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CONSTITUTIONAL LAW—EQUAL PROTECTION—DEMOCRATIC AMENDMENT TO MICHIGAN'S CONSTITUTION PROHIBITING AFFIRMATIVE ACTION UPHELD AS CONSTITUTIONAL.

Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014).

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In its plurality opinion, the Supreme Court of the United States precisely asserted the issue at bar in *Schuette v. Coalition to Defend Affirmative Action*[1]: "[I]t is important to note what this case is not about. It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education."[2] Instead, the issue in *Schuette* arose out of a statewide debate regarding race-conscious governmental decisionmaking.[3] In 2003, the Supreme Court of the United States ruled on two affirmative action cases from Michigan: *Gratz v. Bollinger*[4] and *Grutter v. Bollinger*.[5] Thereafter, Michigan voters adopted an amendment to the State Constitution prohibiting race-based preferences during the admissions process for state universities and other state actions.[6] Originally entitled Proposal 2, the amendment became Article I, § 26, of the Michigan Constitution after it passed by a voting margin of 58% to 42% in 2006.[7]

Initially, two lawsuits challenging the addition to Michigan's Constitution, Section 26, were consolidated by the United States

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[1] Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014) (plurality opinion).

[2] *Id.* at 1630.

[3] *Id.* at 1629.

[4] 539 U.S. 244 (2003).

[5] 539 U.S. 306 (2003).

[6] *Schuette*, 134 S. Ct. at 1629. In *Gratz*, the University of Michigan's undergraduate admissions process, permitting the explicit consideration of an applicant's race, violated the Equal Protection Clause. *Id.* (citing *Gratz*, 539 U.S. at 270). In *Grutter*, the University of Michigan's law school admissions process permitted a more limited consideration of an applicant's race which the Supreme Court found constitutional. *Id.* (citing *Grutter*, 539 U.S. at 343).

[7] *Id.*

District Court for the Eastern District of Michigan.[8] In 2008, the district court upheld Section 26[9] by granting summary judgment to Michigan and "[denying] a motion to reconsider the grant of summary judgment."[10] In 2011, a panel of the United States Court of Appeals for the Sixth Circuit reversed the grant of summary judgment, holding that Section 26 violated principles the Supreme Court of the United States developed in *Washington v. Seattle School Dist. No. 1*.[11] In 2012, the Sixth Circuit, en banc, upheld the panel's decision and stated that *Seattle* "mirrors the [case] before us."[12] Later, in 2013, the Supreme Court of the United States granted certiorari.[13]

Veiled by the principle of affirmative action, the circumstances in *Schuette* asked the Supreme Court the more pointed question of whether democratic action taken by voters to enact an amendment to the state constitution prohibiting race-conscious preferences in state governmental actions is a violation of

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[8] *Id.* at 1629–30. There were several plaintiffs involved: the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), students, faculty, and prospective applicants to Michigan public universities. *Id.* "The named defendants included then-Governor Jennifer Granholm, the Board of Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University. The Michigan Attorney General was granted leave to intervene as a defendant." *Schuette*, 134 S. Ct. at 1630.

[9] Article I, § 26 of the Michigan Constitution states, in pertinent part:

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.
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> (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

MICH. CONST. art. I, § 26.

[10] *Schuette*, 134 S. Ct. at 1630.

[11] *Id.*; Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 487 (1982). The principle established in *Seattle* is "any state action with a 'racial focus' that makes it 'more difficult for certain racial minorities than for other groups' to 'achieve legislation that is in their interest' is subject to strict scrutiny." *Schuette*, 134 S. Ct. at 1634 (quoting *Seattle*, 458 U.S. at 470, 474). This is also known as the political-process doctrine. *Id.* at 1640 (Scalia, J., concurring).

