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A More Perfect Union? An Analysis of Schuette v. The Coalition to Defend Affirmative Action and Minority Group Rights in Multicultural Democracies

by
Robert L. Barber Jr.

A thesis submitted to the faculty of The University of Mississippi in partial fulfillment of the requirements of the Sally McDonnell Barksdale Honors College

Oxford
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Approved by

Advisor: Professor Eric Weber

Reader: Professor Marvin King

Reader: Professor John Samonds

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“Education is one of the fundamental human rights to which all people should have access without discrimination. It should foster respect, solidarity, cooperation, dialogue, consensus, tolerance, and inclusion as necessary values, celebrating cultural diversity, rather than covering over those differences” – Rigoberta Menchu Tum, Nobel Peace

Prize Laureate 1992

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Introduction Part I: Abstract

In 2006, the State of Michigan passed Proposal 2, an amendment to the Michigan Constitution which effectively banned affirmative action and race-conscious admissions policies at Michigan's public universities. Despite arguments that this policy placed an undue burden on certain ethnic and racial minorities by suppressing their participation in the American political process, the U.S. Supreme Court upheld Proposal 2 as constitutional in the 2014 case *Schuette v. Coalition to Defend Affirmative Action*. This thesis seeks to argue for the necessity of restoring the access to political participation removed with the passage of Proposal 2, as well as present a convincing case that race-conscious university admission policies continue to exist as salient policy interventions that minority groups should have the ability to advocate for. The following literature review will first explore and contextualize the policy problem addressed in *Schuette*. Part One will begin by briefly summarizing the arguments of the case through the dissent authored by Justice Sonya Sotomayor and plurality opinion of Justice Anthony Kennedy. Part Two will explore classical and contemporary scholarship on the issues of group rights vs. individual rights and the field's intersection with the majoritarian democracy. These sources will range from Aristotle's *Nicomachean Ethics* to Kymlicka's *Citizenship in Diverse Societies*. Drawing from this literature review, my thesis will move towards a discussion which attempts to engage the question, "at what point is government intervention necessary to ensure equal access to the political process for minority groups in democratic societies?" Following this discussion, the work will seek to make a relevant policy recommendation that may prove clarifying as the Court reexamines *Fisher v. University of Texas-Austin*.

Introduction Part II: Motivations

My motivations for the following thesis have stemmed directly from the formative experiences lived during my past four years at the University of Mississippi. Coming to Ole Miss, I found myself bewildered by the racialized climate that surrounded me. A blessing of my upbringing that I had taken for granted was the multicultural environment my parents had always sought to immerse me in, and the personal worldview I had developed as a result. Between showing goats, forestry judging with my local 4-H club, traveling as part of a multiracial violin performing group, and working at the food bank with my siblings every other week, I was exposed to a variety of perspectives and people groups from an early age. As a result, the fact that African Americans still struggled to participate fully in campus life as equals was alarming to me. The near de jure segregation of certain Greek houses and the de facto segregation of dining environments such as the Ole Miss Student Union disheartened me and I found myself confused about what my personal role was and could be as an agent of change. The fact that so much remained to be done in a locale merely an hour from my hometown only enhanced the immediacy of my desire to see my university as an inclusive place for all who chose to pursue an education here.

During my sophomore year, student protests erupted on campus following the reelection of President Barack Obama. I happened to be watching the election results with a reporter for the Ole Miss student news broadcast, Newswatch, when word of these demonstrations reached us. Wild claims of cars on fire and proverbial blood in the streets, communicated via social media networks like Twitter, saw us running to our cars to take an account of these events for ourselves. I will never be able to adequately describe the

feeling in the pit of my stomach standing on a hill and watching the sea of my peers below churn with animosity. While I found many initial reports of this incident had been exaggerated, witnessing the hurling of racial epithets between students, the burning of a black candidate's campaign signs, and pickup trucks rolling by with Confederate flags waving from the windows was enough to bring tears to my eyes. This was not what I wanted. This was not the place I wanted to call home, nor the community I wanted to claim as my family. In that moment I felt infinitesimally small and powerless.

As so often happens at the University of Mississippi, however, light seems to shine most brightly in our darkest hours. The following night a candlelight walk was held and attendance far outweighed that of the previous evening's events. Arriving at the center of campus, participants proceeded to collectively read the words of the Ole Miss creed. As our united voices crescendoed over the words "I believe in respect for the dignity of each person, I believe in fairness and civility," my heart swelled. This was a formative moment of my college experience. There was healing and there was hope. I decided then that rather than merely espousing ideas of justice and inclusivity, I desired to spend my time as an undergraduate student working alongside advocates for a more unified campus environment. The progress I have witnessed and participated in advancing since that night has been the privilege of a lifetime and one of the most fulfilling pursuits of my life to date.

