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# THE RHETORICAL ALLURE OF POST-RACIAL PROCESS DISCOURSE AND THE DEMOCRATIC MYTH

Cedric Merlin Powell\*

## INTRODUCTION

With devastating ease, the Roberts Court has pronounced a series of decisions that mark a new era in the Court's race jurisprudence—post-racial constitutionalism.<sup>1</sup> *Schuette v. Coalition to Defend Affirmative Action* is the latest incarnation of this doctrinal posture, but there is something discernibly distinct at work here. The Court is now actively engaged in promoting a post-racial view of society that embraces white privilege and ignores structural inequality.<sup>2</sup> “In this age

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<sup>1</sup> *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637–38 (2014) (plurality opinion) (affirming a voter-initiated Michigan constitutional amendment prohibiting the use of race, as one of many factors, in higher education admissions decisions, employment, or contracting); *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2630–31 (2013) (ignoring the present day effects of structural inequality and striking down the coverage formula, § 4(b), of the Voting Rights Act as unconstitutional because it was based on “old” historical data that referenced discrimination that purportedly has long since been eradicated); *Ricci v. DeStefano*, 557 U.S. 557, 593 (2009) (holding that the City of New Haven violated Title VII when it failed to certify the racially disproportionate results of a Fire Department officer promotion examination in the absence of a strong basis in evidence that it would be subject to disparate impact liability); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 740–47 (2007) (holding that voluntary school assignment plans in Louisville and Seattle, which employed race as one of many factors to maintain integrated schools, were unconstitutional in the absence of identifiable *de jure* segregation).

<sup>2</sup> See *Washington v. Davis*, 426 U.S. 229, 238–39 (1976). Structural inequality denotes the complexity of discrimination beyond the formalistic doctrinal boundaries set by the Court in doctrines such as the requirement of discriminatory intent:

of covert racism, the conception of racism must change to capture its clandestine nature. The majority of society, which the Supreme Court reflects, misperceives racism as merely hateful individuals engaging in overtly racist acts.”<sup>3</sup> Advancing formalism and post-racialism,<sup>4</sup> the Court is thoroughly engaged in constitutionalizing inequality through post-racial proceduralism.<sup>5</sup> Through post-

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The term *structural inequality* is broad and is in a rough sense the inverse of the state action doctrine. That is, *structural inequality* refers to existing conditions of inequality that are not directly attributable to a specific past act of governmental discrimination that would give rise to a right to race-conscious relief under the Equal Protection Clause. It includes “the institutional defaults, established structures, and social or political norms that may appear to be . . . neutral, non-individual focused, and otherwise rational but that taken together create and reinforce” segregation and inequality.

Jennifer S. Hendricks, *Contingent Equal Protection: Reaching for Equality After Ricci and Pics*, 16 MICH. J. GENDER & L. 397, 399 (2010) (quoting Erica Frankenberg & Chinh Q. Le, *The Post-Parents Involved Challenge: Confronting Extralegal Obstacles to Integration*, 69 OHIO ST. L. J. 1015, 1016 n.3 (2008)); R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1536 n.42 (2011) (discussing and cataloguing scholarship on structural inequality). Unless it is “obvious” on its face, the Court has failed to acknowledge the existence of structural inequality. See, e.g., Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL’Y & LAW 1, 49 (2015) (“The Court has never confronted the reality that its discussion of social tension within the context of affirmative action and other forms of remedial race-conscious state action responds primarily to whites’ opinions regarding these policies.”); Girardeau A. Spann, *Proposition 209*, 47 DUKE L. J. 187, 324 (1997) (“Nevertheless, the suggestion that the Supreme Court can operate in a countermajoritarian manner that is immune from the discriminatory inclinations of the overall political culture is a claim that is difficult to maintain. The Supreme Court itself is part of the political culture, and as such can stray only so far from popular political preferences.”).

<sup>3</sup> William Y. Chin, *The Age of Covert Racism in the Era of the Roberts Court During the Waning of Affirmative Action*, 16 RUTGERS RACE & L. REV. 1, 3 (2015).

<sup>4</sup> Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1601–04 (2009) (ignoring the present day effects of past discrimination, the Court advances a literal conception of equality; thus, every individual is “equal”; and, since all state sanctioned racial oppression has been eliminated, then race is constitutionally irrelevant).

<sup>5</sup> The Court has created a doctrinal and analytical structure that reinforces popular opinion against affirmative action and race-conscious remedies. Post-racial proceduralism denotes the judicially created doctrines that make it virtually impossible to establish a discrimination claim. Emphasizing formalistic equality, strict adherence to the *de jure-de facto* distinction, and the strong basis in evidence standard for the narrow use of racial remedies, the Court all but determines the unsuccessful result of any claim brought by people of color. This aspect of the Court’s post-racial constitutionalism is termed post-racial determinism:

Post-racial determinism describes the Court’s formalistic adherence to a set analytical framework built upon three conceptual premises: (1) all claims for transformative racial justice are presumptively invalid, so reverse discrimination

racial proceduralism, this Article locates a central analytical feature of the Court's post-racial constitutionalism. The Court constructs a series of doctrinal rules and neutral rationales that make it virtually impossible to prove structural inequality without proof of particularized discrimination. *Schuette* adds another component to post-racial proceduralism—it endorses the power of the electorate to determine what antisubordination means under the Fourteenth Amendment and whether anti-discrimination laws, in general, are necessary.<sup>6</sup>

*Schuette* did not garner much public attention because it ostensibly maintained the status quo, it did not explicitly overrule the diversity principle set out in *Grutter v. Bollinger*,<sup>7</sup> nor did it address the constitutionality of race-conscious remedies.<sup>8</sup> The Court fashioned its decision as one about the democratic process, and how it should function. Inevitably, the Court emphasizes process values over substantive constitutional rights;<sup>9</sup> it minimizes the present day effects of past discrimination;<sup>10</sup> and posits neutral process rhetoric to rationalize a fundamental restructuring of the political process, which ultimately ensures that any significant progress on racial inclusion will be undermined.<sup>11</sup>

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claims advanced by “injured” whites are virtually guaranteed success; (2) anti-discrimination law has largely achieved its purpose so an “expansive” view of constitutional protections must be rejected and replaced by a narrow view that ultimately leads to the reversal of these “unnecessary” race laws; and (3) the shift from colorblind to post-racial constitutionalism means that race should never be a factor in institutional decision-making—when it is, it is appropriate for the Court to intervene and “correct” the process notwithstanding the fact that the political community has chosen to pursue a race-conscious remedial approach.

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

<sup>6</sup> *Schuette*, 134 S. Ct. at 1638 (“This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it.”).

<sup>7</sup> 539 U.S. 306, 325 (2003).

<sup>8</sup> *Schuette*, 134 S. Ct. at 1630 (“The question here concerns not the permissibility of race-conscious admissions policies under the Constitution but 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.”).

<sup>9</sup> *Id.* at 1631, 1638 (emphasizing the values of democratic debate under the First Amendment and citizen involvement).

<sup>10</sup> *Id.* at 1637–78 (noting that there is no injury inflicted on racial minorities on these facts).

<sup>11</sup> Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L. J. 1197, 1212 (2010) (discussing the inverted “civil rights” language in the Court’s opinions and noting that “[i]mplicit in this language is that the Civil Rights era achieved racial equality, rendering racial oppression discourse obsolete. Also festering in this fiction of competing ethnic interests was the complete denial of white privilege.”); Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory*, 56 CLEV. ST. L. REV. 823, 884 (2008) [hereinafter Powell, *Rhetorical Neutrality*].

All of the democratic tropes espoused by the Court—the First Amendment values of debate and an enlightened citizenry;<sup>12</sup> the states as laboratories of democracy and experimentation;<sup>13</sup> and access to an open and neutral political process<sup>14</sup>—obscure the wholesale dismantling of race-conscious remedial approaches to the eradication of structural exclusion. It is hard to argue with voters having their say in the political marketplace; however, in *Schuette*, the Court permitted the Michigan voters to determine the substantive contours of the Fourteenth Amendment.

Justice Kennedy’s *Schuette* plurality opinion is premised on the fact that there is no intentional discrimination on the part of the state; thus, there is no remediable injury.<sup>15</sup> Accordingly, since race-conscious remedies in Michigan served their purpose, at least in the minds of the electorate, it is appropriate to advance a voter initiative to prohibit race-conscious remedies and have it formalized by the legislature in an amendment to the Michigan Constitution.<sup>16</sup> In this vein, the voters are simply “constitutionalizing” the post-racial neutrality embraced by the Court in its opinions. Significantly, six justices, despite their distinct doctrinal interpretations of the political process doctrine,<sup>17</sup> all *presume* that there is no particularized discrimination by the state; this leads to the conclusion that the political process is fair and open.<sup>18</sup> This is the Rhetorical Allure of Post-Racial Process Discourse and the Democratic Myth.

As the title of this Article suggests, the Court uniformly advances process-based values, but *Schuette* represents a fundamental reinterpretation of the Court’s seminal political process decisions<sup>19</sup> and further reinforces the Roberts Court’s post-racial

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<sup>12</sup> *Schuette*, 134 S.Ct. at 1636–37.

<sup>13</sup> *Id.* at 1630, 1637–38.

<sup>14</sup> *Id.* at 1636.

<sup>15</sup> *Id.* at 1633; Cedric Merlin Powell, *Harvesting New Conceptions of Equality: Opportunity, Results, and Neutrality*, 31 ST. LOUIS U. PUB. L. REV. 255, 286–87 (2012) [hereinafter Powell, *New Conceptions of Equality*].

<sup>16</sup> *Schuette*, 134 S. Ct. at 1636 (“Michigan voters used the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority of the voters with respect to a policy of granting race-based preferences that raises difficult and delicate issues.”).

<sup>17</sup> *Id.* at 1636 (“[The] question is not how to address or prevent injury caused on account of race but whether voters may determine whether a policy of race-based preferences should be continued.”); *id.* at 1640 (Scalia, J., concurring) (alteration in original) (citations omitted) (“I would instead reaffirm that the ‘ordinary principles of our law [and] of our democratic heritage’ require ‘plaintiffs alleging equal protection violations’ stemming from facially neutral acts to ‘prove intent and causation and not merely the existence of racial disparity.’”); *id.* at 1650 (Breyer, J., concurring) (noting that there was no Equal Protection Clause violation because there was no restructuring of the political process to harm minorities).

<sup>18</sup> *See Schuette*, 134 S. Ct. at 1633–36; *id.* at 1647–48 (Scalia, J., concurring); *id.* at 1649–51 (Breyer, J., concurring).

<sup>19</sup> *Reitman v. Mulkey*, 387 U.S. 369, 379–81 (1967) (holding that Section 26 of the California Constitution, which was approved in a statewide voter initiative, was unconstitutional because the power of the state would be placed behind the private right to

constitutionalism, proceduralism, and determinism.<sup>20</sup> *Schuette* is the embodiment of the Court's post-racial process discourse: it specifically references and advances post-racial constitutionalism; it elevates process-based proceduralism over substantive constitutional rights; and it ensures that *any* race-conscious approach will be presumptively unconstitutional.

Constructing a new definition of equality under the Fourteenth Amendment, the Court actually encourages reverse discrimination suits (or voter initiatives) based on the "injury" of race consciousness.<sup>21</sup> *Schuette* pushes this proposition even further by constitutionalizing mere access to the political process as a normative constitutional principle, and embracing a contrived democratic model that permits the majoritarian electorate to determine how equal protection is defined in our polity. Where there is no clearly identifiable discrimination, states are free to pull back from overly "expansive" race-conscious remedial approaches to eradicate inequality. This is a defining feature of the Court's formalist conception of equality; it is also a recipe for retrogression.

The doctrinal and conceptual linchpin of post-racial constitutionalism is post-racial proceduralism, which functions as a neutral rationale for structural inequality. "From its colorblind jurisprudence to its post-racial jurisprudence, the Court consistently articulates a process view of polity so that substantive considerations of

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discriminate: "[the provision] does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market."); *Hunter v. Erickson*, 393 U.S. 385, 390 (1969) (declaring City Charter amended by voter initiative unconstitutional because it suspended operation of anti-discrimination housing ordinance and placed a special burden on racial minorities by "requir[ing] the approval of the electors before any future ordinance could take effect."); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470 (1982) (applying *Hunter* and invalidating a voter initiative which "place[d] special burdens on racial minorities" by reallocating decision-making power at a different level of government to impede any attempts by people of color to enact anti-discrimination legislation); *cf.* *Crawford v. Bd. of Educ.*, 458 U.S. 527, 542 (1982) (decided the same day as *Washington v. Seattle*, concluding that *Hunter* was inapplicable and holding Proposition I, an amendment to the California state Constitution, constitutional as a mere repeal of race-related legislation, which went *beyond* the requirements of the federal Constitution by prohibiting *de jure* and *de facto* school segregation; having done so, "the State was free to return in part to the standard prevailing generally throughout the United States."). *But see* *Romer v. Evans*, 517 U.S. 620, 633 (1996) (applying rational basis review to invalidate Amendment 2 to the Colorado Constitution because it placed a special disability and burden on gays and lesbians by classifying them "by a single trait and then den[ying] them protection across the board.").

<sup>20</sup> See Powell *supra* note 5; Powell, *New Conceptions of Equality*, *supra* note 15, at 267–86.

<sup>21</sup> *Schuette*, 134 S. Ct. at 1639 (Scalia, J., concurring) (citation omitted) (noting that some states "have gotten out of the racial-preferences business altogether. And with our express encouragement: 'Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaging in experimenting with a wide variety of alternative approaches.'").

race are ignored.”<sup>22</sup> This is why post-racial process discourse is so alluring—it privileges the democratic myth of access<sup>23</sup> while simultaneously offering a rationale for the enduring features of the present day effects of past discrimination:

[B]ecause the [political] system is generally well-functioning, individuals can organize themselves into groups to advance their discrete interests. So, any systemic discrimination is aberrational and must be identified through a finding of intent (state action). This means that a substantial portion of structural inequality, racial disparities, and unconscious racism is left unchecked and intact.<sup>24</sup>

This leads to the disconcerting conclusion that whenever the Roberts Court addresses a racial issue, the result is virtually predetermined<sup>25</sup> based upon its formalistic interpretation of equality under the Fourteenth Amendment. This is post-racial determinism.<sup>26</sup>

Advancing an analysis of the Court’s political process decisions,<sup>27</sup> this Article posits that the Court erroneously decided *Schuette* by discarding the doctrinal underpinnings of these decisions and focusing instead on process rather than substantive equality. This is the essence of the Court’s post-racial proceduralism. *Schuette* can be understood as a decision that embraces processual values<sup>28</sup> so that inequality is construed narrowly and equality of opportunity is interpreted broadly so that the neutral process value of access is a substitute for substantive equality.<sup>29</sup>

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<sup>22</sup> Cedric Merlin Powell, *From Louisville to Liddell: Schools, Rhetorical Neutrality, and the Post-Racial Equal Protection Clause*, 40 WASH. U. J. L. & POL’Y 153, 163 (2012) [hereinafter Powell, *Louisville to Liddell*]. The Court’s colorblind jurisprudence is premised on the use of race in two narrowly defined instances: (i) to eradicate identifiable discrimination by the state, and (ii) to promote diversity and inclusion in post-secondary education. The Roberts Court has shifted to post-racial constitutionalism where race should never be considered in decisionmaking. See *Parents Involved*, 551 U.S. at 748.

<sup>23</sup> Mere access is insufficient if the process itself has been restructured to undermine the mandate of the anti-subordination principle underlying the Fourteenth Amendment.

<sup>24</sup> Powell, *Louisville to Liddell*, *supra* note 22, at 168.

<sup>25</sup> Of course, there are “minor” victories and steps toward progress such as when the Court endorses an incremental approach to equality, but even here substantive equality is a secondary consideration in light of the impact on white interests. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 12 (1992).

<sup>26</sup> See Powell *supra* note 5 and accompanying text.

<sup>27</sup> See *supra* note 19 and accompanying text.

<sup>28</sup> Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935, 935–37, 976 (1994).

<sup>29</sup> Ann C. McGinley, *Discrimination Redefined*, 75 MO. L. REV. 443, 456 (2010) (“The definition of ‘discrimination’ must include neutral structures and processes that create a disparate impact on persons who have suffered discrimination historically; it should also include behaviors that harm protected groups as a result of unconscious discrimination.”).

Post-racial proceduralism treats equality as a process,<sup>30</sup> making the history, context, and actual outcomes that displace and impact people of color doctrinally irrelevant.

Identifying the salient features of post-racial discourse, this Article critiques neutrality as it rationalizes structural inequality. Part I unpacks and conceptualizes the post-racial discourse that sets the context for the Court's doctrinal reinterpretation of its political process decisions. After tracing the rhetorical components of post-racial discourse, Part I explores the Court's emphasis of the neutral process value of equal opportunity, revealing how it serves to obscure the present day effects of past discrimination.

Part II offers a comprehensive analysis and critique of the Court's political process decisions. Focusing specifically on how the Court shifts from an interpretive approach premised on structural inequality to a process-based approach. Part II reveals how the Court constitutionalizes the electorate's vision of a post-racial Constitution. The substantive mandate of the Fourteenth Amendment—the eradication of subordination and caste—is redefined so that access to the political process is the touchstone, notwithstanding any structural barriers to actual participation and the ability to affect change. This is the democratic myth.

Part II unpacks Justice Kennedy's plurality opinion in *Schuette*, revealing the democratic myth, and concludes by comparing Justice Breyer's surprising concurrence in *Schuette*<sup>31</sup> with Justice Sotomayor's structural inequality dissent.<sup>32</sup>

Rejecting post-racial constitutionalism, Part III constructs an argument for substantive equality, an analytical and doctrinal approach that foregrounds structural inequality and rejects post-racial neutrality. The core of the antisubordination and anticaste principles should not be determined by the whims of the electorate.

## I. POST-RACIAL PROCESS DISCOURSE

In a seminal seven-part article series,<sup>33</sup> New York Times Opinion Editorial columnist Nicholas Kristof explored the structural, political, and cultural aspects of race in light of the tragic events in Ferguson. Kristof compellingly describes structural inequality and the present day effects of past discrimination in his articles, but he also appeals to white empathy as a means of disrupting white privilege. He acknowledges white privilege, but his analysis is limited because he addresses

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<sup>30</sup> Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimization in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1342 (1988).