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

[13] *Id.*

the Equal Protection Clause of the United States Constitution.[14] Consistent in identifying this issue, the Court repeatedly asserted that it was not ruling on the constitutionality or the merits of race-conscious admissions policies in higher education.[15] As Justice Kennedy noted, "[t]his case is not about how the debate about racial preferences should be resolved. It is about *who* may resolve it."[16] In reversing the decision of the Court of Appeals for the Sixth Circuit, the Court stated that "[t]here is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters."[17]

The enduring principle of democracy and the capacity of voters to enact laws fueled the Court's reasoning in *Schuette*. To begin, the Court addressed why the reasoning of the lower courts was misplaced.[18] The Court of Appeals for the Sixth Circuit relied heavily on *Washington v. Seattle School District No. 1* in determining Section 26 was invalid.[19] The Court detailed in great length the conclusion reached in *Seattle*[20]: a conclusion in line with case precedent from *Reitman v. Mulkey*[21] and *Hunter v. Erickson*.[22] In those cases, amendments enacted by voters directly resulted in specific injuries on the basis of race.[23] No infliction of a specific injury of the kind at issue in *Mulkey*, *Hunter*, and *Seattle* existed in *Schuette*.[24] Rather, the amendment in *Schuette* involved a constitutionally valid principle, affirmative action.[25] By removing the use of affirmative action policies, Section 26 in

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[14] *See id.* at 1629–31.

[15] *Id.* at 1630, 1638.

[16] *Id.* at 1638 (emphasis added).

[17] *Id.* Additionally, the Court highlighted the fact that open debate on an issue such as affirmative action "all too often may shade into rancor, . . . [b]ut that does not justify removing certain court-determined issues from voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate." *Schuette*, 134 S. Ct. at 138.

[18] *Id.* at 1630–31.

[19] *Id.* at 1630; Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).

[20] *See Schuette*, 134 S. Ct. at 1631–34.

[21] Reitman v. Mulkey, 387 U.S. 369 (1967).

[22] Hunter v. Erickson, 393 U.S. 385 (1969).

[23] *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967).

[24] *Schuette*, 134 S. Ct. at 1636.

[25] *See id.* at 1630–31.

no way enabled unconstitutional state actions like the amendments in the other cases.[26] Therefore, the Court stated, "there is no precedent for extending these cases to restrict the right of Michigan voters to determine that race-based preferences granted by Michigan governmental entities should be ended."[27] On that basis, the Court declined to extend the principles of *Mulkey*, *Hunter*, and *Seattle* to apply to the issue in *Schuette*.[28] Extending these principles would go against fundamental principles of the Equal Protection Clause,[29] moreover, affirming the reasoning of the Court of Appeals for the Sixth Circuit would invalidate holdings made by the Court of Appeals for the Ninth Circuit and the Supreme Court of California on the same issue.[30]

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[26] *See id*. at 1635–36.

[27] *Id*. at 1636. "*Mulkey*, *Hunter*, and *Seattle* are not precedents that stand for the conclusion that Michigan's voters must be disempowered from acting." *Id.* at 1637–38. *See* Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 708 (9th Cir. 1997) ("That the Constitution *permits* the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether. States are free to make or not make any constitutionally permissible legislative classification."); *id.* at 709 ("To hold that a democratically enacted affirmative action program is constitutionally permissible because the people have demonstrated a compelling state interest is hardly to hold that the program is constitutionally required.").

[28] *See Schuette*, 134 S. Ct. at 1637–38.

[29] *See id.* at 1634.