Of particular significance to me and relevance to this thesis was my involvement in the Associated Student Body's – the moniker of Ole Miss student government – changing of the title "Colonel Reb," the name for..., to the more culturally respectful and inclusive "Mr. Ole Miss." The ASB is modeled after the branches of the United States

federal government and exists as three branches: executive, legislative, and judicial.

During my junior year I was elected by my peers to represent the College of Liberal Arts as a member of the ASB Senate, the acting body of our government's legislative branch. While serving as a senator, I had the opportunity to dialogue with other student leaders about ways to make our university a better place. The product of one of these dialogues birthed the realization that our campus personality elections were not structured in such a way as to encourage minority students to declare candidacy and meaningfully participate. Ole Miss Personality Elections take place every fall, several weeks before the Homecoming football game, to elect a Mr. Ole Miss, a Miss Ole Miss, a Homecoming Queen, an assortment of Homecoming Maids, and those individuals chosen to be Campus Favorites. The elections are as competitive as the campaigns are elaborate, with as many as five thousand students casting ballots on Election Day. Specifically concerning the roles of Mr. and Miss Ole Miss, elected candidates are expected to embody the spirit of what is often termed the "Ole Miss Family." These individuals normally run on a platform of previous commitment and service to the university and a plan to represent and serve all students while filling these desired roles.

In 2003, the University of Mississippi made the decision to remove Colonel Reb, an elderly white man garbed in plantation-owner attire, as its official mascot. While the mascot's origins have been the subject of debate, the prevailing consensus has been that the iconography of Colonel Reb represents the vestiges of antebellum white hegemony – an ideology many Mississippians no longer identify with and find repugnant. However, while the mascot was done away with, the position currently titled "Mr. Ole Miss" remained under the appellation of "Colonel Reb." Along with others, I found this

oversight to be inconsistent with the official stance taken by the University as well as the Creed I had pledged to uphold. It is of interest to note that the student body of Ole Miss had only ever elected two African American men to serve as Colonel Reb, both had expressed the desire that the title not be used. Simply put we began to ask the question, “what minority student is going to feel comfortable representing their fellow students if the cost of doing so requires the humiliation and embodiment of the very figure who historically oppressed their ancestors?”

Legislation was subsequently authored and we sought to pass a resolution through the Senate as a means of ameliorating some of the racial disparities on campus. We failed. While it is beyond the scope of this discussion to elaborate on the many factors that played into the resolution’s failure, I believe it may be pithily described as a case of “Our constituents do not want this. This is not the will of the majority.” This was my first profound experience understanding that in order for democracy to work, limits must sometimes be placed on the outcomes produced through majority rule. We decided to approach the issue through another avenue and submitted a case to the ASB Judicial Council, a veritable Supreme Court for student justice issues. The Council heard our case and decided in our favor, that Colonel Reb violated portions of the ASB Code & Constitution, and the council issued an order that it be changed. In the days following this decision campus exploded with outrage. People felt their opinions had not been respected and that it was patently unacceptable for the Council to force such a change upon the community. These reactions bore many similarities to societal reactions we see today when SCOTUS renders a culturally unpopular ruling. Nevertheless, in the eyes of many justice had been served and few question the decision today.

Interestingly enough, during my senior year I was honored to be elected as the second ever Mr. Ole Miss. Through this experience I was able to see firsthand the impacts that restructuring had on campus health and equity. As that year drew to a close, I had several minority students approach me requesting advice on what running a campaign for the position would look like and what they should expect should they choose to declare candidacy. It was evident to me that, regardless of what the majority of students on campus desired, this had been the right thing to do. I am reminded of Professor Charles Eagles' book on the integration of Ole Miss, *The Price of Defiance*.¹ In many ways I feel that Ole Miss and our nation as a whole are still working to open areas of society that have been historically closed to disenfranchised groups. Sometimes changes that promote the health of society require unpopular decisions. This is often the position the Supreme Court finds itself in as it seeks to mediate the inevitable conflicts that arise in multicultural democracies.

This knowledge must be balanced against a political system structured to be “of the people, by the people, and for the people”² and the inevitable tension that results between *for the people* and *by the people*. The tension between individual rights and group rights lies at the heart of what I am seeking to explore with this thesis. When is it appropriate to trump the will of the majority in favor of fair treatment for the minority? I hope to thoroughly examine this question within the context of the Supreme Court's ruling in its 2006 case *Schuette v. The Coalition to Defend Affirmative Action*.

