Fourteenth Amendment — Equal Protection Clause — Political-Process Doctrine — Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)

In recent years, the Supreme Court has several times considered the constitutionality of race-based admissions preferences.[1] However, it has not analyzed the degree to which the Equal Protection Clause, particularly the political-process doctrine, might restrict the means to abolish such preferences. The political-process doctrine — derived from *Hunter v. Erickson*[2] and *Washington v. Seattle School District No. 1*[3] — prohibits subjecting legislation benefiting racial minorities to a more burdensome political process than that imposed on other legislation. Last Term, in *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)*,[4] the Supreme Court upheld a state constitutional amendment that, inter alia, prohibited public universities from using race as a factor in the admissions process. A three-Justice plurality abandoned the political-process doctrine, and, in its place, introduced a new test — whether the law "had the serious risk, if not purpose, of causing specific injuries on account of race."[5] But because the plurality did not clearly define the term "injury on account of race," its test may prove difficult to apply; and ultimately, the inquiry seems to require the same type of race-based analysis that led the plurality to reject the political-process doctrine.

The political-process doctrine, as enunciated in *Hunter* and *Seattle*, prohibits the state from imposing extra burdens — beyond those of the ordinary political process — on legislation benefiting minorities. In *Hunter*, the voters of Akron, Ohio, amended the city charter to overturn a fair housing ordinance and to require a referendum for any future ordinance prohibiting racial bias in real property transactions.[6] In striking down the amendment, the Supreme Court applied strict scrutiny because the law "place[d] special burdens on racial minorities within the governmental process" by "disadvantag[ing] those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations."[7] Just

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[1] *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

[2] 393 U.S. 385 (1969).

[3] 458 U.S. 457 (1982).

[4] 134 S. Ct. 1623 (2014).

[5] *Id.* at 1633 (plurality opinion).

[6] *Hunter*, 393 U.S. at 386–87.

[7] *Id.* at 391.

over a decade later, *Seattle* relied on *Hunter* to strike down a state constitutional amendment that prohibited desegregative busing absent a court order, thereby extinguishing the authority of local school boards to address de facto segregation.[8] First, the amendment triggered *Hunter* by having "a racial focus"[9]: it banned legislation that minorities may consider to be in their interest and that "inures primarily to [their] benefit."[10] Second, the amendment "work[ed] a reallocation of power" — also known as a political restructuring — "of the kind condemned in *Hunter*" by "remov[ing] the authority to address a racial problem — and only a racial problem — from the existing decisionmaking body, in such a way as to burden minority interests."[11]

Schuette arose from a reallocation of power that dealt with the controversial topic of affirmative action. In 2006, Michigan voters approved Proposal 2, a state constitutional amendment that prohibited public universities from granting race-based preferences in the admissions process.[12] Proposal 2 was immediately challenged as violating the political-process doctrine by removing from university officials the ability to implement race-based admissions preferences.[13] The district court rejected that argument and granted the Michigan Attorney General's motion for summary judgment.[14] The court found the political-process doctrine inapplicable, distinguishing *Hunter* and *Seattle*, cases involving "laws that protect against *unequal* treatment on the basis of

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[8] *Seattle*, 458 U.S. at 462–63. More precisely, the amendment required all students to go to one of the two schools nearest to them, but then set out numerous exceptions so that, in effect, only desegregative busing was outlawed. *See id.*

[9] *Id.* at 474.

[10] *Id.* at 472; *see id.* at 473.

[11] *Id.* at 474. The local school boards retained authority over almost all school-related issues, but remedying de facto segregation now required lobbying the state legislature or the statewide electorate. *Id.*

[12] *Schuette*, 134 S. Ct. at 1629 (plurality opinion). Proposal 2 passed with fifty-eight percent support and became article I, section 26 of the Michigan Constitution. *Id.* Section 26 provides in relevant part: "The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." MICH. CONST. art. I, § 26.