[30] *Id.* at 1636. In *Coalition for Economic Equity v. Wilson*, voters adopted an amendment to the California Constitution with language identical to that of Section 26 of the Michigan Constitution. *Wilson*, 122 F.3d at 696. A lawsuit was filed challenging the amendment on the issue of whether a provision adopted and enacted by the voters prohibiting public race and gender preferences violated the Equal Protection Clause of the United States Constitution. *Id.* at 697. The Ninth Circuit Court of Appeals held that the amendment does not violate the United States Constitution. *Id.* at 701. The court reasoned that the amendment providing that the state shall not discriminate or grant preferential treatment on the basis of race does not classify individuals by race; rather, the amendment "*prohibits* the State from classifying individuals by race or gender. A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender." *Id.* at 702. Therefore, an amendment that bans race and gender preferences, "as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense." *Id.* In *Coral Construction, Inc. v. City & County of San Francisco*, the same amendment to the California Constitution banning racial preferences was challenged on the grounds that it violated the political structure doctrine of *Seattle*. Coral Constr., Inc. v. City & Cnty. of San Francisco, 235 P.3d 947, 956 (Cal. 2010). The Supreme Court of California held that the amendment did not violate the Equal Protection Clause or the political structure doctrine. *Id.* at 956–61. The court noted that the amendment "directly serves the principle that 'all governmental use of race must have a logical end point.'" *Id.* at 960 (citing Grutter v. Bollinger, 539 U.S. 306, 342 (2003)).

With this ruling, the Supreme Court of the United States validated bans on affirmative action policies already in place in seven other states.[31]

Affirmative action is "[a] set of actions designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination."[32] This lingering discrimination comes from a social movement that sparked wide spread debate, hatred, and violence throughout the nation. The Civil Rights Movement of the 1960s influenced this country not only to fully recognize the language of the Equal Protection Clause, but also to live it through actions aimed toward attaining true equality.[33] In 1964, in the midst of the country's colossal transition, Californians voted on a statewide ballot initiative, Proposition 14.[34] This initiative is the centerpiece of *Reitman v. Mulkey*, a case the Supreme Court of the United States heard while the country was enduring an important but difficult transition.[35] Proposition 14 became Article I, Section 26 of the California Constitution, which prohibited any and all state legislative interference with an individual's choice to decline to sell or rent residential property on any basis.[36]

Two separate cases arose questioning the validity of Section 26. First, in *Mulkey v. Reitman*, the Mulkeys sued under Sections

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[31] The following states currently have approved measures: California (1995), Texas (1997), Washington (1998), Florida (1999), Nebraska (2008), Arizona (2010), and New Hampshire (2011). *Affirmative Action: State Action*, NATIONAL CONFERENCE OF STATE LEGISLATORS, (April 2014), http://www.ncsl.org/research/education/aff irmative-action-state-action.aspx.

[32] *Affirmative Action Definition*, BLACK'S LAW DICTIONARY 68 (9th ed. 2009).

[33] *See, e.g.*, Noam Chomsky, *The Election, Economy, War, and Peace*, ZNET (Nov. 25, 2008), https://zcomm.org/znetarticle/the-election-economy-war-and-peace-by-noam-chomsky/ ("The two candidates in the [2008] Democratic primary were a woman and an African-American. That too was historic. It would have been unimaginable forty years ago. The fact that the country has become civilized enough to accept [a Black family in the White House] is a considerable tribute to the activism of the 1960s and its aftermath.").

[34] *See* Reitman v. Mulkey, 387 U.S. 369, 370–71 (1967).

[35] *See id.* at 372–74.

[36] *Id.* at 371. The Proposition stated in pertinent part:

> 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.

CAL. CONST. art. I, § 26 (1964), *reprinted in Mulkey*, 387 U.S. at 371 n.2

51 and 52 of the California Civil Code, claiming that Reitman declined to rent them an apartment because of the their race.[37] Reasoning that the Mulkey's basis for their lawsuit was rendered null and void by the State's recent adoption of Proposition 14, Reitman moved for summary judgment.[38] At trial, the court granted Reitman's motion for summary judgment and the Mulkeys appealed their case to the Supreme Court of California.[39] In the second case, *Prendergast v. Snyder*, the Prendergasts sought to reverse an eviction from their apartment that allegedly was motivated on the basis of racial prejudice.[40] In a cross-complaint filed by Snyder, he claimed he had the right to terminate tenancy agreements even if it was racially motivated.[41] The trial court denied Snyder's motion for summary judgment and dismissed his cross-complaint with prejudice, finding "it unnecessary to consider the validity of Proposition 14 because it concluded that judicial enforcement of an eviction based on racial grounds would . . . violate the Equal Protection Clause of the United States Constitution."[42] Snyder appealed to the Supreme Court of California where his case was heard alongside the Mulkeys'.[43]