Introduction Part III: Structural Description

The following thesis will consist of three parts. In Chapter I, I lay out the arguments of Justice Sotomayor and Justice Kennedy. While these Justices are not the only members of the Court who delivered opinions in the case of *Schuette v. The Coalition to Defend Affirmative Action* I have chosen these in particular for several reasons. To begin with, only one dissenting opinion was delivered in this case, and thus, it is the only one available for examination. At 58 pages, Sotomayor's dissent was the longest of her career to date, over three times longer than Justice Kennedy's. Its length is also one of the reasons I have made the unconventional decision to discuss it before the plurality ruling. Sotomayor and Kennedy discuss the same precedent cases, but Sotomayor offers more detail and context in her descriptions. Moreover, she takes time over the course of her discussion to elucidate the political structure of the state of Michigan and the way it affects the manner in which public universities are run. Regardless of the argument this paper seeks to make, discussing Sotomayor ahead of Kennedy provides a more clarifying foundation for effective analysis.

I have chosen Justice Kennedy's opinion once again in part because of its length. At 18 pages, Kennedy's work provides more substantive analysis to engage than any other authored by the justices ruling for the plurality. Justice Breyer's opinion, for example, leaves much to be desired, covering a scant 6 pages and almost punishing in its brevity. Additionally, a review of other plurality rulings showed similar arguments across the opinions. By analyzing Kennedy, I will argue the reader is able to engage the plurality as a whole, and therefore draw conclusions for himself as to whether or not justice was done with the passage of Proposal 2.

Chapter II of my literature review seeks to build a theoretical basis for the argument that minority groups have common goals and require the ability to politically mobilize towards the achievement of these priorities. Scholarship on individual and group identity construction will be examined as well as the modalities of injustice in multicultural democracies as various groups work to achieve goals that are sometimes in conflict with one another. Such an understanding is essential to critically discussing the *Schuette* case which will occur in the final chapter of this thesis.

Finally, Chapter III will return to the circumstances surrounding the case in question and engage two particular arguments made by Justice Kennedy that I find problematic. Based upon a review of the legal arguments of Justice Sotomayor and Kennedy, and supplemented by contemporary scholarship, I will argue that an unjust ruling was delivered in the case of *Schuette v. The Coalition to Defend Affirmative Action*.

CHAPTER I: CASE ARGUMENTS

Chapter I will consist of an overview of the arguments made by Justice Sotomayor and Justice Kennedy in their delivered opinions regarding *Schuette*. The objective will be to gain a clear and thorough understanding of the circumstances of the case itself, as well as the arguments employed on both sides of the ruling. Comprehending this will facilitate my critical analysis of the case itself as well as its broader implications. Sotomayor will be summarized before Kennedy due to the length and depth of her assessment of details critical to the case. Her more nuanced look at the issues at hand will grant a broader understanding that will be beneficial when engaging Kennedy's more concise discussion for the plurality.

JUSTICE SOTOMAYOR

Justice Sotomayor's argument proceeds from a fundamental understanding that purely democratic societies inevitably disadvantage minorities through certain policies. As the second sentence of her dissent reads "without checks, democratically approved legislation can oppress minority groups." This is the reason for a Constitution, which places limits on the decisions that the popular majority is able to make concerning government and policy. Interpretation of these constraints is precisely the mission of the Supreme Court of the United States and what Sotomayor seeks to do with her dissent, summarized below. Her argument consists of three parts: an examination of relevant SCOTUS precedent rulings, a summary of the events in question and political structure of Michigan, and her own critical argument against the plurality ruling based on her understandings of the political-process doctrine.

Sotomayor begins with a historic overview of the various ways that racial inequality was created in the United States, granting particular emphasis to the systemic and institutionalized racism that continued after ratification of the 15th Amendment, which granted African American men the right to vote. Her point is to illustrate the cases in which popular referendum has sought to prevent racial minorities, particularly African Americans, from participating in the political process. She points to precedent after precedent in which SCOTUS has “reaffirmed the right of minority members to participate meaningfully and equally in the political process.”³ Thus, when popular referendum enacts policy which places a unique or special burden on particular minorities, making it more difficult for them to participate in the political process, the Supreme Court is compelled to rule in such a way as to rebalance the capabilities of all citizens to participate in the political process. Sotomayor states “I firmly believe that our role as judges includes policing the process of self-government and stepping in when necessary to secure the constitutional guarantee of equal protection.”⁴

Using precedent-setting cases relating to voting rights and desegregation of schools, Sotomayor sets up a historical context that shows the court’s role in removing institutional barriers that have historically prevented the participation of minority groups in the political process. From here she proceeds to the crux of her argument, the political-process doctrine. Full understanding of the political-process doctrine proceeds from two key case precedents, *Hunter v. Erickson* and *Parents Involved in Community Schools v. Seattle School District No. 1* (hereto after referred to as *Hunter* and *Seattle*, respectively).

The rulings in these cases lay a foundation for understanding the rights of minority groups regarding their participation in the political process.