<sup>31</sup> *Schuette*, 134 S. Ct. at 1648–51 (2014) (Breyer, J., concurring).

<sup>32</sup> *Id.* at 1651–83 (Sotomayor, J., dissenting).

<sup>33</sup> Nicholas Kristof, *When Whites Just Don't Get It*, N.Y. TIMES, Aug. 31, 2014, at SR11; Nicholas Kristof, *When Whites Just Don't Get It, Part 2*, N.Y. TIMES, Sept. 7, 2014, at SR11; Nicholas Kristof, *When Whites Just Don't Get It, Part 3*, N.Y. TIMES, Oct. 12, 2014, at SR1; Nicholas Kristof, *When Whites Just Don't Get It, Part 4*, N.Y. TIMES, Nov. 16, 2014, at SR7; Nicholas Kristof, *When Whites Just Don't Get It, Part 5*, N.Y. TIMES, Nov. 29, 2014, at SR9; Nicholas Kristof, *When Whites Just Don't Get It, Part 6*, N.Y. TIMES, Apr. 4, 2016, at P9; Nicholas Kristof, *When Whites Just Don't Get It, Part 7*, N.Y. TIMES, Oct. 1, 2016, at SR11.

reverse discrimination and liberal individualism as normative concepts in the new discourse of post-racialism.<sup>34</sup> The Court has actively constitutionalized the perceptions of white Americans in its post-racial jurisprudence by embracing these formalistically literal conceptions of equality.

This is the state of affairs of post-racial discourse—neutral conceptions of the process, and its underlying stringent rules of proof of discrimination, are used to rationalize the intractable disparities that exclude and oppress communities of color.

#### A. *The Neutral Rhetoric of Post-Racialism*

In post-racial discourse, several rhetorical features are readily apparent: (i) neutral rationales are employed to rationalize inequality as inevitable if it is disconnected from state action;<sup>35</sup> (ii) there is a virtually exclusive focus on the most extreme instances of racism;<sup>36</sup> (iii) discrimination is conceptualized as the product of individual actions, not institutional structures;<sup>37</sup> (iv) any challenge to structural inequality is inverted so that it is misinterpreted as racial politics (or balkanization) rather than a reasonable attempt to advance substantive equality;<sup>38</sup> and (v) post-racialism exaggerates racial progress so that the relative, incremental advancements made by oppressed people of color are used to dilute the potency of arguments for transformative social change and undermine laws enacted to ensure that substantive equality exists in every segment of society.<sup>39</sup> These rhetorical features are exchanged

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<sup>34</sup> See, e.g., Chin, *supra* note 3, at 3 (“In this age of covert racism, the conception of racism must change to capture its clandestine nature. The majority of society, which the Supreme Court reflects, misperceives racism as merely hateful individuals engaging in overtly racist acts.”).

<sup>35</sup> See, e.g., *Parents Involved*, 551 U.S. at 731–32 (stating that “[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy . . . a governmental agency’s interest in remedying ‘societal’ discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster.”).

<sup>36</sup> See, e.g., Pat K. Chew, *Seeing Subtle Racism*, 6 STAN. J. C.R. & C.L. 183, 198–204, 216 (2010) (noting decline in explicit and blatant “old fashioned” racism, and discussing modern racism as subtle or implicit).

<sup>37</sup> Wendy Tolson Ross, *The Negro National Anthem Controversy*, 16 TEX. WESLEYAN L. REV. 561, 570 (2010) (“Despite the fact that personal racial prejudices have social origins, racism is considered an individual and personal trait. Society’s racism is then viewed as merely the collection, or extension, of personal prejudices. . . . These extremely individualized views of racism exclude an understanding that race has institutional or structural dimensions beyond the formal racial classification.”) (citation omitted).

<sup>38</sup> Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 42 (2013) (“On this increasingly dominant account, government classification by race poses risks to social cohesion, threatening balkanization and racial conflict, and so strict judicial oversight is crucial to constrain the practice”).

<sup>39</sup> Sahar F. Aziz, *The Blinding Color of Race: Elections and Democracy in the Post-Shelby County Era*, 17 BERKELEY J. AFR.-AM. L. & POL’Y 182, 195–96 (2015) (“Examples of individual success are over-emphasized while collective disparities along racial lines are

between the public and the Court, forming the narrative basis for post-racialism and the denial that race has a continuing significance in the perpetuation of inequality in violation of the antistatutory mandate of the Fourteenth Amendment.

The discussion of race in America has become ritualistic—there are rhetorical steps that are repeated again and again to no avail: there is a crisis or racially charged event; next, there is a public chorus of disbelief that such an occurrence could have happened in our ostensibly post-racial society;<sup>40</sup> then, there is a charged debate about whether the event is racist or there is some neutral non-racial explanation for it; if it cannot be explained away under the guise of post-racial neutrality, then there is a call for a “conversation on race” and substantive solutions to address the vestiges of centuries of subordination; finally, the circularity of the discussion intensifies and then fades away until the next racial crisis. This explains the intractability of racism in our society.<sup>41</sup>

Yet there is something glaringly absent from these calls for a “conversation” on race,<sup>42</sup> there is no substantive conception of equality, nor is there a call to effectively dismantle structural inequality. The rhetorical neutrality inherent in the Court’s race jurisprudence reinforces this discourse.<sup>43</sup> Just as the public discourse rationalizes extant structural inequality, the Court advances post-racial constitutionalism as a means of explaining inequality in society and preserving white

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ignored to justify the elimination of civil rights legislation, affirmative action programs, and diversity initiatives.”).

<sup>40</sup> Unfortunately, there have been so many tragic and brutal instances of young Black men being the victims of the use of lethal force, by police officers, that it has become a fact of life in our post-racial society. See Kimberly Jade Norwood, *The Far-Reaching Shadow Cast by Ferguson*, 46 WASH. U. J. L. & POL’Y 1, 1–7 (2014) (listing several examples of young Black men that have been killed by police officers).

<sup>41</sup> DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL* 192–94 (1992) (examining in his hauntingly prescient allegorical narrative, *The Space Traders*, Derrick Bell explains the appeal of democratic process rationales that are ostensibly neutral, but preserve white privilege and reinforce the permanence of racism: at the end of Bell’s allegory, the white citizenry votes 70 percent to 30 percent to transport African-Americans into outer space in exchange for desperately needed societal treasure).

<sup>42</sup> Charles M. Blow, *Constructing a Conversation on Race*, N.Y. TIMES: OPINION (Aug. 20, 2014), <https://www.nytimes.com/2014/08/21/opinion/charles-blow-constructing-a-conversation-on-race.html?mcubz=3> [<https://perma.cc/YZL7-T988>] (“I wish these calls [for a conversation on race] were not so episodic and tied to tragedies. I also wish this call for a conversation wasn’t tied to protests. Protests have life cycles. They explode into existence, but they all eventually die. They build like pressure in the volcano until they erupt. Then there is quiet until the next eruption. The cycle is untenable and nearly devoid of aim and the possibility of resolution.”).

<sup>43</sup> Powell, *Rhetorical Neutrality*, *supra* note 11, at 831 (“Rhetorical Neutrality is the linchpin of the Court’s colorblind jurisprudence. Three underlying myths—historical, definitional, and rhetorical—all serve to shift the interpretive (doctrinal) framework on questions of race from an analysis of systemic racism to a literal conception of equality where the anti-differentiation principle is the guiding touchstone.”).

privilege.<sup>44</sup> The rhetorical allure of post-racial discourse and the Court's own post-racial jurisprudence reify inequality. Since race is irrelevant and formal state sanctioned subjugation no longer exists, then discrimination and oppression should not be racialized. It is not surprising, then, that whites have moved on from race.<sup>45</sup>

What is particularly striking about this new rhetorical posture and narrative conception is that whites construct all the terms of the discussion, the relevancy of issues, and the manner in which the discussion will be conducted predominantly.<sup>46</sup> This is the essence of white privilege<sup>47</sup> and post-racialism. The tenor of post-racial discourse in America is illustrated by these reader responses to Kristof's articles on race, each denotes a thematic thread that runs through public discussions of race and the Court's post-racial jurisprudence:

1. "Only when there is honest cross-racial dialogue will this country be able to finally move beyond the stereotypes and racial prejudice that have unfortunately been woven in our fabric and history for the past 300 years."<sup>48</sup>

2. "Let us not forget our history, good and bad. Let us not ignore the past, if we don't want to relive it. But please do not saddle me or my children and grandchildren with eternal guilt. I get it, Part 1, 2, 3 and 4."<sup>49</sup>

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<sup>44</sup> Hutchinson, *supra* note 2, at 49 ("The Court has never confronted the reality that its discussion of social tension within the context of affirmative action and other forms of remedial race-conscious state action responds primarily to whites' opinions regarding these policies.").

<sup>45</sup> Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 922–24 (2009) (discussing how racial discourse is premised on neutralizing or completely obscuring the salience of race and racism in American society because whites are simply exhausted by the focus on race in a post-racial society).

<sup>46</sup> Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 648 (2008) ("Discussions about race today occur in an era when the societal notion of colorblindness is a dominant value. The idealized notion of colorblindness tells us that noticing race is wrong because people are equal. The hegemony of colorblindness suggests that by noticing race, one is undermining equality itself."); Barbara J. Flagg, "And Grace Will Lead Me Home": *The Case for Judicial Race Activism*, 4 ALA. C.R. & C.L. L. REV. 103, 108 (2013) ("Whiteness [is the ability] to define the conceptual terrain on which race is constructed, deployed, and interrogated. Whiteness sets the terms on which racial identity is constructed. Whiteness generates a distinct cultural narrative, controls the racial distribution of opportunities and resources, and frames the way in which that distribution is interpreted.") (alteration in original) (citation omitted).

<sup>47</sup> See generally Paula S. ROTHENBERG, *WHITE PRIVILEGE* (4th ed. 2012) (providing an examination and explanation of white privilege).

<sup>48</sup> Erica Itzkowitz & Steven Itzkowitz, *The Race Conversation*, N.Y. TIMES: LETTERS (Nov. 16, 2014), <https://www.nytimes.com/2014/11/23/opinion/sunday/the-race-conversation.html?mcubz=0> [<https://perma.cc/9KUG-73YV>].

<sup>49</sup> Richard Allan, *The Race Conversation*, N.Y. TIMES: LETTERS (Nov. 16, 2014),

3. “It may be true, as Nicholas Kristof points out, that many whites, even those who intellectually oppose racial inequality, are still guilty of, at the least, not noticing injustice. However, it may also be true that those who are striving for racial equality are in some ways promoting inequality.”<sup>50</sup>

4. “I am a white, middle-class college senior, and I have recently applied to medical school. I can easily understand why supporters of racial equality would want to encourage young blacks to pursue a profession as a doctor. And sure enough, black applicants have up to a five times better chance of admission as white applicants with equal qualifications, according to statistics from the Association of American Medical Colleges.”<sup>51</sup>

5. “I ask myself whether it makes sense that, in promoting racial equality, we should consider race as a factor in any decision. I must answer negatively. Equality is impossible until the question of race is no longer posed in any forum, including those attempting to promote equality.”<sup>52</sup>

All the preceding reader statements delineate the discursive boundaries inherent in post-racial discourse; they reflect not only the public’s views on race, but also the rationales upon which the Court constitutionalizes these views as legitimate explanations for structural inequality. The first statement is rooted in the Court’s articulation of the diversity principle in *Grutter*.<sup>53</sup> Here, diversity is a First Amendment concept designed to foster “cross-racial” understanding in future leaders of American society.<sup>54</sup> This rationale has been critiqued as nonsubstantive because it is premised on the process values of the First Amendment—access to the marketplace of ideas—and not on the substantive mandate of the Fourteenth Amendment to eradicate racial subjugation.<sup>55</sup>

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<https://www.nytimes.com/2014/11/23/opinion/sunday/the-race-conversation.html?mcubz=0> [<https://perma.cc/9KUG-73YV>].

<sup>50</sup> Jared Baird, *The Race Conversation*, N.Y. TIMES: LETTERS, (Nov. 16, 2014), <https://www.nytimes.com/2014/11/23/opinion/sunday/the-race-conversation.html?mcubz=0> [<https://perma.cc/9KUG-73YV>].

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

<sup>54</sup> *Id.* at 330.

<sup>55</sup> Powell, *Rhetorical Neutrality*, *supra* note 11, at 873–74.

The second statement, while acknowledging the historical significance of structural racism and its present day effects, nevertheless neutralizes it by emphasizing liberal individualism (“do not saddle me . . . with eternal guilt [for sins of the past]”)<sup>56</sup> and rejecting the notion that structural inequality still exists (“I get it, Part 1, 2, 3 and 4.”).<sup>57</sup>

Finally, the third statement reads like a victim impact statement for the Roberts Court’s post-racial constitutionalism. In many ways, the Court has constitutionalized and codified the reverse discrimination lawsuit.<sup>58</sup> The reverse discrimination claim is the doctrinal fulcrum of the Roberts Court’s post-racial constitutionalism: from school integration,<sup>59</sup> to voting rights,<sup>60</sup> to employment,<sup>61</sup> and now to the structure and substance of the decisionmaking process itself,<sup>62</sup> the Court has actively

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<sup>56</sup> Allan, *supra* note 49; *see generally* Kathleen M. Sullivan, *Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 HARV. L. REV. 78, 98 (1986) (discussing the “quandary of harm to innocents that a sin-based rationale [for affirmative action] inevitably creates”).

<sup>57</sup> Allan, *supra* note 49.

<sup>58</sup> Hutchinson, *supra* note 2, at 47–55.

<sup>59</sup> *Parents Involved in Cmty. Schl. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (rejecting diversity as a compelling interest in maintaining integrated public schools and concluding that there is an individual interest in admission to public school on a race neutral basis). *See infra* Part II.B.2.

<sup>60</sup> *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (noting dramatic change in the 50 years since the enactment of the Voting Rights Act (“VRA”) and holding that § 4(b) of the VRA is unconstitutional because the “old data” of discrimination, upon which it is based, no longer accurately reflects the current need for preclearance for covered jurisdictions); Jon Greenbaum et al., *Shelby County v. Holder: When the Rational Becomes Irrational*, 57 HOW. L. J. 811, 825–40 (2014); *see infra* Section II.B.4.

<sup>61</sup> *Ricci v. DeStefano*, 557 U.S. 557, 583 (2009) (noting that past claims of discrimination, with present day effects, in hiring and promotion in the fire department of New Haven, were too amorphous (and did not provide a strong basis in evidence) to justify upsetting the expectations of white firefighters who passed an exam that disproportionately impacted African-American candidates who failed in substantial numbers so that there was virtually no representation of African-Americans in the senior officer ranks); Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 81–82 (2010); *see infra* Part II.B.3.

<sup>62</sup> *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014) (upholding a voter initiative which amended Michigan’s Constitution to prohibit any consideration of race in state university admissions decisions); *see also* Laura McNeal, *Schuette v. Coalition to Defend Affirmative Action: The Majority’s Tyranny Toward Unequal Educational Opportunity*, 59 ST. LOUIS L. J. 385, 387 (2015) (“The *Schuette* decision has alarming implications for equal education opportunity because it constitutionalized statewide reverse discrimination suits and thus will have the effect of overturning what is left of race-conscious measures designed to create diverse and equitable learning environments.”). It is particularly ironic that *Fisher v. Univ. of Texas*, 136 S. Ct. 2198 (2016) was heralded as a “victory” for progressive advocates and supporters of the use of race, as one of many factors, in admissions decisions. The *Fisher* opinion by Justice Kennedy, who also authored the Court’s opinion in *Schuette*, held that the University of Texas’ use of race in a holistic review

embraced a contrived neutrality and formalism that reifies structural inequality and the oppression of people of color. The Court privileges the rights of whites over those of oppressed minorities; this is the very essence of white privilege.<sup>63</sup> To the Roberts Court and the white public generally, anti-discrimination laws are unnecessary since race is no longer relevant in public life.<sup>64</sup> *Schuette* reaffirms this post-racial principle by upholding the right of the majoritarian white citizenry to vote to discard race-conscious remedial approaches if they are deemed unnecessary.

This Article attempts to deconstruct the post-racial discourse that permeates discussions about race and offers a critique of the Court's race decisions that integrate this discourse. A core principle of post-racial discourse is that the process is open, and intrusive judicial review should be exercised sparingly; however, it is appropriate for Courts to intervene in the event of a rare process malfunction.<sup>65</sup> Essentially, the Court protects equal opportunity and access, not equal results based on race. This proposition is the foundation of post-racial process discourse. It is this discourse that ignores the present day effects of past discrimination, reinforces structural inequality, and leaves white privilege intact.

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process with race as a “factor of a factor of a factor” passed strict scrutiny and was constitutional. *Id.* at 2207. *Fisher* does not “reaffirm” *Grutter* in Michigan because it was handed down in the wake of last term's decision in *Schuette*. It held that voter initiatives could be used to amend the Michigan State Constitution to prohibit the use of race, in any form, in state policymaking. While the Court noted that the consideration of race is permissible in limited circumstances, under *Fisher*, it nevertheless embraced the voters' right to prohibit consideration of race in post-secondary school admissions in Michigan. *Schuette*, 134 S.Ct. at 1630. This, at least implicitly, “overrules” *Grutter*'s application to post-secondary admissions in Michigan, but other states can follow *Schuette* as precedent unless there are other direct democracy challenges to the substantive mandate of the Fourteenth Amendment to dismantle subordination and segregation. This has already happened in eight states (California (1996), Washington (1998), Florida (1999), Michigan (2006), Nebraska (2008), Arizona (2010), New Hampshire (2011), and Oklahoma (2012)). Jess Bravin, *Court Backs Affirmative Action Ban; Justices Uphold State Initiative to End Race-Based Admissions, but Are Divided on Broader Issue*, WALL ST. J., April 22, 2014, at A1; see Mark S. Brodin, *The Slow Demise of Race Preference*, 39 N.Y.U. REV. L. & SOC. CHANGE 369, 377–78 (noting that Michigan has seen a twenty-five percent decline in minority enrollment and California is even worse).