[13] *See* Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 539 F. Supp. 2d 924, 953 (E.D. Mich. 2008).

[14] *Id.* at 960. The district court also rejected the petitioners' "conventional," *id.* at 951, equal protection argument that eliminating affirmative action is unconstitutional because "university admissions policies that do not consider race are *per se* discriminatory against blacks, Latinos, and Native Americans," *id.* at 948. Under conventional equal protection doctrine, strict scrutiny applies to laws that explicitly classify on the basis of race or that are facially neutral but evince a racially discriminatory motive. *See id.* at 949–50. The court held that Proposal 2 is facially neutral and that the plaintiffs could not prove discriminatory intent. *Id.* at 952–53.

race," from Proposal 2, which prohibits laws "seek[ing] *advantageous* treatment on the basis of race."[15]

A divided panel of the Sixth Circuit reversed the grant of summary judgment, but the full court granted en banc review.[16] The en banc Sixth Circuit then reached the same result by an 8–7 vote.[17] Writing for the majority, then-Judge (now Chief Judge) Cole[18] argued that the *Hunter-Seattle* doctrine prohibits political structures through which "the majority has not only won, but has rigged the game to reproduce its success indefinitely."[19] He concluded that Proposal 2 had reordered the political process to place special burdens on minority interests and was thus subject to strict scrutiny.[20] Because Michigan did not assert that Proposal 2 served a compelling state interest, the Sixth Circuit struck down the provisions.[21]

The Supreme Court reversed.[22] Writing for a plurality, Justice Kennedy[23] began by noting that the case was "not about the constitutionality, or the merits, of race-conscious admissions policies in higher education" but was rather about "whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions."[24] Justice Kennedy then reviewed three important cases in the Court's political restructuring jurisprudence — *Reitman v. Mulkey*,[25] *Hunter*, and *Seattle*[26] — and distilled

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[15] *Id.* at 957 (citing Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 708 (9th Cir. 1997)). The district court later denied a motion to reconsider the grant of summary judgment. Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 592 F. Supp. 2d 948, 952 (E.D. Mich. 2008).

[16] Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 701 F.3d 466, 473 (6th Cir. 2012) (en banc).

[17] *Id.* at 470. The seven dissenting judges filed five separate opinions. Judge Gibbons's dissent (joined in full by four others and in part by one) argued that *Seattle* invalidated a law that was carefully tailored to interfere with desegregative busing (and thus concerned only a racial problem), whereas Proposal 2 ended preferences more generally and broadly. *Id.* at 495–96 (Gibbons, J., dissenting).

[18] Then-Judge (now Chief Judge) Cole was joined by Judges Martin, Daughtrey, Moore, Clay, White, Stranch, and Donald in full and by then-Chief Judge (now Judge) Batchelder and Judges Gibbons, Rogers, Sutton, Cook, and Griffin in Part II.B and C.

[19] *Coal. to Defend Affirmative Action.*, 701 F.3d at 475 (majority opinion).

[20] *See id.* at 485, 488.

[21] *See id.* at 489.

[22] Justice Kagan did not participate in the consideration or decision of the case.

[23] Chief Justice Roberts and Justice Alito joined the plurality opinion.

[24] *Schuette*, 134 S. Ct. at 1630 (plurality opinion).

[25] 387 U.S. 369 (1967). Between 1959 and 1963, the California legislature enacted a series of statutes addressing private discrimination in residential housing. *See id.* at 374. In response, the voters of California passed a state constitutional amendment (coincidentally, also codified at article I, section 26) to preserve the right to sell, lease, or rent property at the owner's absolute discretion. *Id.* The Supreme Court concluded that the amendment would "significantly encourage and involve the State in private discriminations" and was therefore unconstitutional. *Id.* at 381.