In the 1969 case of *Hunter*, the city of Akron, Ohio had passed an ordinance to combat housing discrimination by assuring “equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry, or national origin.”⁵ However, the majority of Akron’s citizens did not agree with the ordinance and, through the process of popular referendum, overturned it. Moreover, the majority went further to modify Akron’s city charter, stipulating that no future ordinances dealing with housing discrimination could be passed without a majority vote of approval by the citizens of Akron. Based on the Equal Protection Clause of the 14th Amendment, SCOTUS ruled to overturn this change to the Akron charter because the change placed “special burdens on racial minorities within the governmental process.”⁶ The court reasoned that because extra obstacles were being placed in the way of minority groups from participating in the political process, those same groups were being denied equal protection under the law, a right specifically granted to them by the Constitution. The court went further to equate the barriers created by the charter amendment to the barriers that would have been created had Akron chosen to deny racial minorities the right to vote. The ruling showed that not all cases of majority rule through popular referendum are appropriate or just. As one opinion in the case summarized, “the sovereignty of the people is itself subject to...constitutional limitations.”⁷

In the 2007 case of *Seattle*, the Court invalidated an initiative popularly approved by the citizens of Washington state to end mandatory busing programs that had been designed to aid in the integration of schools following the Court’s ruling in *Brown v.*

Board of Education. As with *Hunter*, the Court found the initiative violated the Equal Protection Clause and placed “*special* burdens on racial minorities within the governmental process” such that it was “*more* difficult for certain racial and religious minorities...to achieve legislation...in their interest.”⁸

The rulings in these cases give us an understanding of the Court’s view of constitutional allocations of power. The foundation of the political-process doctrine demonstrates that no reallocation of power by a State or community electorate can serve to impede the equal participation of a minority group in the political process, because the equal participation is an essential right granted by the Equal Protection Clause. A pithy summary of this idea would be to say that equal protection is equivalent to equal participation. As the Court stated in *Seattle* “it is beyond dispute that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner.”⁹ Moreover, both cases found that when a non-neutral reallocation of power is racial in nature, jurisprudence dictates it must be subjected to a different and more rigorous level of examination than other reallocations of power. Sotomayor finds that, based upon these precedents, the governmental action or political process outcomes violate the Constitution when they have “(1) a racial focus, targeting a policy or program that ‘inures primarily to the benefit of the minority or (2) alter the political process in a manner that uniquely burdens racial minorities’ ability to achieve their goals through that process.”¹⁰ Her argument proceeds by applying these principles in the case of Section 26, the portion of the Michigan constitution altered with the passage of Proposal 2.

By its very nature, Section 26 has the “racial focus” described above. The purpose of affirmative action and race-conscious university admissions policies is to increase access to higher education for minority students and thus, similar to desegregation, most certainly “inure primarily to the benefit of the minority.” Considering degrees of racial focus is important but is perhaps too fluid of a conversation to build a solid foundation for concrete prescriptive arguments. More tangible are transfers of power and access to participation. Sotomayor chooses to expend the majority of her dissent on the second half of her defined principle, the special burdens placed on minority groups through the unjust restructuring of the political process. To understand what she sees as an ineffective restructuring of Michigan’s political process, an understanding of its original structure is necessary.

Prior to the passage of Section 26, Michigan’s Constitution left absolute power regarding decisions relating to the State’s public universities to each respective institution’s governing board. These boards consisted of eight members and were in control of, among other affairs, all admissions criteria, including the race conscious criterion in question. The granting of this power was found in Michigan Constitution Article VIII, Section 5 which established 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. As Sotomayor states, by their very nature these boards are “indisputably a part of the political process in Michigan.”¹¹ Board members come to hold office for an eight-year term via statewide political election. Sotomayor points out that there is significant precedent for cases in which candidates would incorporate their views on affirmative action admissions policies as part of their political

platform. Thus, candidates were able to engage voters through their views on the matter in question and voters were free to lobby for legislation that served their interests.

Following the enactment of Section 26, board members at Michigan's public universities retained exclusive authority in nearly all institutional affairs, as described above, *except* for admissions criteria with a racial focus. This reallocation of power was achieved through statewide popular referendum by the Michigan electorate in which the constitutional amendment, labeled Proposal 2, by a 58% margin on November 7, 2006.¹² The process of amending the Michigan Constitution is arduous. In order for a potential amendment to become a ballot initiative it must garner either the support of two-thirds of both Houses of Michigan's Legislature or a number of voter signatures equal to 10 percent of the total number of votes cast in the most recent gubernatorial election. The latter method proves to be even more difficult than it appears as more signatures are often required, by as much as a 50% margin, to account for invalid or duplicate signatures that often accompany citizen-sponsored ballot initiatives. Costs of promoting citizen-sponsored ballot initiatives are extreme, often amounting to hundreds of millions of dollars.

In light of the principles espoused in *Hunter* and *Seattle*, such a restructuring of the political process in Michigan proves problematic of Sotomayor. She finds that "while substantially less grueling paths remain open to those advocating for any other admissions policies, a constitutional amendment is the only avenue by which race-sensitive admissions policies may be obtained."¹³ She goes on to throw the conflict she sees into sharper relief with a hypothetical.