<sup>63</sup> Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935, 976 (1994).

<sup>64</sup> Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 201–04 (2000).

<sup>65</sup> This is the Process Theory, posited by John Hart Ely, which is a theory of judicial review rooted in *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). See Powell, *Louisville to Liddell*, *supra* note 22, at 154 n.4; see *infra* Part II.A.

*B. Equal Opportunity, Equal Results, and Process*

The allure of the democratic process is referenced throughout the Court's race jurisprudence: *Grutter v. Bollinger*,<sup>66</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*,<sup>67</sup> *Ricci v. DeStefano*,<sup>68</sup> and *Shelby Cty. v. Holder*.<sup>69</sup> All advance processual conceptions of equality<sup>70</sup> while explicitly rejecting structural inequality as a guiding principle in constitutional analysis. These decisions serve as the doctrinal foundation for *Schuette* and its post-racial proceduralism. Under this view, equal opportunity is essential to the legitimacy of the process, while race-conscious remedies or results should be avoided at all costs. The Constitution protects individuals, not racial groups;<sup>71</sup> and, it protects equal opportunity, not equal results, based on race.<sup>72</sup>

These ostensibly neutral propositions protect process over substance by conceptualizing "equality as a process"<sup>73</sup> and ignoring the continuing salience of structural inequality;<sup>74</sup> diminishing the significance of anti-discrimination law because formal inequality has been eliminated from society;<sup>75</sup> conceptualizing discrimination as a rare occurrence which does not exist, in the absence of discriminatory intent;<sup>76</sup> narrowly confining the use of judicial review to minor

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<sup>66</sup> 539 U.S. 306 (2003).

<sup>67</sup> 551 U.S. 701 (2007).

<sup>68</sup> 557 U.S. 557 (2009).

<sup>69</sup> 133 S. Ct. 2612 (2013).

<sup>70</sup> Flagg, *supra* note 63, at 964.

<sup>71</sup> *Grutter*, 539 U.S. at 343.

<sup>72</sup> David A. Strauss, *The Illusory Distinction Between Equality of Opportunity and Equality of Result*, 34 WM. & MARY L. REV. 171, 181–82 (1992); Jeffrey J. Wallace, *Ideology vs. Reality: The Myth of Equal Opportunity in a Color Blind Society*, 36 AKRON L. REV. 693, 704–13 (2003).

<sup>73</sup> Crenshaw, *supra* note 30, at 1336, 1342–43.

<sup>74</sup> Kiyana Davis Kiel, *Brown, Fisher, and the Necessity of Context to Achieve Racial Equity in Public Institutions*, 52 SAN DIEGO L. REV. 913, 914 (2015) ("When interpreting the Constitution, the lasting and pervasive impact of structural and institutional racism and the undercurrents of white privilege should not be ignored.").

<sup>75</sup> Cho, *supra* note 4, at 1645 ("While race-neutral policies and rationales designed to camouflage the operation of racial subordination are at least as old as the post-bellum Amendments, what is new and distinct about post-racialism (as compared to say, colorblindness) is that the state's retreat from race-based remedies is only possible in a society that is perceived as having made significant strides in racial equality, at least symbolically.").

<sup>76</sup> Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & L. 197, 205 (2004) (critiquing the "individual intent" view of racism as flawed because it obscures the existence of structural inequality and the "central role of institutions in transmitting th[e] cumulative disadvantage.").

process malfunctions of access rather than redressable claims of historically oppressed groups;<sup>77</sup> and preserving white privilege.<sup>78</sup>

*Grutter*, *Parents Involved*, *Ricci*, and *Shelby County* are all process-based decisions, which fit squarely within the Court's post-racial constitutionalism:

The Court's post-racial jurisprudence preserves structural inequality under the guise of neutrality. Similarly situated individuals should not be differentiated on the basis of race, and equal opportunity (or equal treatment) is the touchstone of the Court's post-racial jurisprudence. Process is valued over the eradication of caste and substantive rights. This process-based, market approach to substantive equality should be rejected—the marketplace model of equal protection where the process is *open* and individuals “compete” for goods and substantive rights is antithetical to the mandate of the Fourteenth Amendment. It ignores the core purpose of the amendment—the eradication of race-based oppression.<sup>79</sup>

This is a defining feature of post-racial constitutionalism—the denial of race and racism so that formalistic equality determines the scope of equal protection under the Fourteenth Amendment. The process is open to all so equality means equal access and treatment,<sup>80</sup> notwithstanding the present-day effects of past discrimination.<sup>81</sup>

In *Grutter*, this means that while diversity is a compelling interest,<sup>82</sup> race cannot be the sole factor that determines any outcome in the admission process<sup>83</sup> so that the process will be neutral and whites will receive the educational benefit of “cross-

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<sup>77</sup> Crenshaw, *supra* note 30, at 1342 (“Nor does the restrictive view [of anti-discrimination law] contemplate the courts playing a role in redressing harms from America’s racist past, as opposed to merely policing society to eliminate a narrow set of proscribed discriminatory practices.”).

<sup>78</sup> *Id.* (“Moreover, even when injustice is found, efforts to redress it must be balanced against, and limited by, competing interests of white workers—even when those interests were actually created by the subordination of Blacks. The innocence of whites weighs more heavily than do the past wrongs committed upon Blacks and the benefits that whites derived from those wrongs.”).

<sup>79</sup> Powell, *New Conceptions of Equality*, *supra* note 15, at 270.

<sup>80</sup> Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 *FORDHAM L. REV.* 1753, 1757 (2001) (arguing that the Court’s conception of equal protection is rooted in the formalism of equal treatment; thus, the anti-subordination principle is essentially ignored).

<sup>81</sup> Khiara M. Bridges, *Race Matters: Why Justice Scalia and Justice Thomas (and the Rest of the Bench) Believe that Affirmative Action is Constitutional*, 24 *S. CAL. INTERDISC. L.J.* 607, 656 (2015) (emphasizing the present-day effects of past discrimination, and concluding that history must be acknowledged to construct a jurisprudence that addresses how non-white people are still oppressed in society).

<sup>82</sup> *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

<sup>83</sup> *Id.* at 334.

racial” understanding.<sup>84</sup> Of course, students of color will receive a “benefit,” too, but it is premised on access, not substantive equality. Jettisoning the substantive core of the Fourteenth Amendment’s anticaste and antisubordination principles, *Parents Involved* reconceptualized *Brown* as a process decision, which protects an individual right to attend a school of one’s choice, without race being a determinative factor in the school assignment.<sup>85</sup>

*Ricci* engrafted the formalistic intent requirement, under the Fourteenth Amendment, on to Title VII, so that there must be “a strong basis in evidence to believe [an employer] will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.”<sup>86</sup> Invalidating section 4 of the Voting Rights Act (“VRA”), the Court in *Shelby County* concluded that “old data” of discrimination could not be the basis of remedial efforts to address the present day effects of past discrimination in voting.<sup>87</sup>

These process decisions mark a clear doctrinal shift to post-racial constitutional proceduralism. The process defines what rights are recognized, protected, and privileged. This means that process and equal opportunity are touchstone principles when the Court examines claims of discrimination. *Grutter*, *Parents Involved*, *Ricci*, and *Shelby County* share a common doctrinal thread—each decision envisions an open process and seeks to limit any conceivable burden on the interests of whites. Doctrinally, these decisions favor the majoritarian interests of whites over the interests of historically oppressed minorities. Thus, these decisions “explain” how subordination remains invisible to the Court because of the rhetorical allure of post-racial discourse. This narrative leads directly to the Court’s decision in *Schuette*.

### 1. *Grutter*: First Amendment Process Values

Essentially, *Grutter* is a decision that promotes “cross-racial understanding” to benefit white majoritarian interests.<sup>88</sup> Adopting a forward-looking approach,<sup>89</sup> with no reference to structural inequality or the present day effects of past discrimination, the Court held that diversity was a compelling interest that could be pursued by the

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<sup>84</sup> See Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 450 (2014); Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577, 582 n.22 (2009).

<sup>85</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007) (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) (“*Brown II*”)) (“At stake is the personal interest of the plaintiffs in admission to public schools . . . on a nondiscriminatory basis.”).

<sup>86</sup> *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009).

<sup>87</sup> *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2628–29 (2013).

<sup>88</sup> Bryan K. Fair, *Re(caste)ing Equality Theory: Will Grutter Survive Itself by 2028?*, 7 U. PA. J. CONST. L. 721, 761 (2003) (“*Grutter* maintains the status quo primarily benefiting whites, and rests on an empty idea of equality. It accomplishes no substantive improvement in the elimination of educational caste.”).

<sup>89</sup> Powell, *Rhetorical Neutrality*, *supra* note 11, at 873–74.

University of Michigan Law School in a holistic admissions review process.<sup>90</sup> There must be a critical mass of viewpoints in the classroom—the First Amendment marketplace of ideas must be open to all.<sup>91</sup> But this reads the antisubordination and anticaste principles out of the Fourteenth Amendment, and conceptualizes access as the guiding principle.<sup>92</sup> “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>93</sup>

Liberal individualism is at the thematic core of *Grutter* because the Constitution “protect[s] *persons*, not *groups*,”<sup>94</sup> and individuals must be evaluated in a neutral admissions process that does not insulate them from comparison with other applicants due to race.<sup>95</sup> *Grutter* “incorporates liberal individualism into a neutral group rights theory.”<sup>96</sup> Strict scrutiny is applied to any use of race by the state, but there are rare instances when the use of race is permissible, such as the pursuit of diversity with race as a “plus” of many factors.<sup>97</sup>

What is particularly striking about the Court’s endorsement of process and formalistic equality is its explicit concern about the “burden” on white interests. Near the end of the decision, the Court concludes, “in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School’s race-conscious admissions program *does not unduly harm nonminority applicants*.”<sup>98</sup> This proposition is integral to the Court’s process decisions,<sup>99</sup> and it is graphically illustrated in the Court’s reinterpretation of *Brown* in *Parents Involved*.

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<sup>90</sup> *Grutter v. Bollinger*, 539 U.S. 306, 336–43 (2003).

<sup>91</sup> *Id.* at 333.

<sup>92</sup> Powell, *Rhetorical Neutrality*, *supra* note 11, at 878.

<sup>93</sup> *Grutter*, 539 U.S. at 332.

<sup>94</sup> *Id.* at 326.

<sup>95</sup> *Id.* at 334.

<sup>96</sup> Powell, *Rhetorical Neutrality*, *supra* note 11, at 881.

<sup>97</sup> *Grutter*, 539 U.S. at 334; *accord* *Fisher v. Univ. of Texas*, 136 S. Ct. 2198, 2207 (2016) (“*Fisher II*”) (citation omitted) (affirming *Grutter*, and stating that “although admissions officers can consider race as a positive feature of a minority student’s application, there is no dispute that race is but a ‘factor of a factor of a factor’ in the holistic-review calculus.”).

<sup>98</sup> *Grutter*, 539 U.S. at 341 (emphasis added).

<sup>99</sup> Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 320 (2015) (“This is the essence of the innocence paradigm; it rests on the premise that whites are ‘innocent’ of continuing racial inequality and that they are, thereby, ‘injured’ by state considerations of race that seek to redress it. As a result, the use of race to identify persons for the purpose of distributing government benefits is itself regarded as harmful, even if white plaintiffs have not been specifically denied a government benefit as a result of the contested policy itself.”).

## 2. Parents Involved: *Individual Choice and Process*

Holding the Louisville and Seattle school assignment plans unconstitutional, the Court concluded, “without a history of state-enforced racial separation, a school district has no affirmative legal obligation to take race-based remedial measures to eliminate segregation and its vestiges.”<sup>100</sup> This is a remarkable proposition because it essentially guarantees that resegregation will be irremediable—once formalized state dual school systems have been eradicated, the constitutional duty to integrate ends. The Court has subscribed to this narrow rationale since 1974.<sup>101</sup> Eschewing the anticaste principle underlying the Fourteenth Amendment, the *Parents Involved* decision creates an individual right to attend an elementary or secondary school of one’s choice in a neutral school assignment process devoid of race.

*Brown* is reinterpreted as a process decision, which had little to do with racial caste and stigmatization, subordination, or oppression; and, instead was based on the fact that school children were assigned to dual school systems based on race.<sup>102</sup> It was this race-based process that was unconstitutional because individual children were deprived of equal educational opportunity: “It was *not* the *inequality* of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954.”<sup>103</sup> This puts a completely different analytical gloss on the Equal Protection Clause: since formal state mandated segregation “ended” in 1954, there is only “the personal interest [of school students] in admission to public schools . . . on a *nondiscriminatory basis*.”<sup>104</sup>

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<sup>100</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 753 (2007).

<sup>101</sup> *See, e.g., Missouri v. Jenkins*, 515 U.S. 70, 100–03 (1995) (holding that interdistrict remedy of increased spending to bring whites into the school district was invalid in the absence of an interdistrict violation); *Freeman v. Pitts*, 503 U.S. 467, 490–91 (1992) (holding that federal courts should return supervisory control to local authorities as soon as possible; indeed, federal control may be withdrawn completely or partially based on good-faith compliance with the desegregation decree); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249–50 (1991) (explaining that based on a good-faith finding of compliance, a district court may dissolve a desegregation order where the vestiges of *de jure* segregation had been eradicated “to the extent practicable”); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436–37 (1976) (stressing a temporal limit on federal court intervention, the Court concluded that once a court implemented a racially neutral attendance plan, in the absence of intentional racially discriminatory actions by the school board, the court could not adjust its desegregation order to address population shifts in the school district); *Milliken v. Bradley*, 418 U.S. 717, 745, 752 (1974) (holding that interdistrict remedies must be specifically tailored to address interdistrict violations). These decisions illustrate that the Court has little concern for the vestiges of segregation if they cannot be directly traced to clearly identifiable discriminatory action by the state itself. *See Wendy Parker, Limiting the Equal Protection Clause Roberts Style*, 63 U. MIAMI L. REV. 507, 533–34 (2009).

<sup>102</sup> *Parents Involved*, 551 U.S. at 746.

<sup>103</sup> *Id.* (emphasis added).

<sup>104</sup> *Id.* at 747 (quoting *Brown v. Board of Education*, 349 U.S. 294, 300 (1955)) (emphasis added).

What this means is that the present day effects of past discrimination, like resegregated public schools,<sup>105</sup> are irrelevant to the Court in the absence of identifiable state discrimination. School integration is displaced by the interest of white students to attend their school of choice; individual school choice is particularly appealing as a product of a neutral school assignment process, but this simply replicates racially isolated schools.<sup>106</sup>

The neutral rhetoric of post-racial process rationalizes segregated schools as the status quo because “[r]acial balance is not to be achieved for its own sake.”<sup>107</sup> In an amazing doctrinal twist, the eradication of dual school systems is supplanted as a constitutional imperative under the Fourteenth Amendment. Racial integration of schools does not require some fixed racial proportionality<sup>108</sup>—this would be a race-based result, which is antithetical to a neutral process. But what this really means is that the Court will tolerate segregated school systems in the name of local control where there is no clearly discernible discrimination by the state itself.<sup>109</sup> White students’ individual right to attend schools of their choice must take precedence over the claims of students of color who languish in hyper segregated schools.<sup>110</sup>

Referring to *Parents Involved* as the “Resegregation case,” Professor Girardeau Spann unpacks the rationale of post-racial discourse:

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<sup>105</sup> Girardeau A. Spann, *The Conscience of a Court*, 63 U. MIAMI L. REV. 431, 444–53 (2009); Cedric Merlin Powell, *Milliken*, “Neutral Principles,” and Post-Racial Determinism, 31 HARV. J. RACIAL & ETHNIC JUST. ONLINE 1 (2015) [hereinafter Powell, *Milliken*].

<sup>106</sup> Again, this is insignificant to the Court because it is the result of voluntary choice, not state-mandated discriminatory action. See *Parents Involved*, 551 U.S. at 750 (Thomas, J., concurring) (“Although presently observed racial imbalance might result from past *de jure* segregation, racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices.”). The choice rationale has been critiqued by a number of scholars. See John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 691–92 (2001); Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L. J. 814, 843–48 (2011).

<sup>107</sup> *Parents Involved*, 551 U.S. at 729–30 (quoting *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

<sup>108</sup> *Id.* at 732.

<sup>109</sup> See *supra* note 101 and accompanying text.

<sup>110</sup> Gary Orfield et al., *Brown at 62: School Segregation By Race, Poverty and State*, THE CIVIL RIGHTS PROJECT 4–6 (May 16, 2016), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-62-school-segregation-by-race-poverty-and-state/Brown-at-62-final-corrected-2.pdf> [<https://perma.cc/V9AS-M6HG>].

In the *Resegregation* case, the Supreme Court chose to give a seat in an oversubscribed school to a white student rather than a minority student, knowing that the likely result would be to promote segregation over integration. The *Resegregation* case therefore “overruled” *Brown*’s prohibition on racial oppression, by sacrificing the integration interest of minority school children in order to advance what turns out to be simply the segregationist interest of white parents.<sup>111</sup>

This formalism is essential to the Court’s post-racial process discourse. What troubles the Court in *Parents Involved* is not the possibility of retrogression and resegregation, but the *individualized* right of white students to attend a school of their *choice*. Because there is no *de jure* segregation to remedy in the school systems of Louisville and Seattle, any attempt at maintaining diverse, integrated schools is rank racial balancing in direct contravention of post-racial constitutionalism.<sup>112</sup> The Fourteenth Amendment is turned on its head.<sup>113</sup>

Inequality is rationalized through a series of ostensibly neutral doctrinal propositions. “Racism, combined with equal opportunity mythology, provides a rationalization for racial oppression, making it difficult for whites to see the Black situation as illegitimate or unnecessary.”<sup>114</sup> Since the process is neutral, there is no discrimination to remedy. So, it is inevitable that seminal anticaste and antisubordination decisions, like *Brown*, will be “overruled,”<sup>115</sup> modified, and substantially revised in the name of post-racial constitutionalism. The Court has adopted a similar posture in reconceptualizing anti-discrimination statutes like Title VII. Indeed, in the Court’s post-racial jurisprudence, the Fourteenth Amendment and Title VII overlap doctrinally.<sup>116</sup>

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<sup>111</sup> Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 566, 600 (2008).