[26] Justice Kennedy emphasized that, although desegregative busing without proof of de jure segregation is now unconstitutional under the Court's recent equal protection cases, *Seattle* must

them into the principle that restructuring is impermissible when "the state action in question . . . had the serious risk, if not purpose, of causing specific injuries on account of race."[27] In those cases, "the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race."[28]

The plurality then disavowed, for several reasons, a "broad reading of *Seattle*"[29] that applied strict scrutiny to "any state action with a 'racial focus' that makes it 'more difficult for certain racial minorities than for other groups' to 'achieve legislation that is in their interest.'"[30] First, determining whether legislation is in the interest of a particular racial group required courts to "define individuals according to race"[31] and could require reliance upon "demeaning stereotypes" such as that members of the same racial group share the same political interests.[32] Second, determining the policy realms in which certain racial groups "have a political interest" could create incentives for partisans "to cast the debate in terms of racial advantage or disadvantage."[33] Finally, Justice Kennedy saw "no apparent limiting standards" regarding the public policies that the broad *Seattle* formulation could reach.[34] On the whole, he believed that *Seattle*'s "racial focus" inquiry would lead to "racial antagonisms and conflict."[35] Finding that Proposal 2 neither caused nor risked injury on the basis of race, the plurality concluded that "no authority in the Constitution of the United States or in th[e] Court's precedents" permitted judges to overturn the decision of Michigan voters.[36]

Chief Justice Roberts filed a brief concurring opinion, mainly to respond to Justice Sotomayor's characterization of the plurality's analysis as "out of touch with reality."[37] The Chief Justice emphasized that "[p]eople can disagree in good faith"[38] about the desirability of affirma-

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be understood as a case in which "the legitimacy and constitutionality of the remedy in question . . . was assumed." *Schuette*, 134 S. Ct. at 1633 (plurality opinion).

[27] *Id.*; *see also id.* at 1632 ("*Hunter* rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities.").

[28] *Id.* at 1638.

[29] *Id.* at 1634.

[30] *Id.* ("The expansive reading of *Seattle* has no principled limitation and raises serious questions of compatibility with the Court's settled equal protection jurisprudence.")

[31] *Id.*

[32] *Id.* at 1635.

[33] *Id*. Furthermore, Justice Kennedy objected to the fact that these inquiries would not be guided by "clear legal standards." *Id.*

[34] *Id.* (naming as examples "[t]ax policy, housing subsidies, wage regulations, and even the naming of public schools, highways, and monuments").

[35] *Id.*

[36] *Id.* at 1638.

[37] *Id.* at 1675 (Sotomayor, J., dissenting).

[38] *Id.* at 1639 (Roberts, C.J., concurring).

tive action; it is not out of touch to think "that racial preferences may themselves have the debilitating effect of reinforcing" a minority student's doubts over whether she belongs.[39]

Justice Scalia concurred in the judgment.[40] Like the plurality, Justice Scalia objected to asking whether a policy issue is "racial" because that inquiry was indeterminate and contradicted a "long line of cases"[41] holding that "the Fifth and Fourteenth Amendments . . . protect *persons*, not *groups*."[42] Further, he disparaged the second part of *Hunter-Seattle*, which analyzed whether decisionmaking power has been lodged at a different level of government,[43] because striking down laws on that ground contradicted "the near-limitless sovereignty of each State to design its governing structure as it sees fit."[44] However, Justice Scalia thought the plurality stopped short: he would have overruled both *Hunter* and *Seattle* as "[p]atently atextual, unadministrable, and contrary to [the Court's] traditional equal-protection jurisprudence."[45] He also criticized the plurality's new test for "leav[ing] ajar an effects-test escape hatch," contrary to the well-established *Washington v. Davis*[46] discriminatory purpose requirement.[47]

Justice Breyer also concurred in the judgment. His analysis relied on the fact that Proposal 2 transferred authority from "unelected university faculty members and administrators" to the Michigan voters.[48] Hence, there was no "reordering of the *political* process" that would trigger the *Hunter-Seattle* doctrine.[49]

Justice Sotomayor dissented.[50] She first compared "chang[ing] the basic rules of the political process . . . in a manner that uniquely disadvantaged racial minorities" to previous efforts to limit political par-

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[39] *Id.* at 1638–39.