The effect of Section 26 is that a white graduate of a public Michigan university who wishes to pass his historical privilege on to his children may freely lobby the board of that university in favor of an expanded legacy admissions policy, whereas a black Michigander who was denied the opportunity to attend that very university cannot lobby the board in favor of a policy that might give his children a chance that he never had and that they might never have absent that policy.¹⁴

Thus Sotomayor brings the point home that the restructuring of the political process through Proposal 2 uniquely burdens racial minority groups in a manner that violates the political process doctrine. The political process doctrine does not enshrine the idea that minority groups are expected to come out ahead, or always achieve the legislation they advocate for. What it is expected to protect, however, is the equal access of all groups in American society to legislation advocacy, rather than intentionally discriminate against select groups. The precedents of *Hunter* and *Seattle* are expected to guarantee that all American citizens are supposed to play by the same rules in the legislative process. Another precedent that illustrates the vital importance of protecting minority rights comes with the case of *United States v. Carolene Products Co.* (hereto after referred to as *Carolene Products*).

In *Carolene Products*, a case which centered around a law which banned certain types of milk from being shipped between states for commercial purposes, a precedent was established through the well-known Footnote Four, in which Justice Harlan Stone stated that “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.”¹⁵ Stone’s words demonstrate that not only should there be searching judicial review applied for the protection of all groups in society when it comes to their access to the political process, but the scrutiny of jurisprudence should be applied

even more intensely. It is clear that the protection of access of the minority to the political process is of tantamount importance for the health of society and effective democracy. This is the heart of the political-process doctrine. Certainly autonomy and self-government are essential to the functioning of American democracy, but as Sotomayor points out through the precedents discussed above, they are not without limits, an idea she feels the plurality is advocating for in their ruling on the Michigan case.

At the heart of Justice Sotomayor's argument, and her fundamental disagreement with the plurality, is the appropriate course of action for ending racial discrimination in America. The excerpt of her opinion below encapsulates the essence of her dissent and provides an appropriate conclusion to this summary of her opinion. She writes:

In my colleagues' view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race *does* matter.¹⁶

JUSTICE KENNEDY

In comparison to the dissent in this case, the judgement of the Court, delivered by Justice Anthony Kennedy, was much shorter, spanning only 18 pages compared to Sotomayor's 58. Justice Kennedy's discussion proves less nuanced because, as he sees it, it is not the Court's place to answer many of the questions Justices Sotomayor and Ginsburg found to be so crucial in this case. In principle, it first appears that Kennedy and Sotomayor are on the same page with regards to the intent of this case. In his opening statement, Kennedy begins by asserting "The Court in this case must determine whether

an amendment to the Constitution of the State of Michigan, approved and enacted by its voters, is invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.”¹⁷ Beyond this stated intent, however, the justices begin to part ways.

Justice Kennedy finds that this case should not have the focus of determining the constitutionality of race-sensitive college admissions policies, but whether or not the voters of Michigan should have the right to utilize popular referenda to make governmental decisions regarding racially focused legislation. Kennedy uses a different set of precedents to analyze this case, introducing several new cases not discussed by Sotomayor, but also reinterpreting two of the pivotal cases discussed in the previous section, *Hunter* and *Seattle*. The first on this list is *Reitman v. Mulkey*.

In *Mulkey*, a voter majority passed an amendment to the California Constitution that barred the state from interfering in a private property owner’s decisions on whether or not to rent or sell based on whatever criteria pleased them. Within the context of the case, it was clear to the Court that this amendment was specifically passed with the intent to perpetuate housing discrimination towards minorities. The Court ruled to invalidate the amendment on these grounds because it served to cause “real and specific injury.”¹⁸

Next, Kennedy moves to examining the case of *Hunter*. To briefly restate our summary of the events of this case from the previous section, citizens of Akron, Ohio voted by popular referendum to overturn the City Council of Akron’s fair housing ordinance. The Court moved to invalidate the majority’s decision and used the political-process doctrine as one of its central arguments. Once again, the Court moved to this ruling within the context of a racially-charged community where pervasive discrimination

was occurring. Kennedy finds the contexts of *Mulkey* and *Hunter* to be at the heart of contrasting the rulings of these precedents with the judgement he is delivering regarding Proposal 2. Yet even Kennedy points out that in *Hunter*,

The Court found that the city charter amendment, by singling out antidiscrimination ordinances, ‘places special burden on racial minorities within the governmental process,’ thus becoming as impermissible as any other government action taken with the invidious intent to injure a racial minority...*Hunter* rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities.¹⁹

We will recall that in the events of *Seattle*, a citizen vote passed an initiative to end school bussing for the purposes of desegregating. In this case, as in *Mulkey* and *Hunter* the Court saw this case as a case that was primarily motivated with the intent of racial injury and discrimination. Such was the climate under which they delivered judgement and overturned the statewide initiative. However, Kennedy believes Justice Sotomayor’s reading and interpretation of *Seattle* is flawed.