<sup>112</sup> *Parents Involved*, 551 U.S. at 747–48 (“For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County [Louisville], the way ‘to achieve a system of determining admission to the public schools on a nonracial basis’ is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

<sup>113</sup> Powell, *supra* note 5, at 457–77.

<sup>114</sup> Crenshaw, *supra* note 30, at 1380–81.

<sup>115</sup> Spann, *supra* note 111, at 600.

<sup>116</sup> Powell, *New Conceptions of Equality*, *supra* note 15, at 323.

### 3. Ricci v. DeStefano:<sup>117</sup> *The White Burden Narrative*

Affirming the results of a flawed City of New Haven, Connecticut firefighter promotion examination,<sup>118</sup> which disproportionately impacted African-American candidates in failures,<sup>119</sup> the Court concluded that

[R]ace based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute. The respondents, we further determine, cannot meet that threshold standard. As a result, the City's action in discarding the test was a violation of Title VII.<sup>120</sup>

This means that voluntary compliance with Title VII will be overturned in the absence of a “strong basis in evidence” that an employer would be subject to disparate impact liability. In other words, disparate impact alone is insufficient to establish a Title VII claim. This directly contradicts the Court's Title VII jurisprudence prior to its decision in *Ricci*.<sup>121</sup> By importing Fourteenth Amendment principles into its Title VII jurisprudence, the Court creates a new and novel

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<sup>117</sup> Ricci v. DeStefano, 557 U.S. 557 (2009). *Ricci* is the first decision in the Court's post-racial jurisprudence in which Justice Kennedy is the primary author. His concurrence in *Parents Involved* provided the decisive fifth vote to Justice Roberts' plurality opinion, but he rejected the proposition that race should never be considered in public school assignments in elementary and secondary schools. *Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring). While *Parents Involved* and *Ricci* are both process decisions, each advances liberal individualism and equal access, Justice Kennedy posits two distinct processual rationales. In his *Parents Involved* concurrence, Justice Kennedy notes that there is “a compelling interest . . . in avoiding racial isolation.” *Id.* Racial isolation and resegregation are process malfunctions, which should be corrected by the Court. *See* Powell, *New Conceptions of Equality*, *supra* note 15, at 271 n.88. This is a rare instance where the use of race is permissible “after other race neutral alternatives prove ineffective.” *Id.* at 271. Justice Kennedy rejects post-racial formalism in *Parents Involved* and embraces it in *Ricci*:

Conversely, *Ricci* is all about equal results—a neutral result cannot be disturbed to guarantee a preferred racial outcome. Disparate impact—the fact that no African-American firefighter passed the promotion examination—is irrelevant because every eligible firefighter had an opportunity to pass the examination. There is no reference to racial isolation in the officer corps of firefighters, no acknowledgement of a history of exclusion with present day effects, and no mention of diversity in the employment ranks of firefighters in general.

Powell, *New Conceptions of Equality*, *supra* note 15, at 273.

<sup>118</sup> Harris & West-Faulcon, *supra* note 61, at 126–27, 143.

<sup>119</sup> Powell, *New Conceptions of Equality*, *supra* note 15, at 259 n.26.

<sup>120</sup> *Ricci*, 557 U.S. at 563.

<sup>121</sup> Powell, *New Conceptions of Equality*, *supra* note 15, at 293–301.

threshold standard that will be virtually impossible to meet; it requires state employers to “anticipate” whether they will be subject to disparate impact litigation. There is no diversity interest here, and the Court is content with a promotion process that is slanted toward expanding a hyper segregated firefighter officer corps.

The process is neutral and open because all firefighter officer candidates, regardless of race, have an equal opportunity to pass the examination. “So, racial disparity that negatively impacts African-Americans is ‘natural,’ and any burden on white privilege and settled entitlements is constitutionally suspect or a violation of Title VII.”<sup>122</sup> Since there is no guarantee of proportionate racial results under the Court’s view of process, “[t]he Court concluded that the city engaged in disparate treatment (intentional discrimination) of the white and Latino firefighters who *expected to be promoted* based on the results of the exam.”<sup>123</sup> Anti-discrimination law, whether under the Constitution or statute, has been framed to protect the expectancy interests of whites.<sup>124</sup>

This proposition is graphically illustrated in how the Court privileges the individual narrative of Frank Ricci, the white lead plaintiff, whose rights were purportedly undermined by the decertification of the skewed examination results.<sup>125</sup> The rhetorical allure of post-racial process discourse highlights how the Court actively embraces reverse discrimination claims of whites, while discarding substantive discrimination claims advanced by people of color.<sup>126</sup> All of the previous decisions are concerned, in varying degrees, with “balancing” any perceived incremental gains by African-Americans, based on race, with the burden on innocent whites.<sup>127</sup>

Conversely, while *Shelby County v. Holder*<sup>128</sup> adopts the post-racial balancing approach, it also advances a structural view of the political process, which starts from the premise that since African-Americans have amassed substantial “political power,” then there must be clearly identifiable *current* discrimination by the state to warrant any consideration of race.<sup>129</sup> There is no constitutional right to “win” on the basis of race, only to participate equally. Since all citizens can “vote,” additional legislation and supervision of covered jurisdictions is unnecessary because “[t]he tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years.”<sup>130</sup> Just as in the school desegregation decisions, there is no concern with retrogression or the present day effects of past discrimination.

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<sup>122</sup> *Id.* at 259 n.27.

<sup>123</sup> *Id.* at 259 (emphasis added).

<sup>124</sup> Harris & West-Faulcon, *supra* note 61, at 81–82.

<sup>125</sup> IAN HANEY LÓPEZ, DOG WHISTLE POLITICS, HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS, 143–44 (2014).

<sup>126</sup> James, *supra* note 84, at 482–83 (noting how the rhetorical trope of white innocence is employed by the Court to reject substantive race-conscious remedial measures).

<sup>127</sup> *Id.*

<sup>128</sup> *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2616 (2013).

<sup>129</sup> *Id.* at 2625–29.

<sup>130</sup> *Id.* at 2625.

Post-racial discourse creates the myth of substantive equality by emphasizing formalism, access, and opportunity. As “appealing” as these neutral conceptions are, they nevertheless reinforce structural inequality. Indeed, the Court consistently chooses retrogression over voluntary compliance with anti-discrimination law.<sup>131</sup>

#### 4. *Shelby County: Contrived Federalism*

Advancing a novel federalism and equal sovereignty rationale<sup>132</sup> for the proposition that covered jurisdictions<sup>133</sup> should not be “burdened” by the substantive requirements of the Voting Rights Act (“VRA”),<sup>134</sup> the Court held that Section 4 of the Act was unconstitutional.<sup>135</sup> Again, the rhetorical narrative of neutral political discourse is employed to justify inequality and retrogression.

Just as it has done in its Fourteenth Amendment jurisprudence in the school integration cases and Title VII in public employment cases,<sup>136</sup> the Court has reconceptualized the VRA as merely a minimal procedural guarantee of access to participate in a race neutral process. Since formal discrimination by the states has been eliminated, then there must be current data of discrimination in voting rather than “decades-old data”<sup>137</sup>—“current burdens” on similarly situated states must be based on “current needs” to eradicate identifiable discrimination in a covered jurisdiction.<sup>138</sup>

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<sup>131</sup> Spann, *supra* note 111, at 607–08 (discussing the inherent racism underlying the Court’s post-racial constitutionalism, concluding that the Court perpetuates racial discrimination by actively protecting white majoritarian interests so that substantive equality is undermined).

<sup>132</sup> *Shelby Cty.*, 133 S. Ct. at 2624.

<sup>133</sup> *Id.* at 2619 (“covered” jurisdictions “were those States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voting registration or turnout in the 1964 Presidential election,” § 4(b), 79 Stat. 438).

<sup>134</sup> *Id.* at 2623–31.

<sup>135</sup> *Id.* at 2631.

<sup>136</sup> *See supra* Part I.B.2–3.

<sup>137</sup> *Shelby Cty.*, 133 S. Ct. at 2629.

<sup>138</sup> *Id.* at 2622.

But history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the “current need [ ]” for a preclearance system that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.<sup>139</sup>

Because so much racial “progress” has been made in securing voting rights for African-Americans,<sup>140</sup> any new burden that disrupts the concept of equal sovereignty amongst the states must be justified by current conditions that evince voting discrimination. The VRA differentiates between covered and noncovered states—this conflicts with tenets of federalism and equal state sovereignty—preclearance requirements will be declared unconstitutional if there is no remedial basis for imposing such an extraordinary intrusion on state sovereignty.<sup>141</sup>

This Court-created federalism fairytale insulates the present day effects of past discrimination in voting by simply recounting all of the “progress” that has been made,<sup>142</sup> and concluding that any consideration of race in the coverage formula dooms Section 4 to constitutional oblivion. The democratic myth is particularly appealing here because the Constitution protects process, access, and individual opportunity, not a group right to win (or enhance political power) based on race.<sup>143</sup>

Unifying *Grutter*, *Parents Involved*, *Ricci*, and *Shelby County* is the post-racial process discourse of equal opportunity. The Court’s process decisions advance several propositions:

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<sup>139</sup> *Id.* at 2628–29.

<sup>140</sup> *Id.* at 2625–26 (discussing progress made in covered jurisdictions in voter turnout and registration, and stating that blatant discrimination, like evasion of federal decrees, poll taxes, and literacy tests, is rare; and, that “minority candidates hold office at unprecedented levels.”).

<sup>141</sup> *Id.* at 2624.

<sup>142</sup> Kimberlé Crenshaw, *The Court’s Denial of Racial Societal Debt*, 40 HUM. RTS. 12, 13–14 (2013) (pinpointing the Court’s use of the post-racial narrative of progress, and how its celebratory tenor obscures the lingering vestiges of centuries of racial subjugation by focusing on formalistic equality, and leads to the dismantling of seminal anti-discrimination legislation like the VRA).

<sup>143</sup> Terry Smith, *White Backlash in a Brown Country*, 50 VAL. U. L. REV. 89, 97 (2015) (exploring the social dynamic of white backlash and how it animates rulings of the Roberts Court, and offering an insightful critique of the racial progress rationale as formalistic and linear).

1. The Court privileges reverse discrimination law suits; and, through its process decisions, advances a neutral rationale for the preservation of white privilege;<sup>144</sup>
2. Anti-discrimination law is reinterpreted to protect neutral process values, and the Court will intervene whenever there is a substantive outcome that negatively impacts (or substantively burdens) the entitlement “rights” of whites;<sup>145</sup>
3. Structural inequality<sup>146</sup> does not exist because it cannot be proven with exacting particularity in the form of discriminatory intent;<sup>147</sup>
4. Ostensibly positive, pluralistic values, essential to the American polity, like participation in the democratic process, voting, and interest group organization are skewed by the Court’s expansive interpretation of process access and cramped view of equality;<sup>148</sup> and
5. The electorate has a democratic “right” to define equality under the Fourteenth Amendment.<sup>149</sup>

After significantly diluting, if not completely dismantling the edifice of anti-discrimination law, the Court now endorses a deceptively neutral approach premised on a contrived participatory democracy model. Justice Kennedy’s plurality opinion in *Schuette* reads like a primer on democracy, post-racialism, and the First Amendment.

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<sup>144</sup> Mario L. Barnes, “*The More Things Change . . .*”: *New Moves for Legitimizing Racial Discrimination in a “Post-Race” World*, 100 MINN. L. REV. 2043, 2067–100 (2016).

<sup>145</sup> Spann, *supra* note 111, at 607–08; Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 216 (2016) (noting how the Roberts Court has reinterpreted the Fourteenth Amendment, and Title VII, to protect white privilege while simultaneously constructing nearly insurmountable proof barriers to advance anti-discrimination claims).

<sup>146</sup> See *supra* note 2 and accompanying text.

<sup>147</sup> Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “the Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931, 943–44 (2008) (critiquing the discriminatory intent requirement).

<sup>148</sup> See Lenhardt, *supra* note 2, at 1530–33. Professor Robin Lenhardt has explored how the Court has inverted the categories of “good” and “bad” cities, with “good” cities being those that completely ignore race in their attempts to eradicate inequality, and “bad” cities being those that use race-conscious remedies to address the lingering effects of inequality. The Court prefers the post-racial discourse centered on the neutral attributes of democratic governance rather than a substantive approach to the eradication of racial subordination. The opinions in *Schuette* dramatically illustrate this post-racial doctrinal posture.

<sup>149</sup> See *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1636–37 (2014).

## II. SCHUETTE AND THE DEMOCRATIC MYTH

The preceding discussion focused on how public discourse is rooted in neutral principles that are particularly appealing to the Court, and how the Court translates these principles into normative propositions like equal access, opportunity, and process. *Grutter*, *Parents Involved*, *Ricci*, and *Shelby County* all involve the use of race to combat some form of societal retrogression and vestiges of formal subjugation, but the Court nevertheless transforms each of these decisions into an occasion to affirm reverse discrimination suits and dismiss any consideration of structural inequality.<sup>150</sup> The Court's race jurisprudence is premised on process values, liberal individualism, white victim-innocence narratives, and stringent proof requirements based upon the virtually illusive discriminatory intent.<sup>151</sup>

Building upon this narrative and doctrinal connection, Part II highlights how the Court's political process doctrine has evolved to advance its post-racial constitutionalism. The decisions that form the conceptual core of the Court's political process doctrine all focus on some type of explicit governmental legislation or restructuring of the process that targets African-Americans for injury.<sup>152</sup> Initially, it was "easy" for the Court to identify the alleged state discrimination on its face, but all of this changed with the advent of *Washington v. Davis* and the Court's doctrinal allegiance to colorblind constitutionalism and later post-racial constitutionalism.<sup>153</sup>

Under the Equal Protection Clause, all of the Court's political process decisions represent, in varying forms, structural displacement. A central tenet of structural inequality is the displacement of discrete and insular minorities, those groups that are targeted for exclusion based upon a history of oppression with present day effects. These decisions illuminate how systemic exclusion is achieved explicitly or implicitly so that the neutral allure of "open" democratic decisionmaking becomes deceptively appealing. The Democratic Myth denotes the fact that while the rhetoric

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<sup>150</sup> See Darren Lenard Hutchinson, "Unexplainable on Grounds Other than Race": *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 670–71.

<sup>151</sup> *Id.* at 664–68.

<sup>152</sup> See *Schuetz*, 134 S. Ct. at 1636 (plurality opinion) ("The question is not how to address or prevent injury caused on account of race but whether voters may determine whether a policy of race-based preferences should be continued."); *id.* at 1640 (Scalia, J., concurring) ("I would instead reaffirm that the 'ordinary principles of our law [and] of our democratic heritage' require 'plaintiffs alleging equal protection violations' stemming from facially neutral acts to 'prove intent and causation and not merely the existence of racial disparity.'"); *id.* at 1650 (Breyer, J., concurring) (noting that there was no Equal Protection Clause violation because there was no restructuring of the political process to harm minorities).

<sup>153</sup> See *supra* notes 2 & 5 and accompanying text.

of direct democracy is inspiring, because it embraces neutral concepts like access, organization, and even “change,” the impact on the historically oppressed is devastating because it ratifies inequality by majority vote.<sup>154</sup>

The Court rejected this distorted democracy rationale in *Reitman*, *Hunter*, and *Washington v. Seattle*, but it then elevated the discriminatory intent requirement to a threshold standard that virtually precludes relief.<sup>155</sup> *Crawford* marks the beginning of this rigid analytical posture. *Schuette* is the doctrinal culmination of this conceptual shift.<sup>156</sup>

Justice Kennedy’s plurality opinion in *Schuette* advances the Court’s post-racial constitutionalism by framing the analysis as not about the constitutionality of race-conscious remedies, but about whether “voters in the States may choose to prohibit consideration of racial preferences in governmental decisions, in particular with respect to school admissions.”<sup>157</sup> The states as laboratories of democracy and experimentation<sup>158</sup> is a particularly appealing rhetorical tool in the Court’s decision—the Court can exercise its judicial power cautiously in the name of the process and post-racial constitutionalism.

The real danger is that the voters may choose to “experiment” in a manner that harms discrete and insular minorities by targeting them for displacement from the process. This is why it is particularly telling that Justice Kennedy’s opinion in *Romer v. Evans*<sup>159</sup> is not mentioned, analogized, or even distinguished in the *Schuette* plurality.<sup>160</sup> *Schuette* alters the doctrinal core of the political process decisions.

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<sup>154</sup> Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1, 20–21 (1978).

<sup>155</sup> Hutchinson, *supra* note 150, at 670–74 (discussing inversion of the intent requirement so that whites are protected as oppressed minorities, and people of color must meet a heightened level of proof under the guise of a neutral, fair, and colorblind process); Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1081 (2011) (“Absent proof of discriminatory purpose, the government is almost certain to prevail because it would receive only rational basis review [the most deferential tier of equal protection scrutiny]. Thus, the combination of the tiers of scrutiny and the requirement for a discriminatory purpose combine to immunize from judicial review countless government actions which create great social inequalities.”). Likewise, in *Schuette*, since there is no cognizable proof of discriminatory intent, the voter initiative is imbued with the presumption of validity, notwithstanding its impact in removing substantive race-conscious remedies from all sectors of public decisionmaking.

<sup>156</sup> While it is beyond the scope of this Article, the *Schuette* decision has been conceptualized as a paradigmatic example of moral exclusion—an implicit systemic bias toward historically oppressed groups—because majoritarian voter initiatives “create moral boundaries which are used to exclude others from equitable treatment and considerations of fairness.” McNeal, *supra* note 62, at 401. This is fundamental to the political restructuring wrought in *Schuette*.

<sup>157</sup> *Schuette*, 134 S. Ct. at 1630 (plurality opinion).

<sup>158</sup> *Id.* at 1636–38.

<sup>159</sup> 517 U.S. 620 (1996).