[40] Justice Scalia was joined by Justice Thomas.

[41] *Schuette*, 134 S. Ct. at 1644 (Scalia, J., concurring in the judgment) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 230 (1995)) (internal quotation mark omitted).

[42] *Id.* (quoting *Adarand*, 515 U.S. at 227) (internal quotation mark omitted).

[43] *Id.* at 1645.

[44] *Id.* at 1646.

[45] *Id.* at 1643.

[46] 426 U.S. 229 (1976).

[47] *Schuette*, 134 S. Ct. at 1647 (Scalia, J., concurring in the judgment). In *Davis*, the Supreme Court held that a law, even one that has a racially disproportionate impact, does not violate the Equal Protection Clause unless it was enacted with "a racially discriminatory purpose." 426 U.S. at 239.

[48] *Schuette*, 134 S. Ct. at 1650 (Breyer, J., concurring in the judgment); *see id.* at 1651.

[49] *Id.* at 1650. In Justice Breyer's view, extending *Hunter* and *Seattle* into the administrative realm was problematic for two main reasons. First, the minority never participated in a "prior electoral process" in which it had won, so the restructuring had not "diminish[ed] the minority's ability to participate meaningfully." *Id.* at 1651. Second, it is "particularly difficult in [the administrative] context for judges to determine when a change in the locus of decisionmaking authority places a comparative structural burden on a racial minority." *Id.*

[50] Justice Sotomayor was joined by Justice Ginsburg.

ticipation by minorities — efforts like disenfranchisement, literacy tests, poll taxes, and gerrymandering.[51] In Justice Sotomayor's view, it was permissible to end affirmative action by either "persuad[ing] existing board members to change their minds" or "vot[ing] uncooperative board members out of office."[52] But Proposal 2 impermissibly created two tracks of political action: "one for persons interested in race-sensitive admissions policies and one for everyone else."[53] The political-process doctrine forbade such two-tiered systems.[54]

The dissent then criticized the plurality for "rewrit[ing] *Hunter* and *Seattle* so as to cast aside the political-process doctrine *sub silentio*" such that it is "unclear what is left" of the doctrine.[55] In addition to invoking stare decisis, Justice Sotomayor justified the political-process doctrine by emphasizing its protection of the minority's right to "meaningful participation in the political process."[56] In her view, Proposal 2 limited minority participation and "restrict[ed] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[57] Applying the *Hunter-Seattle* test, the dissent found that Proposal 2 triggered strict scrutiny because it had a "racial focus"[58] and had reconfigured the existing political process to make it more difficult for minorities — and only minorities — to achieve legislation in their interest.[59] Michigan did not assert that Proposal 2 satisfied a compelling state interest, so Justice Sotomayor would have found the amendment unconstitutional.[60]

The *Schuette* plurality effectively interred the political-process doctrine by reinterpreting *Seattle* and *Hunter* as having invalidated laws that had the serious risk or purpose of causing injury on account of race. But the plurality did not provide a rule for separating injuries on account of race from other injuries. Without a more complete explication of this critical term, the plurality leaves the test's reach undefined and ultimately appears to rely on the same sort of intuition it condemned in the racial-focus prong of the political-process doctrine.

The constitutional infirmity that the political-process doctrine seeks to remedy is not lawmaking tainted by racial prejudice. That is the province of conventional equal protection doctrine, which applies strict

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[51] *Schuette*, 134 S. Ct. at 1652 (Sotomayor, J., dissenting); *see id.* at 1651.

[52] *Id.* at 1653.

[53] *Id.*

[54] *Id.* at 1669.

[55] *Id.* at 1664.

[56] *Id.* at 1668.

[57] *Id.* (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)) (internal quotation mark omitted).