The Supreme Court of California reversed the trial court's decision in the Mulkeys' case and held that Section 26 was "invalid as denying the equal protection of the laws guaranteed by the Fourteenth Amendment."[44] Recognizing the importance of this case, the Supreme Court of the United States granted certiorari.[45] Before the Court was the issue of whether Section 26 denied the equal protection of the laws within the meaning of

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[37] *Mulkey*, 387 U.S. at 372. Specifically, the Mulkeys brought their claim under Sections 51 and 52 of the California Civil Code. *Id.* Section 51 provided in pertinent part:

> All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

CAL. CIV. CODE § 51-52 (1959), *as reprinted in Mulkey*, 387 U.S. at 372 n.3.

[38] *Mulkey*, 387 U.S. at 372.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 372–73.

[43] *Id.* at 373.

[44] *Mulkey*, 387 U.S. at 373.

[45] *Id.* The United States Supreme Court affirmed the findings of the Supreme Court of California. *Id.*

the Fourteenth Amendment of the Constitution of the United States.[46] The Supreme Court of the United States reiterated the legal analysis applied by the Supreme Court of California in finding Section 26 unconstitutional.[47]

The Court first reviewed Section 26 in terms of its purpose and effect on private discrimination in residential housing.[48] Past efforts to regulate private discrimination in residential housing formed the historical foundation on which Section 26 was passed—a foundation eliminated entirely by the passage of Section 26.[49] The Supreme Court of California stated that the immediate design and intent of Section 26 was "'to overturn state laws that bore on the right of private sellers and lessors to discriminate,' the Unruh and Rumford Acts, and 'to forestall future state action that might circumscribe this right.'"[50] Section 26 ultimately created a constitutional right to privately discriminate on the basis of race; a right unavailable under the Equal Protection clause should state action be involved.[51]

Next, the Court reviewed the Supreme Court of California's analysis on whether the State was involved in private residential discrimination to the extent that their involvement became an unconstitutional state action.[52] To safeguard against potentially unconstitutional state involvement in private discrimination, "the court deemed it necessary to determine whether Proposition 14 invalidly involved the State in racial discriminations in the housing market."[53] In concluding that Proposition 14 did invalidly involve the State in racial discriminations, the court "could 'conceive of no other purpose for an application of [S]ection 26 aside from authorizing the perpetration of a purported

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[46] *Id.* at 370.

[47] *See id.* at 381.

[48] *Id.* at 374.

[49] *See Mulkey*, 387 U.S. at 374. In 1959, the Unruh Act, also entitled California Civil Code Sections 51 and 52, was passed and is the basis of the Mulkey's case. *Id.* Another piece of legislation was the Hawkins Act, which prohibited discriminations in publicly assisted housing. *Id.* More legislation followed and "[i]n 1961, the legislature enacted proscriptions against restrictive covenants." *Id.* In 1963, the Rumford Fair Housing Act replaced the Hawkins Act by "prohibiting racial discriminations in the sale or rental of any private dwelling containing more than four units." *Id.*

[50] *Id.*

[51] *See Mulkey*, 387 U.S. at 374.

[52] *Id.* at 374–75 (citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)).

[53] *Id.* at 375.

private discrimination,'" to which the State would be a partner.[54] Therefore, with the encouragement of unconstitutional State involvement in discrimination, Section 26 was held invalid under the Equal Protection Clause of the United States Constitution.[55]

Reitman argued that the court was misinterpreting the Fourteenth Amendment "since the repeal of any statute prohibiting racial discrimination, which is constitutionally permissible, may be said to 'authorize' and 'encourage' discrimination because it makes legally permissible that which was formerly proscribed."[56] The Supreme Court of California found several reasons why Reitman's logic was improper.[57] First, the court rejected the idea that the State was required to have a statute prohibiting racial discrimination.[58] Second, the court asserted the intent of Section 26 was to create a constitutional right to privately discriminate.[59] Third, the court concluded that Section 26 would significantly involve the State in private racial discrimination contrary to the Equal Protection Clause.[60] The Supreme Court of the United States affirmed the Supreme Court of California's conclusion that Section 26 allowed "private racial discriminations to an unconstitutional degree."[61]