<sup>160</sup> See generally *Schuette*, 134 S. Ct. at 1670–71 (illustrating that Justice Kennedy’s opinion does not contain any reference to *Romer v. Evans*, however Justice Sotomayer’s

*A. The Political Process Doctrine and Discrete and Insular Minorities*

A central tension in constitutional jurisprudence is whether the Court should intervene in the legislative decisionmaking process, which is generally presumed to be functional, and render its opinion on the propriety of state action. This is the countermajoritarian difficulty;<sup>161</sup> analytically, the Court resolves this antidemocratic problem through its multitiered approach to judicial review under the Equal Protection Clause.<sup>162</sup> In the famous footnote four of the *United States v. Carolene Products* decision, the Court sets the nascent tiers of equal protection review:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote . . . upon dissemination of information . . . on interferences with political organizations . . . as to prohibition of peaceable assembly . . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.<sup>163</sup>

Starting from the pluralistic premise that the political process generally functions well, and that democracy truly means access, *Carolene Products* nevertheless identifies a narrow set of process circumstances when judicial intervention is not only permissible, but mandated by our constitutional structure.<sup>164</sup>

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dissenting opinion does).

<sup>161</sup> Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361, 363 (2008) (citing Alexander Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (1962) as the originator of this term, and discussing the literature).

<sup>162</sup> Hutchinson, *supra* note 150, at 633–34.

<sup>163</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (citations omitted).

<sup>164</sup> William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1281 (2005) (elaborating on the doctrinal contours of *Carolene Products* footnote four, and identifying instances where there is no strong presumption of constitutionality; specifically, laws targeting discrete

“[M]ore searching judicial inquiry”<sup>165</sup> is called for when structural animus targets the politically powerless; most notably, racial minorities or others who have been historically excluded from participating in the process.<sup>166</sup> It is clear that mere access is insufficient in such cases, because the process has been so fundamentally altered that it cannot be relied upon, certainly not by the excluded group, to correct itself.<sup>167</sup>

In *Democracy and Distrust*, Professor John Hart Ely posits the Process Theory, in which he conceptualizes footnote four of *Carolene Products* to offer a rationale for judicial review based upon a representation-reinforcement theory.<sup>168</sup> “The Process Theory, or representation-reinforcement rationale, does not address the present day effects of past discrimination—there is no substantive conception of equality because the Process Theory’s primary focus is on those ‘rare’ process malfunctions that impede access to the political process.”<sup>169</sup> This forward-looking approach obscures the complexity of structural inequality and the present day effects of past discrimination. The same doctrinal and conceptual limitations are inherent in the Court’s political process decisions.

The malleable factors of the political process doctrine allow it to be manipulated by the Court to reinforce post-racial process discourse as an explanation for the reversal of substantive race-conscious remedial approaches.<sup>170</sup> This means that instead of interpreting and enforcing the mandate of the Fourteenth Amendment, some of that responsibility has now been given to the electorate to determine the efficacy of race-conscious affirmative action and the very substance of the antidisubordination principle. The post-racial process discourse outlined above<sup>171</sup> is the rhetorical underpinning of voter initiatives, which seek to define equality by popular majority vote.<sup>172</sup>

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and insular minorities for exclusion and unequal treatment).

<sup>165</sup> *Carolene Prod.*, 304 U.S. at 152 n.4.

<sup>166</sup> David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251, 1257 (discrete and insular minorities are those “groups that are not able to play their proper role in democratic politics. They are ‘discrete’ in the sense that they are separate in some way, identifiable as distinct from the rest of society. They are ‘insular’ in the sense that other groups will not form coalitions with them—and, critically, not because of a lack of common interests but because of ‘prejudice.’”).

<sup>167</sup> *Id.* at 1257–58 (“But if a group has been silenced . . . or not allowed to play the game . . . then the process is not working as it should. Then the courts have a role to play, because the self-correcting properties of democratic politics will be nullified, and only the courts can make the democratic process work as it should.”).

<sup>168</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST A THEORY OF JUDICIAL REVIEW* 101–03, 146 (1980) (arguing that The Court should unblock any stoppages in the system, and should function as a referee to the process, not an evaluator of the substance of rights or issues).

<sup>169</sup> Powell, *Rhetorical Neutrality*, *supra* note 11, at 827 n.15.

<sup>170</sup> Hutchinson, *supra* note 45, at 927 (“Race-based remedies harm and alienate innocent whites and give blacks a special or preferential status.”). This narrative is essential to the Court’s post-racial determinism. See *supra* note 5 and accompanying text.

<sup>171</sup> See *supra* Part I.

<sup>172</sup> Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which*

All of the political process decisions deal with structural animus aimed directly against one quintessential discrete and insular minority—African-Americans.<sup>173</sup> In *Reitman v. Mulkey*, the state stands behind a private right to discriminate in housing;<sup>174</sup> *Hunter v. Erickson* involves an explicit racial classification that treats housing matters differently based on race, thereby placing a “special burden” on African-Americans;<sup>175</sup> the companion cases of *Washington v. Seattle*<sup>176</sup> and *Crawford v. Board of Education of Los Angeles*<sup>177</sup> raise analytical problems because the Court begins to erect an intent requirement which dramatically transforms how harm is conceptualized when the political process is restructured;<sup>178</sup> and, finally, while *Romer v. Evans*<sup>179</sup> is generally not theorized as a political process decision, it is because it involves yet another discrete and insular minority (the LGBTQ community), and an attempt, by the state, through ostensibly neutral legislation, to exclude such a disfavored minority.<sup>180</sup>

This is structural animus. *Schuette* is the latest case in this line of decisions, and it erroneously expands the formalistic intent distinction that the Court creates to distinguish the results in *Seattle* and *Crawford*.

### I. *Reitman v. Mulkey: Rejection of Neutrality*

California voters passed Proposition 14, a statewide initiative, which added Article I, Section 26 to the state constitution, and provided that:

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.<sup>181</sup>

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*Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L. J. 399, 514–15 (1999) (critiquing rhetorical allure of direct democracy-voter initiative movements, and discussing the heightened risks of exclusion from the process through (i) toxic rhetoric; (ii) “we-they” thinking; (iii) manipulation of issues through slanted framing (“special rights” or “preferences” that harm innocent whites); and (iv) “cultural-ideological initiatives set up a scenario where majorities cast votes on the minorities’ very membership in the polity, and where the minorities almost always lose.”).

<sup>173</sup> Straus, *supra* note 166, at 1258.

<sup>174</sup> 387 U.S. 369, 381 (1967).

<sup>175</sup> 393 U.S. 385, 391 (1969).

<sup>176</sup> 458 U.S. 457, 485 (1982).

<sup>177</sup> 458 U.S. 527, 543 (1982).

<sup>178</sup> *Id.* at 537–38 (upholding, as a mere repeal of race-related legislation, Proposition I, and stating that “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.”).

<sup>179</sup> 517 U.S. 620 (1996).

<sup>180</sup> *Id.* at 635–36.

<sup>181</sup> *Reitman v. Mulkey*, 387 U.S. 369, 371 (1967) (quoting ART. I, § 26 CA. CONST.).

Construing the “immediate objective,”<sup>182</sup> “ultimate effect,”<sup>183</sup> and “historical context”<sup>184</sup> underlying the enactment of section 26, the Court concluded, “Proposition 14 invalidly involved the State in racial discriminations in the housing market.”<sup>185</sup> By giving individuals the “absolute discretion” to “decline to sell . . . to such persons as he . . . chooses,”<sup>186</sup> “the State had taken affirmative action designed to make private discriminations legally possible.”<sup>187</sup>

What is striking here is that the Court rejects the neutral language of Proposition 14, and concludes that it nevertheless constitutes a violation of the Equal Protection Clause. Moreover, there is no formalistic discriminatory intent requirement.<sup>188</sup> To the Court, there was no other conceivable basis “for an application of Section 26 aside from authorizing the perpetration of a purported private discrimination.”<sup>189</sup> Because Section 26 overturned “laws that bore on the right of private sellers and lessors to discriminate,”<sup>190</sup> and created a “constitutional right to privately discriminate”<sup>191</sup> the Court held that this was unconstitutional state action.<sup>192</sup> In its analysis, the Court acknowledged that there was a “range of situations in which discriminatory state action has been identified.”<sup>193</sup> This is more of a process view, because the Court recognizes that there is an ultimate effect and impact to this deceptively neutral legislation.<sup>194</sup> Thus, *Reitman* establishes the important proposition that political process cases are fact specific, and the analytical inquiry should focus on the ultimate effect, impact, and context.<sup>195</sup>

## 2. *Hunter v. Erickson: Explicit Racial Classification*

Unlike the purportedly race neutral legislation in *Reitman*, there was an explicit racial classification that treated housing matters differently based on race.<sup>196</sup> Specifically, the City of Akron, Ohio amended the city charter “to prevent the city council from implementing any ordinance dealing with racial, religious, or ancestral

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<sup>182</sup> *Id.* at 373.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 375.

<sup>186</sup> *Id.* at 388.

<sup>187</sup> *Id.* at 375.

<sup>188</sup> *Id.* (noting “a prohibited state involvement could be found ‘even where the state can be charged with only encouraging’ rather than commanding discrimination.”).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 374.

<sup>191</sup> *Id.* (emphasis omitted)

<sup>192</sup> *Id.* at 380–81.

<sup>193</sup> *Id.* at 380.

<sup>194</sup> Stephanie L. Grauerholz, *Colorado’s Amendment 2 Defeated: The Emergence of a Fundamental Right to Participate in the Political Process*, 44 DEPAUL L. REV. 841, 872 (1995).

<sup>195</sup> *Reitman*, 387 U.S. at 373, 378–80.

<sup>196</sup> *Hunter v. Erickson*, 393 U.S. 385, 389 (1969).

discrimination in housing without the approval of the majority of the voters of Akron.”<sup>197</sup> Here, the effect of this amendment is even more damaging than that in *Reitman* because it “not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the [majority of] electors before any future ordinance could take effect.”<sup>198</sup> This fundamental altering of the process was unconstitutional.<sup>199</sup>

This meant that the fair housing ordinance was unavailable to plaintiffs because of the amended city charter;<sup>200</sup> indeed, any future anti-discrimination ordinance had to “first be approved by a majority of electors.”<sup>201</sup> Section 137, the amendment to Akron’s City Charter, suspended the extant anti-discrimination housing ordinance and curtailed any subsequent remedial legislation in the absence of approval by the electors.<sup>202</sup> The fact that “implementation of this change”<sup>203</sup> occurred “through popular referendum”<sup>204</sup> did not “immunize it”<sup>205</sup> from strict scrutiny.<sup>206</sup>

Section 137 made enactment of anti-discrimination housing ordinances “substantially more difficult,”<sup>207</sup> and its ostensibly neutral tenor belies the fact that it explicitly targeted fair housing ordinances for suspension:

Only laws to end housing discrimination based on “race, color, religion, national origin or ancestry” must run § 137’s gantlet. 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. But §137 nevertheless disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor.

. . .

Moreover, 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. . . . [Section] 137 places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others.<sup>208</sup>

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<sup>197</sup> *Id.* at 386.

<sup>198</sup> *Id.* at 389–90.

<sup>199</sup> *Id.* at 393.

<sup>200</sup> *Id.* at 387.

<sup>201</sup> *Id.* at 397.

<sup>202</sup> *Id.* at 389–90.

<sup>203</sup> *Id.* at 392.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 392.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 390.

<sup>208</sup> *Id.* at 390–91.

Here again, impact is significant. It is *how* the process is structured, designed, and implemented that impacts African-Americans and places a “special burden” on them so that there is *no real chance* of effective redress because the law in place has been suspended, and any other legislation must be approved by a majority of a hostile electorate. To the Court, this is akin to the denial of the right to vote—the manner in which the process is rigged ensures that anti-discrimination claims, like diluted or suppressed votes, will not be heard. “The *Hunter* case established the bedrock principle that a state may not restructure the procedures [or process] of the government for the purpose of targeting racial minorities, even if the manner is facially neutral.”<sup>209</sup> Here, the law specifically targeted race, and it restructured the process in a manner that placed a special burden on African-Americans (a discrete and insular minority).

### 3. *Washington v. Seattle and Crawford v. Board of Education of the City of Los Angeles: Restructuring the Process?*

The doctrinal shift<sup>210</sup> that sets the stage for *Schuetz* and its underlying democratic myth is the Court’s drawing of the rigid *de jure/de facto* distinction in *Washington v. Seattle* and *Crawford*. It should be noted that these cases were decided during the Court’s wholesale retreat from school integration<sup>211</sup> and its strict adherence to the discriminatory intent requirement in *Washington v. Davis*.<sup>212</sup> The analysis in the political process decisions changes from how the process impacts minorities to whether there is discriminatory intent to establish an equal protection claim. This explains the incongruent result in *Crawford*.<sup>213</sup>

Until the *Crawford* decision, all the political process decisions had held that targeting discrete and insular minorities for exclusion from the political process was unconstitutional. This structural animus is not tolerated under the Equal Protection Clause. Yet, *Crawford* erects the discriminatory intent requirement as the touchstone of constitutional analysis, raising the bar of proof and discounting the significance of structural impact, which unified all of the pre-*Crawford* decisions.<sup>214</sup>

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<sup>209</sup> McNeal, *supra* note 62, at 390.

<sup>210</sup> See *supra* note 19 and accompanying text.

<sup>211</sup> See *supra* note 101 and accompanying text.

<sup>212</sup> 426 U.S. 229 (1976).

<sup>213</sup> Decided the same day, the Court holds the voter initiative unconstitutional in *Seattle*, and constitutional in *Crawford*. This is an example of the limits of the Court’s doctrinal formalism.

<sup>214</sup> See, e.g., Vicki C. Jackson, *Constitutional Law In An Age of Proportionality*, 124 YALE L.J. 3094, 3183 (2015) (noting that disparate impact on historically oppressed groups may be a signal of a process failure, and concluding that “[d]isparate impacts that adversely burden minority groups might be regarded as of greater constitutional concern than ‘disparate impact’ harms to members of a majority—if not on a substantive theory of racial nonsubordination then on an evidentiary theory that such disparate impacts are likely to result from bias, whether conscious or not.”).

Recognizing the connection between segregated housing and racially isolated schools, the Seattle School District sought to advance integrated schools through transfer programs and magnet schools.<sup>215</sup> These efforts proved unsuccessful, and the District implemented the “Seattle Plan,” which used busing and mandatory reassignments to dismantle segregated schools, and to prevent retrogression in the form of resegregation.<sup>216</sup> Citizens opposed to the desegregation plan formed a group called Citizens for Voluntary Integration Committee (“CiVIC”).<sup>217</sup> CiVIC “drafted a statewide initiative designed to terminate the use of mandatory busing for purposes of racial integration.”<sup>218</sup> Initiative 350 provided 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.”<sup>219</sup>

The Seattle School District, along with the districts of Tacoma and Pasco, filed suit against Washington State alleging that Initiative 350 violated the Equal Protection Clause of the Fourteenth Amendment.<sup>220</sup> Affirming the district court’s holding that Initiative 350 violated the Equal Protection Clause and the principle set out in *Hunter*, the Court concluded that the initiative “uses the racial nature of an issue to define the governmental decisionmaking structure, thus imposing substantial and unique burdens on racial minorities.”<sup>221</sup>

Thus, Initiative 350 was much more than a “simple repeal or modification of desegregation or antidiscrimination laws.”<sup>222</sup> Here, the burden was on any and “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.”<sup>223</sup> Authority over desegregation efforts was moved from the local board to the state level, and this fundamental structural reordering of the decisionmaking process “differentiat[ed] between the treatment of problems involving racial matters and that afforded other problems in the same area.”<sup>224</sup> That

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<sup>215</sup> *Washington v. Seattle Sch. Dist.*, 458 U.S. 457, 460–61 (1982).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 461–62. It is ironic that a group *opposed* to integration would call itself a “voluntary” integration committee. This illustrates the public discourse outlined in Section I, and the rhetorical allure of direct democracy movements. *See Vargas, supra* note 172.

<sup>218</sup> *Seattle*, 458 U.S. at 462.

<sup>219</sup> *Id.* (quoting WASH. REV. CODE § 28A.26.010 (1981)).

<sup>220</sup> *Id.* at 464.

<sup>221</sup> *Id.* at 470.

<sup>222</sup> *Id.* at 483. This is the proposition that the Court employed to distinguish the result in *Crawford*. *See Crawford*, 458 U.S. at 539; *accord Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1636–37 (2014).

<sup>223</sup> *Seattle*, 458 U.S. at 483.

<sup>224</sup> *Id.* at 480.

is, there is something so inherently discriminatory about this restructuring of the process that it is unexplainable on any other grounds except race.<sup>225</sup> The restructuring is designed specifically to burden minority interests.<sup>226</sup>

Stating that the Court has “not insisted on a particularized inquiry into motivation in all equal protection cases,”<sup>227</sup> it held that Initiative 350 was the type of legislation that, like Section 137 in *Hunter*, falls within “an inherently suspect category.”<sup>228</sup> This is significant because the Court noted that *Washington v. Davis* did not overturn *Hunter*.<sup>229</sup>

Discriminatory intent, then, is not the touchstone, but how the process targets race-conscious anti-discrimination legislation and reallocates the structure of the process to burden minority interests. This is tantamount to rigging the process against discrete and insular minorities—the allocation of power “places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the ‘special condition’ of prejudice.”<sup>230</sup> Indeed, Initiative 350 all but guarantees continued isolation in the form of segregated neighborhood schools,<sup>231</sup> and it makes change within the process unusually difficult (and perhaps impossible) for minorities and desegregation advocates who want to pursue integrated schools. Participation, like the right to vote, must be meaningful.<sup>232</sup> There is no way that minorities can be successful under the reconfigured decisionmaking process. Thus, Initiative 350 is unconstitutional.

By contrast, although under similar facts and decided the same day, *Crawford* comes out with a completely different result. In *Crawford*, the issue, to the Court, was not how the process was structured; but, rather whether a state may recede in its remedial efforts after it chooses to do more than required under the Fourteenth Amendment.<sup>233</sup> The Court concluded that the state’s “democratic processes” and

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<sup>225</sup> See Hutchinson, *supra* note 150.

<sup>226</sup> *Seattle*, 458 U.S. at 485 (“But when the political process . . . used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the government action plainly ‘rests on distinctions based on race.’”).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 484–85.