[58] *Id.* at 1659.

[59] *See id.* at 1659–63.

[60] *Id.* at 1663.

scrutiny to explicit race classifications and laws created with a discriminatory intent.[61] By contrast, the political-process doctrine applies strict scrutiny "when the political process or the decisionmaking mechanism used to address racially conscious legislation — and only such legislation — is singled out for peculiar and disadvantageous treatment."[62] Thus, the whole point of the doctrine is to identify a particular kind of decisionmaking structure as intrinsically suspect.[63] By framing *Hunter* and *Seattle* as concerned with concrete racial injuries rather than unequal political processes, the *Schuette* plurality declared that such a structure is not necessarily problematic: rather, strict scrutiny applies only if the majoritarian action produces demonstrable harms beyond the increased difficulty of enacting favorable legislation.[64]

The reinterpretation of *Hunter* and *Seattle* as cases "in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race"[65] raises

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[61] To be sure, these two threads of equal protection — conventional and political process — are intertwined. *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 486 n.30 (1982) ("[S]ingling out the political processes affecting racial issues for uniquely disadvantageous treatment inevitably raises dangers of impermissible motivation."). However, the clear distinction is that, in the political-process cases, plaintiffs were not required to prove discriminatory intent. The *Seattle* majority reconciled that holding with *Davis* by arguing that laws like the antibusing amendment occupied an "inherently suspect category," *id.* at 485, (similar to explicit racial classifications) and thus were subject to strict scrutiny without a motive inquiry. *See id.* ("While decisions such as *Washington v. Davis* . . . considered classifications facially unrelated to race, the charter amendment at issue in *Hunter* dealt in explicitly racial terms with legislation designed to benefit minorities 'as minorities,' not legislation intended to benefit some larger group of underprivileged citizens among whom minorities were disproportionately represented."); *see also* Hunter v. Erickson, 393 U.S. 385, 389 (1969) (labeling the charter amendment "an explicitly racial classification treating racial housing matters differently from other racial and housing matters").

[62] *Seattle*, 458 U.S. at 485 (emphasis omitted). Conversely, the political-process doctrine would not have been implicated if Proposal 2 had removed all authority over admissions policy from the Board of Regents. *See id.* at 486 n.30 ("When political institutions are more generally restructured, . . . '[t]he very breadth of [the] scheme . . . negates any suggestion' of improper purpose." (alterations in original) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 689 (1970) (Brennan, J., concurring))).

[63] *See id.* at 480 n.23 ("[W]hat we find objectionable . . . is the comparative burden [the antibusing amendment] imposes on minority participation in the political process — that is, the racial nature of the way in which it structures the *process* of decisionmaking.").

[64] *See Schuette*, 134 S. Ct. at 1636 (plurality opinion) (describing the absence of a specific injury to be the "principal flaw" in the Sixth Circuit's decision). On this point, Justice Kennedy's statement that *Reitman v. Mulkey*, 387 U.S. 369 (1967), "is a proper beginning point for discussing the controlling decisions," *Schuette*, 134 S. Ct. at 1631 (plurality opinion), is highly revealing. It is difficult to characterize *Reitman* as a political-process case rather than a traditional equal protection case. The *Reitman* opinion nowhere discussed the unique burdens minorities would face to overturn the state constitutional amendment. *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 272 (1991). Rather, the difficult question that divided the Court 5–4 was whether, in repealing the antidiscrimination measure, the state had become so involved with private discrimination as to violate equal protection. *See Reitman*, 387 U.S. at 378–79; *id.* at 392 (Harlan, J., dissenting).

[65] *Schuette*, 134 S. Ct. at 1638 (plurality opinion).

the question of what exactly constitutes such an injury. The disadvantage borne by minorities in *Hunter* was private discrimination,[66] and thus was not by itself a constitutional injury — that is, a violation of the Fourteenth Amendment.[67] Of course, if the disadvantage had to be a constitutional injury, there would be no need to rely on the political-process doctrine since conventional equal protection would cover all such cases. To the *Hunter* Court, the charter amendment was unconstitutional not because it brought about private discrimination but because it restructured the political process to burden minority interests. However, to the *Schuette* plurality, what mattered was that the charter amendment had the serious risk (or purpose) of causing private housing discrimination, an injury on account of race.