Two years after the United States Supreme Court decision in *Reitman v. Mulkey*, a similar issue arose in *Hunter v. Erickson* when an amendment was enacted by the voters of Ohio which overturned a fair housing ordinance and required any additional

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[54] *See id.* The court supported this conclusion with case precedents identifying unconstitutional state actions of discrimination in which the state "authorized" or "encouraged" discrimination. *Id.*

[55] *Id.* at 376.

[56] *Mulkey*, 387 U.S. at 376.

[57] *See id.* The Court stated:

> But, as we understand the California court, it did not posit a constitutional violation on the mere repeal of the Unruh and Rumford Acts. It did not read either our cases or the Fourteenth Amendment as establishing an automatic constitutional barrier to the repeal of an existing law prohibiting racial discriminations in housing; nor did the court rule that a State may never put in statutory form an existing policy of neutrality with respect to private discriminations.

Id.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 378–79.

antidiscrimination housing ordinances to be approved by referendum.[62] In 1964, the City Council of Akron, Ohio enacted a fair housing ordinance to address problems caused by racial discrimination in residential housing.[63] This fair housing ordinance provided a platform for the plaintiff, Mrs. Hunter, to file a complaint alleging she was discriminated against when her real estate agent informed Mrs. Hunter that she could not see any houses on the list of houses for sale because those homeowners "did not wish their houses shown to negroes."[64] In response to her complaint, Mrs. Hunter was informed that the provisions under the fair housing ordinance were unavailable to her because the City Charter of Akron, Ohio was amended, overturning that ordinance.[65]

Mrs. Hunter brought legal action seeking to obtain a writ of mandamus requiring enforcement of the fair housing ordinance and permission to move forward with her complaint.[66] The Supreme Court of Ohio reversed the trial court's decision, concluding that enforcement of the provisions of the fair housing ordinance was invalid under state law.[67] The court remanded the case back to the trial court where it was decided that the fair housing ordinance was rendered ineffective by the charter amendment.[68] The Supreme Court of Ohio affirmed this con-

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[62] *See* Hunter v. Erickson, 393 U.S. 385, 387–89 (1969).

[63] *Id.* at 386, 391 ("[T]he population of Akron consists of 'people of different race, color, religion, ancestry or national origin, many of whom live in circumscribed and segregated areas, under substandard unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing.'")

[64] *Id.* at 387.

[65] *Id.* The city charter provided, in pertinent part:

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

Id. Placed on the ballot at a general election upon petition of more than 10% of Akron's voters, this charter amendment passed by a majority. *Hunter*, 393 U.S. at 387.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 388.

clusion, "holding that the charter amendment was not repugnant to the Equal Protection Clause of the Constitution."[69] The issue before the Supreme Court of the United States on appeal was whether the City of Akron, by amending its city charter to prevent the city council from implementing any antidiscrimination ordinances without the approval of the majority of the voters of Akron, denied Mrs. Hunter equal protection of the law.[70] The Court held that the charter amendment "discriminates against minorities, and constitutes a real, substantial, and invidious denial of the equal protection of the laws."[71]

With the passing of the Civil Rights Act of 1968 and other legislation related to open housing, the City of Akron argued that the case was moot.[72] However, the legislation cited by the City of Akron was not intended to obstruct local housing ordinances.[73] The Civil Rights Act of 1968 "specifically preserves and defers to local fair housing laws," and the Akron fair housing ordinance is "precisely [the] sort of very localized solution to which Congress meant to defer."[74] Therefore, the Court rejected the City's contention that the case was moot.[75] The City further argued that the case before the Court was unlike *Reitman v. Mulkey* "in that here the city charter declares no right to discriminate in housing, authorizes and encourages no housing discrimination, and places no ban on the enactment of fair housing ordinances."[76] The Court agreed and duly noted *Reitman v. Mulkey* was not needed to decide the case before them because "unlike *Reitman*, there was an explicitly racial classification treating racial housing matters differently from other racial and housing matters."[77]

