny.

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 was not advocating the use of race-conscious measures even when the Federal Constitution barred their use. On the contrary, the Michigan amendment was precluding 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.”\textsuperscript{245} 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 \textit{Mulkey} and \textit{Hunter} and in the history of the Seattle schools,”\textsuperscript{246} the electoral process jurisprudence was inapplicable to the Michigan referendum. The Michigan referendum

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\textsuperscript{244} See \textit{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 \textit{Adarand Constructors, Inc. v. Pena}, 515 U.S. 200, 227 (1995).
\textsuperscript{245} \textit{Schuette}, 134 S. Ct. at 1639 (Roberts, C.J., concurring).
\textsuperscript{246} Id. at 1636.
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instead involved “the right of Michigan voters to determine that race-based preferences granted by Michigan governmental entities should be ended.”

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 anti-discrimination measures that had been repealed, the injury was not in the repeal of those measures, since a mere repeal would have been permissible. 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 followed 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 private rather than state action. The injury was in having increased electoral burdens imposed with respect to matters of a racial nature. But Schuette also involves the imposition of electoral burdens on matters of a racial nature.

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247 Id. at 1635.
248 See Reitman, 387 U.S. at 376 (noting that “the [mere] repeal of any statute prohibiting racial discrimination … is constitutionally permissible”); Hunter, 393 U.S. at 390 n.5 (“we do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment”).
249 See supra note 195 and accompanying text.
250 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 Seattle, 458 U.S. at 472 n. 15).
251 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.”).
is thought to advance minority interests, because creating more opportunity,\textsuperscript{252} or instead to undermine minority interests, because causing some to undervalue or underestimate the degree to which minorities succeed on the “merits.”\textsuperscript{253} 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 seems to be contrasting specific harms on the one hand and mere preferences on the other.\textsuperscript{254} The plurality suggests 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 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.\textsuperscript{255}

\textsuperscript{252} 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.”).

\textsuperscript{253} Cf. Adarand, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment) (“These programs stamp minorities with a badge of inferiority.”).

\textsuperscript{254} Cf. Schuette, 134 S. Ct. at 1637 (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)).

\textsuperscript{255} 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.”).
Suppose that Smith and Jones are applying to a state university that places an inordinate weight on race in its admissions decisions. 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,

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.

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,” 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

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256 Cf. Gratz, 539 U.S. at 274 (striking down an admissions policy because it made “race a decisive factor for virtually every minimally qualified underrepresented minority applicant”).
258 Id. at 666. See also Parents Involved, 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.”).
259 Jacksonville, 508 U.S. at 666.
understanding of the amendment’s constitutionality, notwithstanding the plurality’s admission that “race was an undoubted subject of the ballot issue.”

Why wasn’t the amendment subjected to strict scrutiny? Part of the explanation is likely that the plurality did not believe the amendment invidiously motivated but, instead, adopted to reduce divisiveness. “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.” Unwilling to presume bias on the electorate’s part, the plurality believed its position consistent with preventing injury to minority interests. “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.”

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, 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.

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260 Schuette, 134 S. Ct. at 1635.
261 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.”).
262 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.”).
263 Id. at 1638.
264 Id. at 1637.
265 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)).
266 Id. at 1638.
267 See id. at 1629.
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.268 As the Court explained in Johnson v. California,269 “We have insisted on strict scrutiny in every context, even for so-called ‘benign’ racial classifications, such as race-conscious university admissions policies.”270

C. On Neutrality

Justice Scalia’s opinion concurring in the judgment may make something explicit that implicitly undergirds the Schuette plurality opinion, namely, why the Michigan amendment is “neutral,” notwithstanding its expressly precluding according preferences on the basis of race. He criticizes both the Schuette plurality and the Schuette 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.”271 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.”272

268 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”).
270 Id. at 505 (citing Grutter, 539 U.S. at 326).
271 Schuette, 134 S. Ct. at 1647 (Scalia, J., concurring in the judgment).
272 Id. (citing Crawford, 458 U.S. at 537–38).
How is it that an amendment expressly employing the term “race” can nonetheless be neutral? Justice Scalia explains 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. Why? Because “statutes mandating equal treatment” preclude treating individuals differently on account of race. Basically, by prohibiting discrimination and prohibiting according preferences, there is a sense in which the state is requiring that race is 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.” 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.” 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 governmental decisionmaking structure, and thus impose[d] substantial and unique burdens on racial minorities.” Because Crawford neither expressly nor implicitly targeted race, it 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.” But the Schuette plurality admitted that race was a
subject of the amendment, which should have triggered strict scrutiny according to both Seattle and Crawford.

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. 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.

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.

279 See Schuette, 134 S. Ct. at 1635.
280 See Seattle, 458 U.S. at 470; Crawford, 458 U.S. at 536.
281 Cf. Coalition for Economic 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.”).
282 Hunter, 393 U.S. at 387.
283 Id. at 389.
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 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, so the City Council could not have adopted measures that encouraged racial discrimination without offending equal protection guarantees contained in the Federal Constitution. 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.

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. 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,” the Michigan amendment was presumably merely precluding what the Federal Constitution already

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284 Id. at 391 (“the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race”).
286 Lest it be thought that the City Council was merely prohibiting what state law prohibited, the Court noted that, unlike the state law, the local antidiscrimination measure did not merely target commercial housing. See Hunter, 393 U.S. at 389 n.3.
288 Schuette, 134 S. Ct. at 1639.
precludes. 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. 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 close scrutiny because of its presumed impact on racial minorities. Whether or not the Schuette plurality believed that the Michigan amendment was designed to preclude benefiting minorities, 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.” The Court explained that other kinds of private discrimination could be precluded by the City Council without requiring electoral ratification. 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

289 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.”).
290 Cf. Schuette, 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.”).
291 Hunter, 393 U.S. at 393.
292 Cf. Schuette, 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.”).
293 Hunter, 393 U.S. at 391.
294 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.”).
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,\(^{295}\) as Justice Scalia presumably would have held.\(^ {296}\) For that, 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 has done so in a way that is unfathomable. While resisting Justice Scalia’s call to overrule the doctrine,\(^ {297}\) the plurality has applied a doctrine without explaining what the doctrine 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

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\(^{295}\) 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.”).

\(^{296}\) Id. at 1639 (Scalia, 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 states to be race-neutral, i.e., afford neither benefits nor burdens on the basis of race. Cf. id. at 1648 (Scalia, J., dissenting) (“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) (dissenting opinion).

\(^{297}\) Id. at 1643 (Scalia, J., concurring in the judgment) (“Patently atextual, unadministrable, and contrary to our traditional equal-protection jurisprudence, Hunter and Seattle should be overruled.”).
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 classes—^298—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,^299 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,^300 i.e., if narrowly tailored to promote a compelling state interest. 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).

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

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^298 See, for example, Hunter, 393 U.S. at 390-91 (“But s 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.”).

^299 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?”).

^300 Id. at 1630.

^301 See Johnson, 543 U.S. at 505.
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 reneging on its commitment to promote racial justice and fairness, protestations to the contrary notwithstanding, and the Court must do something to dispel the suspicions that Schuette is almost certain to aggravate.

302 Cf. Schuette, 134 S. Ct. at 1654 (Sotomayor, J., dissenting) (“The plurality's decision fundamentally misunderstands the nature of the injustice worked by § 26.”).
303 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.”).