Identifying the injury in *Seattle* presented more of a predicament for the plurality. The *Seattle* Court seemed to believe the injury was de facto school segregation,[68] but if de facto segregation can be an injury on the basis of race, why not the revocation of affirmative action? Instead, Justice Kennedy hinted that the injury in *Seattle* had really been the segregative outcomes of "a system of *de jure* segregation."[69] This suggestion drew significant criticism from both Justice Scalia and Justice Sotomayor, who argued that the *Seattle* Court could not have known of the "recently discovered evidence" of de jure segregation that the plurality invoked.[70] In any case, Justice Kennedy's suggestion

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[66] Similarly, Justice Kennedy described one couple's inability to rent an apartment and another couple's eviction in *Reitman* as "adverse actions . . . on account of race." *Id.* at 1631.

[67] The Civil Rights Cases, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment."); *see also Reitman*, 387 U.S. at 378–79. State encouragement of private discrimination — even very slight encouragement — could be a constitutional injury. *See* Klarman, *supra* note 64, at 269–79 (describing decisions relaxing the state action requirement during the Vinson and Warren Courts). But in *Schuette* the plurality opinion separated "injury on the basis of race" from the "state encouragement or participation" that aggravates it, *Schuette*, 134 S. Ct. at 1632 (plurality opinion), so private discrimination seems to be what the plurality had in mind.

[68] The decision consistently characterized the busing at issue as remedying de facto segregation. *See Seattle*, 458 U.S. at 474–75 ("Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. . . . In a very obvious sense, the initiative thus 'disadvantages those who would benefit from laws barring' *de facto* desegregation 'as against those who . . . would otherwise regulate' student assignment decisions . . . ." (second omission in original) (quoting Hunter v. Erickson, 393 U.S. 385, 391 (1969))).

[69] *Schuette*, 134 S. Ct. at 1633 (plurality opinion). The plurality never explicitly identified the injury in *Seattle*, but it did say that the "disapproval of the . . . busing remedy was an aggravation of the very racial injury in which the State itself was complicit." *Id.* Justice Scalia read the plurality opinion to mean that the injury was "Seattle's equal-protection-denying status quo," *id.* at 1642 (Scalia, J., concurring in the judgment), which would have made it a constitutional injury. Justice Sotomayor similarly understood the plurality to mean that because "Seattle's desegregation plan was constitutionally required, . . . the initiative halting the plan was an instance of invidious discrimination aimed at inflicting a racial injury." *Id.* at 1664 (Sotomayor, J., dissenting).

[70] *Id.* at 1642 (Scalia, J., concurring in the judgment); *see id.* at 1663–64 (Sotomayor, J., dissenting).

that *Seattle* involved de jure segregation could not have meant that a racial injury must implicate the Constitution since the detriment in *Hunter* — private housing discrimination — clearly did not. Rather, Justice Kennedy might have meant that de jure school segregation is a sufficient injury based on race, while de facto segregation is not, for a reason other than the fact that the first is a violation of the Constitution, while the second is not.[71] But imagining such a reason is difficult — the impact on the minority group appears to be the same, and the presence of state action appears to be the predominant difference.[72]

Thus the plurality's test turns on the question of which effects count as injuries based on race. The plurality asserted without explanation that *Schuette* did not present the "infliction of a specific injury of the kind at issue in [*Reitman*] and *Hunter* and in the history of the Seattle schools."[73] But what is the line separating private discrimination in residential housing and de jure (or perhaps de facto) school segregation from the loss of race-based admissions preferences? After all, some of the *Schuette* plaintiffs considered affirmative action to be a right — "a system that embodies equality by offsetting systemic handicaps (e.g., having grown up poor and having attended an underfunded school)."[74] Without further explicating what "injury on the basis of race" means, the plurality's test may prove difficult for lower courts to apply.