The underlying problem of the amendment to the Charter of the City of Akron was not only the elimination of existing ordinances prohibiting racial discrimination in residential housing but also the mandate that all other similar ordinances had to be approved by a majority of the city voters.[78] For minorities who

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[69] *Id.*
[70] *Id.* at 386.
[71] *See Hunter*, 393 U.S. at 393.
[72] *Id.* at 388.
[73] *See id.*
[74] *Id.* at 388–89.
[75] *Id.* at 389.
[76] *Id.*
[77] *Hunter*, 393 U.S. at 389.
[78] *Id.* at 389–90.

reaped the benefits of antidiscrimination ordinances, the process by which they could regain that protection was immensely more difficult due to the referendum mandated for passage of antidiscrimination ordinances under the new City Charter.[79] The Court concluded that this placed a special burden on minorities within the governmental process equivalent to "denying them the vote, on an equal basis with others."[80] The amendment to the Akron City Charter unconstitutionally disadvantaged the minority group by making it more difficult to enact legislation on their behalf, just as it is similarly unconstitutional to "dilute any person's vote or give any group a smaller representation than another of comparable size."[81]

Despite several years of time passing after the Civil Rights Movement of the 1960s, racial prejudice continued to present problems in residential housing.[82] These problems had a direct effect on the racial balance among public school systems where the segregation in the school system directly correlated with the way school districts were drawn in residential areas.[83] This nationwide problem affected nearly every citizen of the United States, and local governments fought tirelessly to mend a nation driven by racial prejudice.[84] Some programs were put into place in an attempt to solve the problem of racially imbalanced schools.[85] One of these programs was the core of the issue in

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[79] *See id.* at 390. The court elaborated noting the amendment "drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends." *Id.*

[80] *Id.* at 391.

[81] *Id.* at 392–93 (citing Avery v. Midland Cnty., 390 U.S. 474, 478–80 (1968); Reynolds v. Sims, 377 U.S. 533, 568 (1964)).

[82] *See generally* NAT'L COMM'N ON FAIR HOUSING & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING 5–12 (Dec. 9, 2008), *available at* http://www.civilrights.org/publications/reports/fairhousing/future_of_fair_housing_report.pdf (examining the historical roots of racial and economic discrimination and segregation in housing and schooling persisting after the enactment of the Fair Housing Act).

[83] *See id.* at 6 ("Housing segregation and school segregation are also intertwined, creating a vicious cycle of a lack of opportunity and a lack of education.").

[84] *See* Nicole Love, Note, Parents Involved in Community Schools v. Seattle School District No. 1*: The Application of Strict Scrutiny to Race-Conscious Student Assignment Policies in K-12 Public Schools*, 29 B.C. THIRD WORLD L.J. 115, 122–24 (2009) (describing the contentious court proceedings in the 1960s and 1970s to define the scope of Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

[85] *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 460 (1982). Racial imbalance "exists when the combined minority student enrollment in a school exceeds the districtwide combined average by 20 percentage points, provided that

Washington v. Seattle School District No. 1.[86]

The Seattle School District included 112 schools with 54,000 public school students, thirty-seven percent of whom belonged to a racial minority.[87] An attempt to relieve racial imbalance in Seattle schools by implementing a magnet program encouraging voluntary student transfers failed as program ultimately increased the racial imbalance of the Seattle school system.[88] Desperate to find a solution to racial imbalance, the District concluded that the only solution would be the mandatory reassignment of students.[89] In 1978, the District announced the "Seattle Plan" for desegregation, which made extensive use of busing for the mandatory reassignment of students.[90] This program proved to be effective, with substantial reductions of the number of racially imbalanced schools and substantial reductions in the percentage of minority students in those schools still racially imbalanced.[91]

Opponents of the Seattle Plan proposed an initiative barring the use of mandatory busing for desegregation.[92] The proposal, entitled Initiative 350, in pertinent part 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 . . .