<sup>230</sup> *Id.* at 486 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

<sup>231</sup> Sean Riley, *How Seattle Gave Up on Busing and Allowed its Public Schools to Become Alarming Resegregated*, THE STRANGER (Apr. 13, 2016), <http://www.thestranger.com/feature/2016/04/13/23945368/how-seattle-gave-up-on-busing-and-allowed-its-public-schools-to-become-alarmingly-resegregated> [https://perma.cc/ZFB6-PJ2A]; see Nikole Hannah Jones, *Worlds Apart: How My Daughter’s School Became a Battleground Over Which of New York’s Children Benefit from a Separate and Unequal System*, N.Y. TIMES, June 12, 2016, at 34.

<sup>232</sup> See *Seattle*, 458 U.S. at 487; Grauerholz, *supra* note 194, at 905 (discussing a fundamental right to equal political participation).

<sup>233</sup> *Crawford v. Bd. of Ed. of City of Los Angeles*, 458 U.S. 527, 535 (1982).

ability to experiment with race-conscious policies allow it to do just that.<sup>234</sup> This is the democratic myth that will be the foundation of the *Schuette* decision thirty-two years later.

Voters ratified Proposition I, an amendment to the California Constitution, which confirmed “the power of state courts to order busing to that exercised by the federal courts under the Fourteenth Amendment.”<sup>235</sup> Proposition I provided that:

[N]o court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause . . . .<sup>236</sup>

Concluding that Proposition I was constitutional because it was race neutral and simply “embrace[d] the requirements of the federal constitution with respect to mandatory school assignments and transportation,”<sup>237</sup> the Court then references the discriminatory intent requirement as a constitutional prerequisite to a finding of a violation of the Equal Protection Clause.<sup>238</sup> In the absence of a constitutional violation (*de jure* segregation), state courts are forbidden to order pupil school assignment or pupil transportation.<sup>239</sup>

California’s constitution places an affirmative constitutional obligation on the school board to eliminate segregation whether its origin is *de facto* or *de jure*.<sup>240</sup> This is more expansive than the Federal Constitution’s narrow prohibition of *de jure* segregation.<sup>241</sup> Proposition I, which addresses a racial matter in a neutral fashion, merely “repeals” the previously expansive interpretation of remediable segregation under the California Constitution;<sup>242</sup> and, the State “having gone beyond the requirements of the Federal Constitution, . . . return[s] in part to the standard prevailing generally throughout the United States.”<sup>243</sup>

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 532.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 535.

<sup>238</sup> *Id.* at 537–38.

<sup>239</sup> *Id.* at 537.

<sup>240</sup> *Id.* at 530.

<sup>241</sup> *See, e.g.,* *Washington v. Davis*, 426 U.S. 229, 240 (1976); *Milliken v. Bradley*, 418 U.S. 717, 744–45 (1974); *Parents Involved in Cmty. Schls. v. Seattle Schl. Dist. No. 1*, 551 U.S. 701, 720–21 (2007) (noting the “compelling interest of remedying the effects of past intentional discrimination”).

<sup>242</sup> *Crawford*, 458 U.S. at 538–39.

<sup>243</sup> *Id.* at 542. The Court noted, “the Proposition simply removes one means of

It is difficult to explain how the Court reaches two completely different conclusions in *Seattle* and *Crawford*.<sup>244</sup> Both cases involve fundamental reorderings of the process: in *Seattle*, decisionmaking power was moved to the state level, adding a nearly insurmountable barrier to access for discrete and insular minorities;<sup>245</sup> in *Crawford*, the process was restructured to limit the equitable powers of courts to order remedies to dismantle segregated schools and prevent resegregation.<sup>246</sup> Notwithstanding their neutral rhetoric, both initiatives targeted race-conscious remedies, and sought to either prohibit (*Seattle*) or severely limit the scope of such remedies (*Crawford*).

To the Court, *Seattle* and *Crawford* are distinguishable based upon the formalistic *de jure/de facto* distinction. In *Seattle*, the restructuring of the political process is unconstitutionally overbroad because it removes mandatory busing as a remedy for even “school boards that had engaged in *de jure* segregation” in the absence of a court order.<sup>247</sup> Conversely, in *Crawford*, since there is merely *de facto*

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achieving the state-created right to desegregated education. School districts retain the obligation to alleviate segregation regardless of cause. And the state courts still may order desegregation measures other than pupil assignment or pupil transportation.” *Id.* at 544. Of course, the Court never explains the scope of this limited remedial power: on the one hand, it appears that there is a continuing state constitutional obligation to eradicate *de facto* segregation, but pupil assignment and transportation plans can only be ordered by the courts upon a finding of discriminatory intent. Resegregation is constitutionally irrelevant, but the Court is indifferent to this because the state constitution still “places upon school boards a greater duty to desegregate than does the Fourteenth Amendment.” *Id.* at 541. Justice Marshall forcefully rejects this make-weight premise: “The fact that mandatory pupil reassignment was still available as a remedy for *de jure* segregation did not alter the conclusion that an unconstitutional reallocation of power had occurred with respect to those seeking to combat *de facto* racial isolation in the public schools.” *Id.* at 554 (Marshall, J., dissenting).

<sup>244</sup> Spann, *supra* note 2, at 250–51.

<sup>245</sup> *Washington v. Seattle Schl. Dist. No. 1*, 458 U.S. 457, 474–75 (1982).

<sup>246</sup> *Crawford*, 458 U.S. at 548 (Marshall, J., dissenting). As Professor Laurence Tribe observes, *Seattle* and *Crawford* are essentially the same type of case, each restructuring the political process to harm minorities; but, justifying the result in *Crawford* as a mere “repeal” of a state created right to desegregated education:

[T]he change wrought by Proposition 1 [in *Crawford*] was strikingly analogous to that wrought by Initiative 350 [in *Seattle*] or by the *Hunter* charter amendment. In *Crawford* the shift in authority was from the courts to the state legislature or electorate; in *Seattle*, from the local school board to the state legislature or the electorate; in *Hunter*, from the city council to the city electorate. The majority and concurring opinions in *Crawford* misconstrued the impact of Proposition 1 because of confusion over just what “right” was at issue. What was at stake was not some sort of derivative “right to invoke a judicial busing remedy,” but a state-guaranteed “right to be free from racial isolation in the public schools.”

LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1487 (2d ed. 1988).

<sup>247</sup> *Seattle*, 458 U.S. at 466.

segregation (or no state mandated discrimination), then the state is free to merely “repeal” a remedial policy that went beyond that mandated under the Federal Constitution, which only prohibits *de jure* segregation. *Crawford* was wrongly decided. Under the political process doctrine, *Seattle* and *Crawford* are the same case: both restructure the process in a manner that perpetuates the subjugation of discrete and insular minorities, but their divergent results are premised on the outcome determinative *de jure/de facto* distinction.

*Reitman*, *Hunter*, *Seattle*, and *Crawford* are the same type of case—they all reallocate decisionmaking power unconstitutionally by codifying inequality and insulating it from judicial review.<sup>248</sup> That is, they leave any progressive social change to the electorate, which is against race-conscious remedial approaches to fulfill the antisubordination principle of the Fourteenth Amendment.<sup>249</sup> *Romer v. Evans*<sup>250</sup> fits squarely within this line of decisions as well. For while it is generally conceived as a case about legislative animus,<sup>251</sup> there is nevertheless a structural dynamic to it that makes it particularly salient to the analysis here.

#### 4. *Romer v. Evans and the Political Process Doctrine*

Amendment 2 to the Colorado Constitution was adopted in 1992 in a statewide referendum.<sup>252</sup> It provided that:

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<sup>248</sup> *Crawford*, 458 U.S. at 558–61 (Marshall, J., dissenting).

<sup>249</sup> See Spann, *supra* note 2, at 278; Chin, *supra* note 3, at 33; see also *supra* notes 2–3 and accompanying text.

<sup>250</sup> 517 U.S. 618 (1996).

<sup>251</sup> Spann, *supra* note 2, at 250 n.270. Perhaps this explains why Justice Kennedy, the author of the *Romer* decision, fails to cite, quote, or analogize *Romer* in his *Schuetz* plurality opinion. It could also be because the Court based its decision in *Romer* on a different rationale, brushing aside the Colorado Supreme Court’s holding, applying strict scrutiny, that the amendment to the Colorado Constitution was unconstitutional under the reasoning of the Court’s political process doctrine decisions. See *Evans v. Romer*, 854 P.2d 1270, 1286 (Colo. 1993). There are some direct doctrinal linkages between the political process doctrine (*Hunter et. al.*) and *Schuetz*. See Stephen M. Rich, *Ruling by Numbers: Political Restructuring and the Reconsideration of Democratic Commitments After Romer v. Evans*, 109 YALE L.J. 587, 615 (1999).

<sup>252</sup> *Romer v. Evans*, 517 U.S. 620, 623 (1996).

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.<sup>253</sup>

This comprehensive amendment repealed anti-discrimination ordinances in Aspen, Boulder, and Denver; and, beyond the repeal, Amendment 2 prohibited “all legislative, executive or judicial action at any level of state or local government designed to protect” members of the LGBTQ community.<sup>254</sup>

The Court reaches two dramatically different results in *Crawford*<sup>255</sup> and *Romer* on what is essentially the same type of structural exclusion. In *Crawford*, “Proposition I works an unconstitutional reallocation of state power by depriving California courts of the ability to grant meaningful relief to those seeking to vindicate the State’s guarantee against *de facto* segregation in the public schools.”<sup>256</sup> The reallocation of state power is even more pervasive and pernicious in *Romer*, as Amendment 2 “nullifies specific legal protections for this targeted class [LGBTQ] in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.”<sup>257</sup> Amendment 2’s reach extends beyond the private sphere “to repeal and forbid all laws or policies providing specific protections for gays or lesbians from discrimination by *every level of Colorado government*.”<sup>258</sup>

Nevertheless, the Court held Proposition I constitutional in *Crawford*, and Amendment 2 unconstitutional in *Romer*. Not only does this illustrate the elusiveness of the Court’s political process doctrine, it denotes the rigid formalism of the *de jure/de facto* distinction and the intent requirement.<sup>259</sup> What is striking

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<sup>253</sup> *Id.* at 624.

<sup>254</sup> *Id.*

<sup>255</sup> *Crawford* was wrongly decided—its holding should have been in line with the Court’s holdings in *Seattle*, *Reitman*, *Hunter*, and *Romer*. See *supra* Part II.A.1–4.

<sup>256</sup> *Crawford v. Bd. of Ed. of City of Los Angeles*, 458 U.S. 527, 554 (1982) (Marshall, J., dissenting).

<sup>257</sup> *Romer*, 517 U.S. at 629.

<sup>258</sup> *Id.* (emphasis added).

<sup>259</sup> Rich, *supra* note 251, at 615 (distinguishing Amendment 2 in *Romer* from *Hunter* and its progeny by noting that it was “an especially pernicious kind of political restructuring” because it targeted a discrete and insular minority for disadvantage). All of the voter initiatives addressed by the Court from *Reitman* through *Crawford* deal with some form of “neutral” classification that impacts race (“the impartial category of race”) while *Romer*’s “partial category” is premised on an *explicit* classification of LGBTQ status. This discriminatory classification is based upon the State’s argument that it is merely leveling the

about *Romer* is that the Court, per Justice Kennedy's opinion, does not require a showing of discriminatory intent, but rather focuses on the impact and restructuring of the process through the Colorado constitutional amendment. The Court does not recognize LGBTQ as a suspect class,<sup>260</sup> so rationality of the process is the analytical focal point.<sup>261</sup> The animus is inherent in the process itself, but this analysis is qualitatively different when it comes to race. The shift is noticeably from impact (in *Romer*) to intent (in *Schuetz*).<sup>262</sup>

What the Court misses is that *Romer* is yet another form of political restructuring with direct implications to its analysis in *Schuetz*. Rather, the Court disconnects *Romer* from its political process jurisprudence, elevates the intent requirement so that *Schuetz* is more of a post-racial decision<sup>263</sup> than a structural process decision, and creates a myth of democratic participation and experimentation that belies the complexity of race, racism, and retrogression.

Indeed, Professor Susannah W. Pollvogt pinpoints this glaring doctrinal contradiction when she notes that the Colorado amendment in *Romer* would be upheld as *constitutional* under the *Schuetz* analysis.<sup>264</sup> This doctrinal disparity is all the more disconcerting given that Justice Kennedy is the author of *Romer* and *Schuetz*.

Perhaps the Court is more adept at recognizing “new” discrimination and less so when it comes to “old” discrimination—discrimination is presumed in *Romer*, and race is viewed skeptically in *Schuetz*.<sup>265</sup> That is, the Court conceptualizes injury

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playing field by removing “special” protections for LGBTQ citizens. *Id.* at 616; *see Romer*, 517 U.S. at 626. The Court forcefully rejected this assertion because it recognized the explicit classification as a rank form of legislative animus. *Id.* at 632.

<sup>260</sup> *See Romer*, 517 U.S. at 631.

<sup>261</sup> *Id.* at 632 (Amendment 2 fails rational basis review because it is a “broad and undifferentiated disability on a single group,” and its enactment cannot be explained by anything except animus toward LGBTQ).

<sup>262</sup> Spann, *supra* note 2, at 303 n.500.

<sup>263</sup> *See supra* Part I.B.

<sup>264</sup> Susanna W. Pollvogt, *Thought Experiment: What If Justice Kennedy Had Approached Romer v. Evans the Way He Approached Schuetz v. BAMN?* (May 13, 2014), <http://ssrn.com/abstract=2436616> [<https://perma.cc/LG38-27NA>] (noting that the divergent results in *Romer* and *Schuetz* can be explained as the Court being adept at identifying “new” discrimination like sexual orientation discrimination, and less so with old, “second generation discrimination” like racial discrimination); *see* Robinson, *supra* note 145, at 226 (noting that Justice Kennedy's *Schuetz* plurality opinion leaves open the possibility of overruling *Grutter*, and concluding that the *Schuetz* rationale should logically lead to the conclusion that *Romer* is not constitutionally viable as well). *See generally* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887 (2012) (providing a detailed account of the Court's animus analysis in *Romer*).

<sup>265</sup> Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 *FLA. L. REV.* 1, 44 (2017) (concluding that the Court is unlikely to alter its post-racial interpretation of the Fourteenth Amendment in the absence of a shift in public opinion about race, and stating that “while the Court decided the sexual-orientation dignity cases as public attitudes concerning LGBT rights shifted rapidly towards greater acceptance

differently in the two cases: in *Romer*, the injury is borne out by the explicit language of exclusion in amendment 2, and the underlying structural animus that it represents against the LGBTQ community; on the other hand, there is no injury in *Schuette* because the electorate chose to reorder the political process (and any exclusion or burden has been voted on and approved). The failure to reconcile these decisions underscores the Court's flawed reliance on post-racial process discourse.

There are several distinct doctrinal propositions underlying the Court's political process jurisprudence:

1. Neutral rationales for the restructuring of the political decisionmaking process should be inherently suspect when the rights of the historically oppressed are targeted for unequal treatment;<sup>266</sup>
2. A State cannot place its imprimatur behind an ostensibly neutral legislative enactment, which actually targets and excludes African-Americans by promoting a private "right" to discriminate;<sup>267</sup>
3. The political process cannot be reconfigured, by moving decisionmaking authority to another level of government, so that substantive access is denied and participation becomes so meaningless that it is akin to vote dilution;<sup>268</sup>

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and tolerance, similar changes have not occurred with respect to public attitudes concerning substantive racial equality." It is not an overstatement to conclude, in the context of our times, that this shift may never occur.

<sup>266</sup> See *Reitman v. Mulkey*, 387 U.S. 369, 379–80 (1967); *Hunter v. Erickson*, 393 U.S. 385, 391–93 (1969).

<sup>267</sup> See *Reitman*, 387 U.S. at 374.

<sup>268</sup> See *Washington v. Seattle Schl. Dist. No. 1*, 458 U.S. 457, 482–83 (1982); David B. Oppenheimer, *Color-Blindness, Racism-Blindness, and Racism-Awareness: Revisiting Judge Henderson's Proposition 209 Decision*, 13 BERKELEY J. AFR.-AM. L. & POL'Y 229, 237 (2011) (noting that restructuring could be "tantamount to vote dilution.").

The fatal defect in each of these three cases [*Hunter*, *Seattle*, and *Romer*] was the restructuring of the political process in a way that required a disadvantaged group to take some extraordinary action—obtaining a charter amendment, ballot initiative or state constitutional amendment—in order to protect its political interests, while those who opposed the interests of the disadvantaged group could have their way simply by utilizing the ordinary political process.

Spann, *supra* note 2, at 250.

4. Anti-discrimination laws cannot be limited or nullified so that the disproportionate impact of structural inequality falls on racial minorities, and places on them “special burdens . . . within the governmental process”;<sup>269</sup>
5. The mere fact that the restructuring of the decisionmaking process was reached by a popular voter referendum (or other “direct democracy” initiative) does not insulate the disproportionate impact on minorities from judicial review;<sup>270</sup> and
6. The Equal Protection Clause guarantees more than superficial access to the political process, it guarantees meaningful access and full participation,<sup>271</sup> so that the deck is not stacked against African-Americans and other historically oppressed people of color.

*Schuette* departs from firmly established precedent and the common doctrinal threads connecting *Reitman*, *Hunter*, *Seattle*, and *Romer*. Conflating the process values espoused in its equal opportunity/equal access decisions,<sup>272</sup> the Court reinterprets the political process doctrine so that it now resembles all of the Court’s post-racial jurisprudence. That is, unless there is discriminatory intent manifested by the state itself, there is nothing to remedy.<sup>273</sup> The Court conceptualizes *Schuette* as simply about benefits and burdens.<sup>274</sup> Since African-Americans have received a tainted racial benefit or “preference,” the polity is free to take it back. Moreover, issues like diversity and race, although “sensitive” societal issues, are properly consigned to the ebb and flow of the democratic process.<sup>275</sup> After all, democracy is a great experiment. As *Schuette* demonstrates, this experiment will have grave consequences for historically oppressed minorities.

### B. Post-racial Constitutionalism

The Fourteenth Amendment is inverted in *Schuette* for it stands for the counterintuitive proposition that states, through their electorate, can amend their constitutions to limit the reach of the antistatutory principle. The Court endorses voter initiatives to enact legislative amendments that preclude the consideration of race in any state decisionmaking process notwithstanding the

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<sup>269</sup> See *Hunter*, 393 U.S. at 391; *Romer v. Evans*, 517 U.S. 620, 632–34 (1996).