In addition to being imprecise, the plurality's test also seems to require the sort of race-based analysis that the five conservative Justices have consistently sought to eliminate. In *Schuette*, both Justice Kennedy and Justice Scalia disparaged the racial-focus prong of the political-process doctrine as indeterminate and undesirable.[75] Their desire to move away from the racial-focus analysis is consistent with their past views on race. The five Justices who signed on to the plu-

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[71] *See* Milliken v. Bradley, 433 U.S. 267, 280 n.14 (1977).

[72] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 795 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("From the standpoint of the victim, . . . an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law."). Then again, it is possible that de jure segregation imposes some extra harm that de facto segregation does not. *See* Yifat Bitton, *The Limits of Equality and the Virtues of Discrimination*, 2006 MICH. ST. L. REV. 593, 599 ("[T]he [de jure/de facto] distinction matters to the way in which discriminated against groups perceive themselves politically and how others perceive the discriminated against groups.").

[73] *Schuette*, 134 S. Ct. at 1636 (plurality opinion).

[74] Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 539 F. Supp. 2d 924, 948 (E.D. Mich. 2008).

[75] *See Schuette*, 134 S. Ct. at 1635 (plurality opinion) ("Were courts to embark upon this venture not only would it be undertaken with no clear legal standards or accepted sources to guide judicial decision but also it would result in, or at least impose a high risk of, inquiries and categories dependent upon demeaning stereotypes, classifications of questionable constitutionality on their own terms."); *id.* at 1643 (Scalia, J., concurring in the judgment) ("No good can come of such random judicial musing.").

rality opinion and Justice Scalia's concurrence are the same five who struck down Seattle's voluntary desegregative busing plan in *Parents Involved in Community Schools v. Seattle School District No. 1*.[76] In that case, both the plurality opinion and Justice Kennedy's concurrence objected to labeling students by race,[77] and it makes sense that the same Justices would also object to labeling select political issues as "racial" or select policies as those minorities would consider to be in their interest. However, it appears that the plurality's test — in focusing on injury on account of race — will require a similar kind of analysis. That is, it is unclear how courts will determine whether a law's effect constitutes a racial injury without surveying those affected, classifying them by race, and determining whether a policy has inured to the detriment of minorities.[78] If the charter amendment in *Hunter* resulted in landlords refusing to rent to both blacks and whites, for instance, it would seem odd to call inability to find housing an injury on the basis of race.

Schuette rewrote *Hunter* and *Seattle* and discarded the political-process doctrine's central idea — that a political restructuring can violate the Constitution merely by making it more difficult to enact legislation that addresses a racial issue. The plurality criticized *Seattle* as requiring inquiries that have "no clear legal standards."[79] Yet its own test will also prove difficult to apply because the crucial term "injury on the basis of race" does not have a self-evident meaning. Application of the *Schuette* test may ultimately require the same kinds of race-based considerations the plurality and Justices Scalia and Thomas found unacceptable in the political-process doctrine.

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[76] 551 U.S. 701.

[77] *Id.* at 730 (plurality opinion) ("[T]he Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)) (internal quotation mark omitted)); *id.* at 798 (Kennedy, J., concurring in part and concurring in the judgment) ("What the government is not permitted to do . . . is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand.").

[78] In fact, any effects-based test designed to measure disparate impact on racial minorities must first define the composition of the minority group. For instance, in the context of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (2012), which prohibits employment practices with a disparate impact, "[c]ourts must classify members of the workforce by race in order to adjudicate disparate impact claims." Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1363 (2010); *see also* Ricci v. DeStefano, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) ("Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes.").

[79] *Schuette*, 134 S. Ct. at 1635 (plurality opinion).