In essence, according to the broad reading of *Seattle*, 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. It is this reading of *Seattle* that the Court of Appeals found to be controlling here. And that reading must be rejected.²⁰

From this position, Kennedy moves into the explanation of his ruling. He makes several points but among the most significant are i) that the plurality has found Proposal 2 was passed with “no infliction of a specific injury of the kind at issue in *Mulkey* and *Hunter* and... *Seattle*,”²¹ and ii) overly sanctioning the interests of minority groups perpetuates stereotypes and discrimination.

The plurality finds that the intent behind the majority vote in Michigan is not comparable to the intent behind the policy changes at the centers of *Mulkey*, *Hunter*, and *Seattle*. In the eyes of the justices concurring in judgement, we are “a society in which

[racial] lines are becoming blurred.”²² They separate this case from the precedents in question because “democracy has 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.”²³

Because of societal progress since the Civil Rights era, Kennedy finds that 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.”²⁴ The justices of the plurality seem to invest a faith in the American voter that our societal consciousness has evolved to the point that personal biases no longer play distinct role in our legislative decision making. The pith of his feeling appears to be that because the Michigan majority (allegedly) did not *intend* to actively discriminate or cause racial injury through their referendum, the outcome of their legislated decision must certainly have a different impact. By making this point it would seem Kennedy is equating positive intentions with positive impacts. That is to say, as long as the people of Michigan really did not mean to inflict harm, then Kennedy argues that injury cannot exist.

Secondly, the plurality contends that acknowledging minority interests may do more harm than good. Kennedy references one finding from the Court’s ruling in the case of *Shaw v. Reno* in which the Court rejected the notion that “members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls.”²⁵ The judgement regarding Proposal 2 finds it to be the perpetuation of demeaning stereotypes that the dissent might insinuate that minority groups have certain common interests on which they are united. According to Kennedy,

under an expansive reading of *Seattle*, “racial division would be validated, not discouraged.”²⁶ When it comes to voting whether or not to incorporate racial-preferences into the university admissions process “the holding in the instant case is simply that the courts may not disempower the voters from choosing which path to follow.”²⁷

As may be seen, this understanding is fundamentally at odds with the perspective of Justice Sotomayor. The Court simply does not have the right to intervene in the legislative process to such an extent that it prevents the majority from discussing and ruling on certain issues. In Kennedy’s mind, intervention on the part of the judiciary would perpetuate the prejudices that have plagued America society for centuries.

CHAPTER II: LITERATURE REVIEW

We have now seen the major argument for the plurality centers around two key points. The first point is the argument that it is racist in and of itself to acknowledge the potential for racial groups to have common goals stemming from their racial identities. The second point is the idea that malicious intent must be present in order for injury deserving of judicial intervention to occur. The identification of these arguments provided direction for my literature review and it is for this reason I have placed it as the subsequent, rather than preceding chapter. In this chapter, I will review scholarship that I hope to use to refute the arguments of Justice Kennedy. First, I will examine classical philosophy regarding the nature of justice when it comes to group interactions. Second, I will explore the formation of the racial identity within multicultural societies and illustrate its salience to informing policy goals of various racial groups. Moving forward, I will address the Kennedy's second argument with a discussion of structural racism and structural violence to demonstrate that malicious intent need not be present for flawed institutions to impact minority groups negatively. Finally, I will take a brief look at the empirical nature of racial disparity in the United States.

Aristotelian Ethics

Nicomachean Ethics

Nicomachean Ethics is the primary text used in defining the field of Aristotelian Ethics. The work contains 10 books which cover a range of topics. Of particular interest to us within the context of this literature review are the Doctrine of the Mean and conceptualization of Rectificatory Justice. In Book II of Aristotle's work *Nicomachean Ethics*, he lays out the Doctrine of the Mean – the idea that justice exists when all are given what is due them, and injustice when there is too much or too little assigned to a

particular group or individual.²⁸ Later in Book V, Aristotle devises a means through which such injustices may be redressed which he terms “rectificatory justice.”²⁹ When distribution of a good, privilege, or ability has not occurred in a just manner, rectificatory justice may be employed as a method of what the United Nations would call “restoring the dignity of the victim(s).”³⁰

As the philosopher presents in *Ethics*, injustices occur in the form of involuntary transactions. While Aristotle presents involuntary transactions in the more tangible forms of theft and assault, the concept may be applied to more abstract circumstances such as the deprivation of opportunity or theft of success. As our historical perspective demonstrated, the African American community has been subjected to a multitude of involuntary transactions since the advent of slavery, some of which continue today. Under Aristotle’s model, involuntary transactions and injustice may be identified according to the Doctrine of the Mean, in which one party has more and another party less than their given due. In these cases, rectificatory justice is necessary and should be administered by competent judicial intervention to restore what has been taken from the disadvantaged party. In short what has been stolen must be transferred from the thief to the victim of the theft. Applied to the field of race relations, we might interpret this Doctrine to mean that racial minorities are the victims of injustice when they are not given what they are due as individuals.