<sup>270</sup> See *Hunter*, 393 U.S. at 392.

<sup>271</sup> See *id.* at 393; Grauerholz, *supra* note 194, at 905.

<sup>272</sup> See *supra* Part I.B.

<sup>273</sup> See *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1647 (2014) (Scalia, J., concurring).

<sup>274</sup> See Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 How. L. J. 1, 68–69 (1995).

<sup>275</sup> See *Schuette*, 134 S. Ct. at 1638.

Court's holding in *Grutter* and *Fisher*.<sup>276</sup> Race is not inherently neutral, so it is appropriate for the citizenry to ban its use in the name of post-racialism.<sup>277</sup> This is the narrative core of the Roberts Court's race jurisprudence. In the absence of identifiable discrimination, race-conscious remedies are constitutionally prohibited; and, diversity, as one of many factors in admissions, cannot be considered in Michigan.<sup>278</sup>

To bring doctrinal uniformity to its rigid formalism, the Court conceptualizes *Schuetz* as a case about the democratic process, neutral results, and the virtues of participating in direct democracy movements<sup>279</sup> rather than a case about the structure of the process itself. Of course, in the midst of this comprehensive primer on democracy and the First Amendment, there is no mention of this new gloss on the Fourteenth Amendment. This is the New Equal Protection,<sup>280</sup> and it is advanced through the rhetorical allure of post-racial discourse and the democratic myth.

### *1. Justice Kennedy's Post-Racial Proceduralism*

In 2006, Michigan voters adopted an amendment to the state constitution prohibiting consideration of race in government decisionmaking.<sup>281</sup> Ballot proposal 2 passed by a vote of 58% to 42%, and became Article I, Section 26 of the Michigan Constitution when it was enacted.<sup>282</sup> The Sixth Circuit Court of Appeals, sitting en banc, concluded that, under the principles articulated in *Seattle*,<sup>283</sup> the state constitutional amendment was unconstitutional.<sup>284</sup> Reversing the Court of Appeals, Justice Kennedy's plurality opinion advances a central tenet of post-racial constitutionalism—post-racial proceduralism, the notion that it is the process itself that shapes the substance of constitutional rights.<sup>285</sup>

The *Schuetz* plurality sets out three post-racial propositions: (i) neutrality is the guiding principle of the Court's analysis of race—so that the decision is not about race at all, but whether “racial preferences”<sup>286</sup> may be prohibited by Michigan voters through the political process;<sup>287</sup> (ii) the political process decisions<sup>288</sup> are unified by

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<sup>276</sup> See *supra* note 62 and accompanying text.

<sup>277</sup> See *Schuetz*, 134 S. Ct. at 1636.

<sup>278</sup> See *id.* at 1638.

<sup>279</sup> See *id.* at 1637–38.

<sup>280</sup> See generally Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) (discussing the shift from a group rights paradigm to a liberty-based conception as a means to alleviate balkanization and “pluralism anxiety”).

<sup>281</sup> *Schuetz*, 134 S. Ct. at 1629.

<sup>282</sup> *Id.*

<sup>283</sup> See *supra* Part II.A.3.

<sup>284</sup> *Schuetz*, 134 S. Ct. at 1630.

<sup>285</sup> See *supra* note 5 and accompanying text.

<sup>286</sup> *Schuetz*, 134 S. Ct. at 1630.

<sup>287</sup> *Id.*

<sup>288</sup> See *supra* Part II.A.1–4.

the requirement of discriminatory intent under the Fourteenth Amendment,<sup>289</sup> and (iii) citizen involvement in the democratic process means that voters have a unique opportunity to advance legislation that not only mirrors the post-racial discourse of the polity,<sup>290</sup> but incorporates it into the text of the state constitution.

It is extraordinary that Justice Kennedy begins his analysis by proclaiming that this case “is not about the constitutionality, or the merits, of race-conscious admissions in higher education.”<sup>291</sup> *Fisher*, of course, remains intact doctrinally in jurisdictions outside of Michigan,<sup>292</sup> and stands for the proposition that “consideration of race in admissions is permissible”<sup>293</sup> if race-neutral alternatives prove ineffective in attaining diversity. *Schuette* is most certainly about race—it is about whether the Michigan electorate can determine the scope and applicability of the Fourteenth Amendment in state decisionmaking, and thereby prohibit the use of race as a factor in such decisions. It seems odd that the Court would expand the interpretive powers of the citizenry in this manner, particularly since it is “the province and duty of [the Court] to say what the law is,”<sup>294</sup> in interpreting the Fourteenth Amendment as a limit on state power.<sup>295</sup>

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<sup>289</sup> *Schuette*, 134 S. Ct. at 1632–34. In order to advance this novel proposition, the Court reinterprets *Seattle*. See *supra* Part II.A.3.

<sup>290</sup> See *supra* Part I.A–B.

<sup>291</sup> *Schuette*, 134 S. Ct. at 1630.

<sup>292</sup> Meera E. Deo, *Faculty Insights on Educational Diversity*, 83 *FORDHAM L. REV.* 3115, 3122 (2015) (noting that *Schuette* left diversity in place while diluting affirmative action more broadly).

<sup>293</sup> *Schuette*, 134 S. Ct. at 1630.

<sup>294</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803); Joshua J. Schroeder, *America’s Written Constitution: Remembering the Judicial Duty to Say What the Law Is*, 43 *CAP. U. L. REV.* 833, 860 (2015).

<sup>295</sup> This is an interesting strand of federalism with state electorates determining the very parameters of a constitutional amendment intended to limit discrimination by the state. See Thomas D. Kimball, *Schuette v. BAMN: The Short-Lived Return of the Ghost of Federalism Past*, 61 *LOY. L. REV.* 365, 397 (2015) (discussing how *Schuette* promotes the flawed notion that voter-initiatives that result in legislative enactments are insulated from review by federal courts); see also Vinay Harpalani, *Narrowly Tailored But Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 *SETON HALL L. REV.* 761, 766–67 (2015).

Conflating the holdings of *Hunter*, *Reitman*, and *Seattle*, Justice Kennedy erects a discriminatory intent requirement where one did not previously exist. Before Justice Kennedy's reinterpretation of *Seattle*, all the political process doctrine decisions stood for the proposition that voter initiated legislation that "places [a] special[] burden[] on racial minorities"<sup>296</sup> is constitutionally invalid. Concluding that this reading of the cases, particularly *Seattle*, was too broad, Justice Kennedy posits that:

In all events we must understand *Seattle* as *Seattle* understood itself, as a case in which neither the State nor the United States "challenge[d] the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation." In other words the legitimacy and constitutionality of the remedy in question (busing for desegregation) was assumed, and *Seattle* must be understood on that basis.<sup>297</sup>

To Justice Kennedy, *Seattle* is a doctrinal outlier, which must be rejected.<sup>298</sup> That is, because the Court assumed the legitimacy and constitutionality of busing as a remedy, there was no reference to the discriminatory intent requirement. This is too broad a reading of *Seattle*. Without a discriminatory intent requirement, *Seattle*'s expansiveness would promote: distribution of benefits based on race;<sup>299</sup> standardless assessments of what is an "injury" to a racial minority's political interest in the process,<sup>300</sup> and balkanization, as racial groups vie for a constitutionally guaranteed right to "win" in the process.<sup>301</sup> This is the classic racial politics rationale that the Court has employed to dismantle race-conscious affirmative action.<sup>302</sup>

*Seattle*, then, guarantees a racialized result premised on a stereotypical understanding of the political interests of minorities—this is contrary to neutrality

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<sup>296</sup> *Hunter v. Erickson*, 339 U.S. 391 (1969); *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967) (stating that courts must assess "the potential impact of official action" in determining whether the state is involved in invidious discrimination); *Washington v. Seattle Schl. Dist. No. 1*, 458 U.S. 457, 470 (1982) (concluding that when "the State allocates governmental power *nonneutrally* by explicitly using the *racial* nature of a decision to determine the decision-making process," it places a *special* burden on racial minorities within the process) (emphasis added); *see supra* Part II.A.4 (the same proposition applies to *Romer* as well).

<sup>297</sup> *Schuetz*, 134 S. Ct. at 1633.

<sup>298</sup> *Id.* at 1634 (noting that the broad reading of *Seattle* that any state action, with a "racial focus," that makes it more difficult to achieve legislative success is subject to strict scrutiny, is contrary to the Court's equal protection jurisprudence).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 1634–36.

<sup>302</sup> Bettrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CAL. L. REV. 1565, 1603–24 (2013) (discussing racial politics rationale, and concluding that the Court has moved away from a race-conscious anti-subordination model that protected racial minorities to a process model that views any political gains by racial minorities skeptically).

and the post-racial constitutionalism espoused by the Court. *Schuetz* purportedly rejects the race-consciousness of *Seattle*, but this is misleading.<sup>303</sup> All the political process decisions advance a structural view of polity premised on displacement, not a discriminatory intent requirement.<sup>304</sup>

Distinguishing *Seattle* without explicitly overruling it, Justice Kennedy emphasizes the fact that there is no injury on the facts in *Schuetz*.<sup>305</sup> Since there is no clearly identifiable discrimination to remedy, and diversity is not a compelling interest in the context of the Michigan voter initiative, the Court characterizes judicial review as overly intrusive and a burden on the right of voters to determine the state's course on issues of race.<sup>306</sup> Perhaps the most devastating aspect of *Schuetz* is its universalist appeal<sup>307</sup> to voter empowerment,<sup>308</sup> the First Amendment and underlying themes of participatory democracy,<sup>309</sup> and states as laboratories of democracy where contentious "issues" like race can be resolved through public debate and experimentation.<sup>310</sup> The allure of this democratic myth is belied by its embrace of formalistic equality and cynical rejection of the anticaste and antisubordination principles of the Fourteenth Amendment.

The Court is more concerned with process (and how the status quo can be preserved) than with substantive constitutional rights.<sup>311</sup> This means that most structural inequality is irremediable because the Court's post-racial constitutionalism requires definitive proof of purposeful discrimination by the State. Justice Kennedy's plurality decision is deceptively neutral and moderate; it appeals to the higher democratic virtues of debate, participation, and experimentation, but

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<sup>303</sup> The *Schuetz* plurality rewrites *Seattle* so that it becomes literally a decision about policies which "inure [] primarily to the benefit of the minority," and this "racial focus," unconstitutionally privileges minorities on the basis of race. *Schuetz*, 134 S. Ct. at 1634. The Constitution guarantees equal opportunity, not equal results based on race. *See supra* Part I.B. Thus, the Court refashions what "injury" means, so that laws that require racial definitions and "the grant of favored status to persons in some racial categories and not others," *id.* at 1638, can be prohibited by the electorate. Under this conception, all race-conscious remedies are cast as unconstitutional windfalls to people of color with whites as the "victims" of this racially tainted process. This rhetorical inversion has been thoroughly critiqued and rejected in the literature. *See* Girardeau A. Spann, *Good Faith Discrimination*, 23 WM. & MARY BILL RTS. J. 585, 608 (2015) (noting how the Court is deferential to the political process when it rejects race-conscious affirmative action, but will intervene and invalidate the will of the political community when it embraces race-conscious remedies to eradicate subordination and segregation); Christopher A. Bracey, *The Cul De Sac of Race Preference Discourse*, 79 S. CAL. L. REV. 1231, 1233 (2006); Stephen A. Plass, *Public Opinion and the Demise of Affirmative Action*, 19 GA. ST. U. L. REV. 495, 501 (2002).

<sup>304</sup> *See supra* notes 144–148, 255–267 and accompanying text.

<sup>305</sup> *Schuetz*, 134 S. Ct. at 1636.

<sup>306</sup> *Id.* at 1636–38.

<sup>307</sup> Barnes, *supra* note 144, at 2071–72.

<sup>308</sup> *Schuetz*, 134 S. Ct. at 1636–37.

<sup>309</sup> *Id.* at 1637.

<sup>310</sup> *Id.* at 1630, 1637–38.

<sup>311</sup> Flagg, *supra* note 46 at 129.

there is an underlying tenor of what Professor Darren Lenard Hutchinson terms “Racial Exhaustion.”<sup>312</sup> The voters of Michigan, after fifteen years of public “debate” on the issue of race in which their elected officials were “unresponsive,” have chosen the “neutral” policy course of prohibiting consideration of race in all state policymaking.<sup>313</sup> Justice Kennedy even suggests that affirming the Court of Appeals would undermine the legitimacy of the process and the rights of the electorate to express their views through duly enacted legislation.<sup>314</sup>

While Justice Kennedy’s analysis leaves a very small doctrinal space for consideration of race in state decisionmaking—for example, the voters may decide that diversity is a compelling interest in Michigan and should be pursued<sup>315</sup>—there is little doubt that *Schuette* all but completes the Roberts Court’s comprehensive assault on race-conscious remedies.<sup>316</sup> What is particularly disconcerting is that Justices Scalia and Thomas would go even further by overruling *Hunter* and *Seattle*.

## 2. Justice Scalia’s Concurrence: Formalistic Equality

Concurring in the judgment, Justice Scalia opens with a triumphant statement that the people have finally embraced the “express encouragement” from the Court to dismantle race-conscious affirmative action and prohibit the use of race in state policymaking.<sup>317</sup> This is a clear indication that the Court intends to codify post-racial discourse.<sup>318</sup> It has done so. The only question, whether it is under the plurality’s approach or Justice Scalia’s concurring view, is: how quickly will this occur?

Concluding that *Hunter* and *Seattle* should be overruled<sup>319</sup> because they stand for the proposition that “a facially neutral law may deny equal protection solely because it has a disparate racial impact,”<sup>320</sup> Justice Scalia affirms *Washington v. Davis* as a constitutional absolute, requiring purposeful discrimination; thus, the Michigan constitutional amendment is permissible because it is race neutral state action.

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<sup>312</sup> Hutchinson, *supra* note 45, at 922.

<sup>313</sup> *Schuette*, 134 S. Ct. at 1636.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 1638.

<sup>316</sup> See *supra* notes 62, 144–148 and accompanying text.

<sup>317</sup> *Schuette*, 134 S. Ct. at 1639–40 (Scalia, J., concurring).

<sup>318</sup> See *supra* Part I.

<sup>319</sup> *Schuette*, 134 S. Ct. at 1643 (Scalia, J., concurring).

<sup>320</sup> *Id.* at 1647.

Justice Scalia goes much further than the plurality, advancing a distorted federalism argument that the political process theory somehow interferes with state sovereignty. Each state has “near-limitless sovereignty”<sup>321</sup> to “design its governing structure as it sees fit,”<sup>322</sup> and, in the absence of any identifiable discrimination, the structural displacement of people of color and discrete and insular minorities is constitutionally irrelevant.<sup>323</sup>

Significantly, all of the Justices in the plurality or concurring opinions *presume* that there was no constitutionally cognizable injury—either because there was no identifiable discrimination by the state; or, the electorate was given direct access to decisionmaking power, which was removed from unelected university policymakers.<sup>324</sup> There is no discernible harm under either rationale. This is the most troubling aspect of *Schuette*: there is no acknowledgement of an injury under the political process doctrine. This is because the structural analysis underlying the political process doctrine has been replaced by the democratic myth. Justice Breyer, at least in a narrow sense, embraces the post-racial discourse that advances the democratic myth.

### 3. Justice Breyer’s Concurrence: Illusory Process

There is a fundamental distinction between Justice Breyer’s interpretation of the political process doctrine and Justice Sotomayor’s conception of process and representation.<sup>325</sup> To Justice Breyer, decisionmaking power is simply moved to a level in the process that is closer to the electorate. Emphasizing “access” rather than the structural impact of moving decisionmaking authority to a different level of government, Justice Breyer concludes that *Hunter* and *Seattle* are inapplicable because here there was no effort to restructure the political process.<sup>326</sup>

It is surprising, given Justice Breyer’s expansively compelling dissent in *Parents Involved*,<sup>327</sup> that he would concur in *Schuette*, an opinion that widens the doctrinal chasm between the Court’s public school decisions and its postsecondary jurisprudence.<sup>328</sup> In *Parents Involved*, the Court undermined the will of the political

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<sup>321</sup> *Id.* at 1646.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 1645–48.

<sup>324</sup> *Id.* at 1650 (Breyer, J., concurring) (“The amendment took decisionmaking authority away from these unelected actors and placed it in the hands of the voters.”).

<sup>325</sup> *Id.* at 1652 (Sotomayor, J., dissenting) (“This case involves this last chapter of discrimination: A majority of the Michigan electorate changed the basic rules of the political process in that State in a manner that uniquely disadvantages racial minorities.”).

<sup>326</sup> *Id.* at 1650 (Breyer, J., concurring).

<sup>327</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803–76 (2007) (Breyer, J., dissenting).

<sup>328</sup> *Id.* at 725 (*Grutter* is inapplicable to elementary and secondary schools). *See supra* note 62 and accompanying text. *Contra Parents Involved*, 551 U.S. at 842 (Breyer, J., dissenting). *See generally* STEPHEN BREYER, *ACTIVE LIBERTY* 83 (2005) (discussing how the Court chose an interpretation of the Equal Protection Clause which was inclusive and

community, and Justice Breyer dissented because the plurality sought to rewrite the mandate of *Brown*.<sup>329</sup> But in *Schuetz*, Justice Breyer does not dissent because there is no injury, nor a constitutional requirement to pursue diversity through race-conscious remedies,<sup>330</sup> and the viability of such remedies is committed to the electorate, not unelected university administrators.<sup>331</sup> This is a truly “democratic” outcome because equal access and opportunity are sufficient guarantees to a well-functioning process.<sup>332</sup>

Because decisionmaking power was moved from an administrative (unelected) process to a political process, there was no diminution of the right to participate meaningfully.<sup>333</sup> Indeed, minorities had not previously participated in the new electoral process, so there was no cognizable injury here.<sup>334</sup> Moreover, once the process is political, rather than administrative, it is more difficult for courts to determine what “structural burden[s]” impact racial minorities.<sup>335</sup> But Justice Breyer’s concurrence does not acknowledge, as he does in *Parents Involved*, the real outcomes of this “neutral process”—retrogression, resegregation, and exclusion.<sup>336</sup> These outcomes are insignificant in light of the fact that Justice Breyer views the process symmetrically: in *Parents Involved* and *Schuetz*, “decisionmaking through the democratic process . . . supports the right of the people . . . to adopt race-conscious policies for inclusion [as in *Parents Involved* to preserve the mandate of *Brown*],” and “the right to vote not to do so [as in *Schuetz*].”<sup>337</sup>

Because all Michigan voters are given an opportunity to participate in the policy debate on diversity, Justice Breyer concludes, “the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits of these programs.”<sup>338</sup> Yet this reasoning supplants the integration interest that he identified in *Parents Involved*. There he endorsed the political community’s voluntary decision to embrace integration and prevent resegregation in the schools.<sup>339</sup> Of course, the decision of the Michigan voters is “voluntary” as well, but this symmetry is belied by the burden it places on people of color and advocates for race-conscious remedies. Given Michigan’s history of segregated schools,<sup>340</sup> the integration interest is clearly applicable in *Schuetz* as well.