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the single minority enrollment . . . of no school will exceed 50 percent of the student body." *Id.* at 460 (alteration in original) (quoting Seattle Sch. Dist. No. 1 v. Washington, 473 F. Supp. 996, 1006 (W.D. Wash. 1979), *aff'd in part, rev'd in part sub nom*. Seattle Sch. Dist. No. 1 v. Wash., 633 F.2d 1338 (9th Cir. 1980), *aff'd sub nom*. *Seattle*, 458 U.S. 457 (1982)) (internal quotation marks omitted).

[86] *Id.* at 457.

[87] *See id.* at 459–60.

[88] *See id.* at 461 (citing *Seattle*, 473 F. Supp. at 1006).

[89] *See id.*

[90] *Seattle*, 458 U.S. at 461. The plan

> desegregates elementary schools by "pairing" and "'triading" predominantly minority with predominantly white attendance areas, and by basing student assignments on attendance zones rather than on race. The racial makeup of secondary schools is moderated by 'feeding' them from the desegregated elementary schools. The District represents that the plan results in the reassignment of roughly equal numbers of white and minority students, and allows most students to spend roughly half of their academic careers attending a school near their homes.

Id. at 461 (citation omitted) (citing Brief for Appellees at 5, *Seattle*, 548 U.S. 457 (No. 81–9)).

[91] *Id.* (quoting *Seattle*, 473 F. Supp. at 1007).

[92] *Id.* at 462.

and which offers the course of study pursued by such student.'"[93] In 1978, two months after the Seattle Plan went into effect, Initiative 350 was on a statewide ballot and passed by sixty-six percent of the vote.[94] Subsequently, the District filed suit "against the State in the United States District Court for the Western District of Washington, challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment."[95] After trial, the District Court held Initiative 350 unconstitutional and the implementation of Initiative 350 was permanently enjoined.[96] The Court of Appeals for the Ninth Circuit affirmed the District Court's decision based entirely on their reasoning that the initiative established an impermissible racial classification in violation of *Hunter*.[97] The Ninth Circuit noted that Initiative 350 subjected "desegregative" student assignments to unique treatment, created a constitutionally suspect racial classification, and "radically restructure[d] the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies."[98] The Supreme Court of the United States granted certiorari to address this important issue in the national education system.[99]

Specifically before the Court was the issue of whether an elected local school board may use the Fourteenth Amendment to defend its program of busing for integration from attack by the state.[100] In response, the Court affirmed the decision made

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[93] *Id.* (alterations in original). The Court noted that Initiative 305 also set out several broad exceptions to this requirement:

> a student may be assigned beyond his neighborhood school if he "requires special education, care or guidance," or if "there are health or safety hazards, either natural or man made, or physical barriers or obstacles . . . between the student's place of residence and the nearest or next nearest school," or if "the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities."

Id. (alteration in original).

[94] *Seattle*, 458 U.S. at 463.

[95] *Id.* at 464. "The United States and several community organizations intervened in support of the District; CiVIC [Citizens for Voluntary Integration Committee] intervened on behalf of the defendants." *Id.*

[96] *Id.* at 465–66.

[97] *Id.* at 466.

[98] *Id.*

[99] *Seattle*, 458 U.S. at 467.

[100] *Id.* at 467.

by the Court of Appeals for the Ninth Circuit.[101] Finding support from *Hunter v. Erickson*, the Court declared Initiative 350 to be invalid because "it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities."[102] The initiative treated educational matters involving racial problems different than other problems, "explicitly using the *racial* nature of a decision to determine the decisionmaking process."[103] The realistic effect of Initiative 350 was to reallocate the power to make educational policy decisions on racial matters from the school boards to the State's electorate.[104] After the initiative was passed, the school board maintained the power to make educational policy decisions in all areas except one: racial matters.[105]

In 1967, the *Mulkey* Court struck down a voter enacted amendment to the California Constitution authorizing the right to privately discriminate.[106] In 1969, the *Hunter* Court struck down a voter enacted amendment to the City Charter of Akron overturning the fair housing ordinance and mandating a referendum for all additional antidiscrimination ordinances.[107] In 1982, the *Seattle* Court struck down a voter enacted amendment barring the use of busing for desegregation in the public school

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[101] *Id.* at 470.