Politics

In Aristotle’s *Politics*, he states “no one will doubt that the legislator should direct his attention above all to the education of the youth,” adding that, “since the whole [society] has one end, it is manifest that education should be one and the same for

all...[citizens] belong to the state, and are each of them a part of the state, and the care of each part is inseparable from the care of the whole.”³¹ Taken together, it would appear Aristotle has made a convincing argument for race-conscious university admissions policies. Before drawing this conclusion, however, we must address a seemingly contradictory discussion of merit in Politics Book 3, Part XII: the metaphor of the flautist. Aristotle uses flute players as an example of why those who are the highest achieving or most qualified should receive the greatest rewards, stating:

When a number of flute players are equal in their art, there is no reason why those of them who are better born should have better flutes given to them; for they will not play any better on the flute, and the superior instrument should be reserved for him who is the superior artist. If what I am saying is still obscure, it will be made clearer as we proceed. For if there were a superior flute player who was far inferior in birth and beauty, although either of these may be a greater good than the art of flute playing, and may excel flute playing in a greater ratio than he excels the others in his art, still he ought to have the best flutes given to him, unless the advantages of wealth and birth contribute to excellence in flute playing, which they do not.³²

Seemingly Aristotle is using this metaphor to argue for the meritocratic side of the debate examined above. It is here that we must make an important distinction between Aristotle’s discussions. As may be seen from the philosopher’s Book 8 discussion, education is discussed as a nurturing process that grows individuals towards being productive members of society. As such, it is only right that educational outcomes be a primary concern of the legislator. In contrast, Aristotle’s Book 3 discussion of the flautist sets a framework of individuals who have received all the training necessary to compete in a competitive market, in this case the competition for the resource of the best flute. Certainly there will always be talent and merit differences within society. This paper does not seek to argue otherwise or encourage societal structure where all are confined to

remaining on the same playing field. However, within the framework of the flute lesson, this paper seeks to argue that while all may not be talented enough to receive the best flute, all deserve the opportunity to receive quality flute lessons. For the sake of our argument we will make flute lessons and their distribution analogous to the distribution of education capital, specifically university admissions. Here, we separate the field of affirmative action into separate spheres. The expressed advocacy for race conscious university admissions policies and affirmative action in the workplace may be seen as similar but different. By employing the political philosophies of Aristotle it is possible to argue in favor of one without an obligation to defend the other.

Political Philosophy and Group Rights

Group Rights: Reconciling Equality and Difference

One principal philosophical issue that must be explored when considering multicultural pluralism in the context of democracy is the concept of individual rights vs. group rights. To some, the idea that these two ideologies can be reconciled seems to be an oxymoron. Certainly when taken at face value, the ideas that some rights are extended to all individuals while some are extended to others preferentially and yet both work to promote equity in society seem to be at odds with one another. Such is the problem David Ingram works to sort through in his work *Group Rights: Reconciling Equality and Difference*. In particular, his work offers us useful definitions that we may utilize to frame further discussion.

Ingram finds there to be two types of group-specific rights, those granted on the basis of well-being and those granted on the basis of status. Well-being related group rights include benefits such as those granted through social welfare programs. Individuals

who are hungry, impoverished, or even homeless are granted certain rights in American society that all do not have access to. In these cases, well-being is the exclusive demarcation that determines right extension. It does not matter whether the individual in question is a black man or a white woman, so long as they meet established criteria demonstrating deficits in their well-being, they have the right to receive any number of benefits such as Medicaid, TANF, or Unemployment Insurance. While the proportion of these benefits is often a significant part of public discourse and debate among policy makers, the actual existence of well-being group rights is rarely debated. We see helping those who lack the base-line securities we have deemed essential to be our societal responsibility and most often find our call to such work to be ensconced in our constitution's guarantee of "life, liberty, and the pursuit of happiness." However, group rights extended on the basis of well-being are not at the heart of the policy question this thesis seeks to explore. Rather, we will focus our discussion on the second category of group rights Ingram identifies, those conferred on the basis of inequity in societal status of the individual.