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facilitated the functioning of democracy in *Grutter*).

<sup>329</sup> *Parents Involved*, 551 U.S. at 803–04.

<sup>330</sup> *Schuetz*, 134 S. Ct. at 1649 (Breyer, J., concurring).

<sup>331</sup> *Id.* at 1650–51.

<sup>332</sup> *See supra* Part I.B.

<sup>333</sup> *Schuetz*, 134 S. Ct. at 1651 (Breyer, J., concurring).

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 858–72 (2007) (Breyer, J., dissenting).

<sup>337</sup> *Schuetz*, 134 S. Ct. at 1651 (Breyer, J., concurring).

<sup>338</sup> *Id.* at 1649.

<sup>339</sup> *Parents Involved*, 551 U.S. at 819–30 (Breyer, J., dissenting).

<sup>340</sup> *Schuetz*, 134 S. Ct. at 1677–79 (Sotomayor, J., dissenting) (cataloguing dramatic declines in undergraduate, graduate, and professional schools in Michigan); Powell,

In *Parents Involved*, Justice Breyer noted that integration had three essential and *compelling* elements: a historical and remedial element to address the present day effects of past discrimination;<sup>341</sup> an educational element to overcome the “adverse educational effects produced by . . . highly segregated schools”;<sup>342</sup> and a democratic element which reflects pluralism, diversity, and inclusion.<sup>343</sup> By contrast, Justice Breyer’s *Schuetz* concurrence discards the remedial and educational elements because there is no “intentional discrimination,” and he instead emphasizes a formalistic conception of equality, access, and democracy.

#### 4. Justice Sotomayor’s Dissent: Structural Inequality

By contrast, Justice Sotomayor’s dissent envisions the representation reinforcement theory as embracing the anticaste and antistatization principles underlying the Fourteenth Amendment.<sup>344</sup> Thus, while it may appear that decisionmaking power now resides with the people, the voter initiated constitutional amendment restructures the political process.<sup>345</sup> This rigging of the process is unconstitutional.<sup>346</sup> Justice Sotomayor rejects the rhetorical allure of post-racial process discourse, and forcefully critiques the democratic myth relied upon by the plurality and concurring opinions.

Rejecting the plurality’s distorted conception of democratic self-governance,<sup>347</sup> Justice Sotomayor concludes that discrimination is not simply evinced by particularized intent, it is *structural* in nature as well.<sup>348</sup> *Schuetz* is a new form of voter dilution because the only manner in which proponents of race-conscious remedies can achieve “success” in Michigan’s political process is to pass a *statewide* constitutional amendment.<sup>349</sup> Thus, there is a two-tiered—separate and unequal system—for racial minorities and advocates of race-conscious remedies and “a separate, less burdensome process for everyone else.”<sup>350</sup> This is certainly a restructuring of the process that targets and excludes discrete and insular minorities, those without power to have meaningful participation in the purportedly neutral process. But the process is not neutral, colorblind, or post-racial because it

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*Milliken*, *supra* note 105; Nancy Kaffer, *Racial Divide Sharp in Michigan Schools*, DETROIT FREE PRESS (Aug. 23, 2016, 12:05 AM), [www.freep.com/story/opinion/columnists/nancy-kaffer/2016/08/23/nancy-kaffer-racial-divide-sharp-michigan-schools/89108212](http://www.freep.com/story/opinion/columnists/nancy-kaffer/2016/08/23/nancy-kaffer-racial-divide-sharp-michigan-schools/89108212) [<https://perma.cc/UJQ7-J93P>].

<sup>341</sup> *Parents Involved*, 551 U.S. at 838 (Breyer, J., dissenting).

<sup>342</sup> *Id.* at 839.

<sup>343</sup> *Id.* at 840.

<sup>344</sup> *Schuetz*, 134 S. Ct. at 1654, 1668–70 (Sotomayor, J., dissenting).

<sup>345</sup> *Id.* at 1652–53.

<sup>346</sup> *Id.* at 1660–63, 1670.

<sup>347</sup> *Id.* at 1667–69.

<sup>348</sup> *Id.* at 1663–64 n.8.

<sup>349</sup> *Id.* at 1661, 1683.

<sup>350</sup> *Id.* at 1653.

specifically designates race-conscious remedies for invalidation.<sup>351</sup> Under the political process doctrine, this type of structural realignment calls for strict scrutiny.<sup>352</sup>

The plurality's attempt to neutralize this basic principle is unpersuasive. Since there is no compelling interest underlying Section 26,<sup>353</sup> the reordering of the political system to place burdens on minorities is unconstitutional.<sup>354</sup> Indeed, Section 26 disrupts the democratic process by essentially "overturning" the central holding of *Grutter*, which permits consideration of race in a holistic admissions process.

The Court has actively constitutionalized reverse discrimination suits<sup>355</sup> through an insurmountable burden of proof of discriminatory intent,<sup>356</sup> a rhetorical narrative that dismisses race and racism as components of structural inequality,<sup>357</sup> and a formalistic conception of equality that privileges white claims of entitlement over the claims of historically oppressed minorities under the myth that most discrimination has already been eliminated.<sup>358</sup>

Justice Sotomayor critiques Justice Breyer's narrow conception of *Hunter* and *Seattle*, which leads him to concur with the plurality. While he would not overrule these decisions, as Justice Sotomayor concludes that the plurality did *sub silentio*,<sup>359</sup> he nevertheless concludes that *Hunter* and *Seattle* are inapplicable. To Justice Sotomayor, Justice Breyer's central premise is inaccurate—this is *not* a case about simply moving decisionmaking authority from an unelected administrative body (faculty members and administrators who receive delegated authority from the elected board) to the voters.<sup>360</sup> Because Justice Breyer views decisionmaking power symmetrically, he fails to acknowledge the asymmetrical impact on discrete and insular minorities. The elected Board "retain[ed] complete supervisory authority over university officials and over all admissions decisions,"<sup>361</sup> but Section 26 impermissibly reorders the process so that power is "removed . . . from the elected boards and placed it . . . at a higher level of the political process in Michigan."<sup>362</sup> This is precisely what occurred in *Hunter* and *Seattle*.<sup>363</sup>

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<sup>351</sup> *Id.* at 1660 (noting that section 26 has a racial focus and restructures the political process).

<sup>352</sup> *Id.* at 1663.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *See supra* Part I.B 1–4.

<sup>356</sup> *See Schuette*, 134 S. Ct. at 1663–64 (Sotomayor, J., dissenting).

<sup>357</sup> *See id.* at 1675–76 ("Race matters. Race matters in part because of the long history of racial minorities' being denied access to the political process.").

<sup>358</sup> *See id.* at 1676.

<sup>359</sup> *Id.* at 1664.

<sup>360</sup> *Id.* at 1664–65.

<sup>361</sup> *Id.* at 1667.

<sup>362</sup> *Id.*

<sup>363</sup> *See supra* Part II.A 3–4.

There is a clear distinction between processual access and substantive participation in the political process unimpeded by legislative animosity camouflaged as neutral decisionmaking.<sup>364</sup> Rejecting the plurality's approach as "self-government' without limits,"<sup>365</sup> Justice Sotomayor identifies three essential features of the right to meaningful participation in the political process: (i) the right to vote,<sup>366</sup> (ii) the "majority may not make it more difficult for the minority to exercise the right to vote",<sup>367</sup> and (iii) "a majority may not reconfigure the existing political process in a manner that creates a two-tiered system of political change, subjecting laws designed to protect or benefit discrete and insular minorities to a more burdensome political process than all other laws."<sup>368</sup>

The plurality adopts a literal process view rooted in formalistic equality. Under this view, equal access and opportunity are sufficiently guaranteed once the Court removes formal barriers to access. Thus, the Court should not "interfere" in a neutral process because this would undermine state sovereignty. This view should be rejected because it is the constitutional duty of the Court to keep channels of political change open.<sup>369</sup> It failed to do so in *Schuette*, and retrogression and retrenchment are almost certainly guaranteed.<sup>370</sup>

Leveling a direct rebuke to the Court's post-racial constitutionalism and its contrived conception of participatory democracy, Justice Sotomayor concludes that the Court abdicated its role as interpreter of the Fourteenth Amendment's antidisubordination principle and guardian of the politically powerless, "permitting the majority to use its numerical advantage to change the rules midcontest and forever stack the deck against racial minorities in Michigan."<sup>371</sup> The Court's race jurisprudence is rigged against racial minorities and the politically displaced.

### III. STRUCTURAL INEQUALITY AND SUBSTANTIVE EQUALITY

This Article has offered a comprehensive critique of the Roberts Court's race jurisprudence. The Roberts Court's most recent decision, *Schuette*, dramatically illustrates a new direction for the Court, as it actively encourages political majorities to "experiment" with the substantive core of the Fourteenth Amendment by invalidating race-conscious remedies. With a substantially weakened body of anti-discrimination law,<sup>372</sup> and the deceptively appealing allure of post-racial democracy, the Court has created a new strand of its post-racial constitutionalism. The Court now gains "legitimacy" by constitutionalizing the post-racial discourse<sup>373</sup> of a

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<sup>364</sup> See *supra* Part II.A.4.

<sup>365</sup> *Schuette*, 134 S. Ct. at 1669 (Sotomayor, J., dissenting).

<sup>366</sup> *Id.* at 1668.

<sup>367</sup> *Id.* at 1668–69.

<sup>368</sup> *Id.* at 1669.

<sup>369</sup> See *id.* at 1668.

<sup>370</sup> *Id.* at 1669 n.11.

<sup>371</sup> *Id.* at 1683.

<sup>372</sup> See *supra* Part I.B 1–4.

<sup>373</sup> See *supra* Part I.A.

citizenry hostile to race-conscious remedies as a means of inclusion and transformative social change.

Doctrinally, the Roberts Court's race jurisprudence is completely devoid of any conceptual recognition of structural inequality.<sup>374</sup> *Schuette* is a paradigmatic example of the Court's adherence to process based values, which exaggerate the openness of the polity, and the neutral rhetoric of the democratic myth. This is why Justice Sotomayor's *Schuette* dissent and Justice Thurgood Marshall's conception of the antistatutory principle<sup>375</sup> are essential in interpreting the Equal Protection Clause as a constitutional provision for those who are systematically targeted for oppression. "Today, however, attempts by government to assist minorities run up against the Roberts Court's perversion of the equal citizenship principle, which largely prohibits remedial efforts based on race."<sup>376</sup>

Applying the antistatutory principle to the voter approved Michigan constitutional amendment, the Court should have held it unconstitutional because it "reinforce[s] systems of subordination that treat some people as second class citizens."<sup>377</sup> By restructuring the process so that proponents of race-conscious remedies can only succeed in advancing their cause through a statewide referendum to amend the Michigan Constitution,<sup>378</sup> "[a] majority of the Michigan electorate changed the basic rules of the political process in that State in a manner that uniquely disadvantaged racial minorities."<sup>379</sup>

This is the essence of second-class citizenship and structural inequality. The antistatutory principle rejects the formalistic intent requirement, rigid classification categories,<sup>380</sup> and neutrality as a rationale for the present day effects of past structural inequality. It seeks to eradicate "legally created or legally reinforced systems of subordination."<sup>381</sup>

The voter approved constitutional amendment is indicative of a legally reinforced system of subordination. African Americans, and other discrete and insular minorities, are targeted for displacement.<sup>382</sup> Thus, Section 26 of the Michigan

<sup>374</sup> See *supra* note 2 and accompanying text.

<sup>375</sup> See *Dandridge v. Williams*, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting) (citations omitted) (rejecting the rigid tiered equal protection analysis of the Court, and noting that "[i]n determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.").

<sup>376</sup> Judge Lynn Adelman, *The Glorious Jurisprudence of Thurgood Marshall*, 7 HARV. L. & POL'Y REV. 113, 135 (2013).

<sup>377</sup> Tribe, *supra* note 246, § 16–21, at 1515.

<sup>378</sup> See *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1653 (2014) (Sotomayor, J., dissenting).

<sup>379</sup> *Id.* at 1652.

<sup>380</sup> See *Dandridge v. Williams*, 397 U.S. 471, 520–21 (1970).

<sup>381</sup> Tribe, *supra* note 246, § 16–21, at 1515.

<sup>382</sup> See *supra* note 62 and accompanying text; *Schuette*, 134 S. Ct. at 1676–81 (Sotomayor, J., dissenting) (chronicling the segregated history of Michigan schools and the precipitous decline in minority post-secondary school enrollments in Michigan and

Constitution is invalid. All of the Court's political process decisions fit squarely within this canon, and explicitly reject such explicit or implicit exclusion from the political process.

The antisubordination principle emanating in the Equal Protection Clause is concerned primarily with the eradication of caste and the advancement of substantive equality in the form of equal citizenship. This means that if the state targets an historically oppressed or disfavored group for exclusion, explicitly through identifiable state action or implicitly through neutral direct democracy initiatives, such action is a violation of the Fourteenth Amendment. In either case, the process is restructured so that "the state's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice," and the operation of the normal political process is "seriously curtailed" so that participation is meaningless.<sup>383</sup>

Embracing the antisubordination principle and reaffirming its role as interpreter of the Fourteenth Amendment, the Court should jettison its illusory equal opportunity rhetoric,<sup>384</sup> acknowledge that structural inequality exists and that whites are not "victims" in the same sense that discrete and insular minorities are;<sup>385</sup> reconceptualize anti-discrimination law so that disparate impact is as significant as discriminatory intent in establishing structural inequality and retrenchment,<sup>386</sup> and, intervene, not to overturn race-conscious remedies adopted by the political community, but to provide substantive access, inclusion, and a meaningful opportunity to participate and promote transformative social change. Of course, the Roberts Court is far from adopting any of these doctrinal propositions, as it is enamored with the rhetorical allure of post-racial discourse and the democratic myth.

The key to dismantling this illusory equality of access is to reject the Court's most recent incarnation of contrived post-racial neutrality. Specifically:

1. The Court should examine the political process itself to determine if it undermines the substantive core of the Fourteenth Amendment by excluding discrete and insular minorities or erecting insurmountable barriers to political success;<sup>387</sup>

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California as a direct result of "neutral" voter initiatives).

<sup>383</sup> *Schuetz*, 134 S. Ct. at 1668 (Sotomayor, J., dissenting) (quoting *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938)).

<sup>384</sup> See *supra* Part I.B.1-4; Crenshaw, *supra* note 142, at 19.

<sup>385</sup> Hutchinson, *supra* note 2, at 48-55; *Schuetz*, 134 S. Ct. at 1673 (Sotomayor, J., dissenting).

<sup>386</sup> See *Schuetz*, 134 S. Ct. at 1667 (Sotomayor, J., dissenting); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (concluding that ostensibly neutral laws may be applied with an "evil eye and an unequal hand" so as to violate the Equal Protection Clause).

<sup>387</sup> *Romer* should be reinterpreted as a substantive decision, not one merely about process. See *supra* Part II.A.4; Kristen Barnes, *Breaking the Cycle: Countering Voter Initiatives and the Underrepresentation of Racial Minorities in the Political Process*, 12 DUKE J. CONST. LAW & PUB. POL'Y 123, 160-65 (2016).

2. Political issues involving interpretation of the substantive content of the antisuordination principle of the Fourteenth Amendment should not be the subject of voter initiatives;<sup>388</sup>
3. Under its own decisions, impact and political displacement are constitutionally relevant,<sup>389</sup> so, the Court should reject the doctrinal appeal of political process neutrality, and focus instead on structural inequality.<sup>390</sup>
4. If states do engage in democratic experiments, then voter or other direct democracy initiatives should enhance participatory democracy by emphasizing inclusion in a manner that reinforces voting as a fundamental right;<sup>391</sup> and

Finally, the history of the political process itself and how powerless groups have been excluded throughout time must be an essential component of any analysis of the efficacy of voter initiatives. History played no part in the analysis of *Schuette*, so the value of democratic decision-making was exaggerated, and inequality was rationalized as the result of a neutral process, which gave voice to the demands of the citizenry.

#### IV. CONCLUSION

We are witnessing the power of distorted and neutral rhetoric that rings with deceptive clarity. This post-racial process discourse is advanced on many levels: in political discourse, by a distrustful citizenry energized by hateful rhetoric that appeals to their concerns of being “left behind” on the basis of “preferences” for minorities that diminish America’s “greatness,” and a Court that seeks to constitutionalize a mythic democracy that promises participation while implicitly endorsing structural exclusion.

Voter initiatives should not determine the substantive core of the Fourteenth Amendment. While democratic participation is essential to our Republic, decisions like *Schuette* perpetuate a democratic myth of accessibility while the political process has been restructured to ensure that race-conscious remedies are invalid. The danger is that we will accept this inequality as a natural product of our democracy. The Court once acknowledged this danger in its political process decisions; and, while these decisions have not been explicitly overruled, *Schuette* marks the constitutionalization of post-racial process discourse and the democratic myth. Now, more than ever, we must reject the rhetorical allure of this contrived neutrality.

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<sup>388</sup> Bames, *supra* note 387, at 160.

<sup>389</sup> See *supra* Part II.A.

<sup>390</sup> See Lenhardt, *supra* notes 2 & 148.

<sup>391</sup> See *supra* Part I.B.4.