[102] *Id.* at 470. The Court also found support from a factually analogous case, *Lee v. Nyquist*, where a New York school board's attempt to implement an integration plan was impeded by a legislative statute passed to bar state education officials and school boards from "assign[ing] or compel[ing] [students] to attend any school on account of race . . . or for the purpose of achieving [racial] equality in attendance . . . at any school." *Id.* at 469 (alterations in original) (quoting Lee v. Nyquist, 318 F. Supp. 710, 712 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971)) (internal quotation marks omitted). There, the District Court applied *Hunter* and invalidated the statute holding that it

> "place[d] *burdens* on the implementation of educational policies designed to deal with race on the local level" by "treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools." This drew an impermissible distinction "between the treatment of problems involving racial matters and that afforded other problems in the same area."

Id. (alteration in original) (quoting *Nyquist*, 318 F. Supp. at 718–19). The Supreme Court of the United States subsequently affirmed the District Court's opinion in *Nyquist*. *Id.*

[103] *Seattle*, 458 U.S. at 470.

[104] *See id.* at 470–71.

[105] *Id.* at 480.

[106] Reitman v. Mulkey, 387 U.S. 369, 395–96 (1967).

[107] Hunter v. Erickson, 393 U.S. 385, 392–93 (1969).

systems.[108] In 2014, the *Schuette* Court upheld a voter enacted amendment to the Michigan Constitution barring the use of affirmative action policies in state governmental actions.[109] The United States of America survives on the foundational principle of democracy. The Declaration of Independence proclaims, "Governments are instituted among Men, deriving their just powers from the consent of the governed."[110] The root of the ruling in *Schuette* was that the people of this country have the power and the voice to change the course of history.[111] The principle of "democracy [is] the capacity—and the duty—to learn from its past mistakes; to discover and confront persisting biases; and by respectful, rationale deliberation to rise above those flaws and injustices."[112]

The nationwide debate on affirmative action continues beyond the ruling in *Schuette*. Nearly forty years after the Civil Rights movement can we still see lingering effects of past discrimination? Another recent case on affirmative action, *Fisher v. University of Texas at Austin*, illustrates this continuous debate.[113] In 2013, the Supreme Court of the United States sent *Fisher* back to the Court of Appeals for the Fifth Circuit to determine whether the affirmative action policies in its admissions process were narrowly tailored.[114] On July 15, 2014, the Court of Appeals for the Fifth Circuit upheld the affirmative action policies of University of Texas at Austin as narrowly tailored, allowing racial considerations among applications.[115] This reaffirms that affirmative action policies are constitutional so long as they are

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[108] *Seattle*, 458 U.S. at 480, 487.

[109] Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1638 (2014) (plurality opinion).

[110] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[111] *See Schuette*, 134 S. Ct. at 1636–37.

> Our constitutional system embraces . . . the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure.

Id.

[112] *Id.* at 1637.

[113] Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013).

[114] *Id.* at 2421–22.

[115] Fisher v. Univ. of Tex. at Austin, 758 F.3d 663, 659–60 (5th Cir. 2014).

narrowly tailored.[116] While *Fisher* provided that affirmative action policies are constitutional,[117] *Schuette* provided that states have the constitutional right to choose not to implement affirmative action plans.[118] Justice Kennedy avowed our constitutional system "embraces . . . the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure."[119]

[116] *See id.*

[117] *See id.*

[118] *See* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1635–39 (2014) (plurality opinion).

[119] *Schuette*, 134 S. Ct. at 1636–37.