Status-driven group rights stem from the base philosophy that minority groups often require institutionalized protections against oppression from, or domination by, an identified majority. Ingram names a variety of social constructs which distinguish majorities from minorities including differences in "race, class, ethnicity, religious orientation, gender, sexuality, and disability."³³ Part of social identity construction requires the defining of the individual against a generalized other. The process of categorization asks an individual to examine what groups they belong to and which they do not and the differences in social status that result may require particular protections

that ensure equity in societal interactions. Based on this distinction between group rights, Ingram reflects “So these group-specific rights ostensibly advance the principle of equal treatment. But how is this possible?”³⁴ He finds the answer requires defining what exactly “equal treatment” means.

In similar fashion, Ingram finds two definitions of equal treatment. The first is both simple and straightforward; equal treatment means to treat everyone the same. The second, in the author’s opinion, argues equal treatment means treating others differently “in a way that respects their individual distinctness no less than their common humanity.”³⁵ Regarding these definitions, Ingram pulls them from John Rawls’ *A Theory of Justice* and Ronald Dworkin’s *Law’s Empire*, respectively.³⁶ Many use the first definition we have identified as their basis for advocating for impartial laws, laws that “advance only universal interests held by any rational individual, in complete abstraction from all the particular interests that differentiate one individual from another.”³⁷ Despite this motivation, Ingram finds that because of the nature of differences in societal differences, adopting a treatment strategy of “sameness” only works in some situations.

Universal treatment is a strategy that society has pursued in many situations involving basic civil rights. Voting rights, the freedoms of speech and religion, and marriage equality represent just a few of the social justice issues in which we have determined that equal treatment of all individuals, or a strategy of sameness, results in the greatest equity. We find that to prevent the favoring of a particular religious group, we ask the government to limit its interaction with religious affairs, and many feel that because such a strategy works in for certain policy issues it should be applied as a political panacea for societal inequality. However, this is not the case in all pluralistic

policy issues. Ingram summarizes the problem that arises from treating everyone the exact same way, “not all persons find themselves in social circumstances that are equally conducive to the full cultivation and exercise of their humanity, and some...have suffered discrimination at the hands of other, more numerous and dominant groups because of their particular differences.”³⁸

Such disparity cannot be universally rectified without the creation of particular exemptions from, or sanctions for, certain group-specific behaviors. The cases in which universal treatment results in pervasive inequalities that fall along the categorical lines such as race, gender, or religion reveal to us systemic discrimination within society. Institutionalized domination of a minority group reveals the need for a nuanced approach to the extension of specific vs. nonspecific group-specific rights. Ingram sees affirmative action and other race-conscious policies to be a good example of *necessary* specific group-specific rights stating,

Affirmative action rights enable women and minorities – who, statistically speaking suffer *systematic* institutional discrimination in hiring, promoting, and educational advancement – to compete for a fair share of scarce positions. In these cases, we compensate persons for disadvantages that would otherwise prevent them from *equally* exercising the *same* basic rights that the rest of us enjoy.³⁹

Thus far we have made important delineations between types of group rights and popular views of equal treatment. Ingram further nuances the discussion by proceeding to define social injustice as discrimination vs. oppression. Oppression, he finds, “is caused by a failure to distribute basic goods in ways that promote the equal treatment of each person’s capacities.”⁴⁰ Here, oppression relates to the well-being rights discussed above. When individuals are denied rights or goods we have determined to be essential for well-being, such as food, shelter, or education, we consider this individual to be

oppressed. Policies that promote or facilitate oppression are evidenced by individuals who do not receive an equal share of social output, be it in the form of goods or opportunities, despite equal individual contribution to the collective labor that creates such output in the first place.

Domination differs from the previous definition because it “is caused by a failure to recognize all citizens as free, responsible human beings worthy of equal respect...[and involves] hierarchies of decision-making of power that prevent some persons from exercising control over their lives.”⁴¹ Ingram identifies five categories of domination: economic, political, legal, social, and cultural. Rarely do we find single-category dominations within American society, and these categories have historically converged to create many of what we now identify as the greatest injustices of our nation’s history, such as Jim Crow laws. Domination is dangerous, Ingram states because it is closely linked with being “denied recognition as a human being” and feeling “diminished in [one’s] capacity as [a] rational decision-maker.”⁴² The author ends his discussion by pointing out that, while different, oppression and domination often go hand-in-hand and one often facilitates the other. Economic domination through the institution of slavery often allowed oppression in the form of inhumane treatment.

The sources of social injustice fall into two categories: systemic and identity-based. As their names suggest, systemic injustice finds its origin in a system or institution while identity-based injustice is caused as a direct result of an individual’s identity or group membership. Systemic injustice does not discriminate and may affect any collective of individuals. For example, systemic poverty resulting from capitalism is color-blind, gender-blind, religion-blind, etc. and can affect any member of society.

Identity-based discrimination results in many of the more common social injustices common in the societal discourse of today such as racism, sexism, homophobia, and xenophobia. Certain groups are the victims of exclusively systemic injustice, others are affected by only identity-based injustice, while still others find themselves in the maelstrom of social injustice stemming both from institutions and their identities. The latter represents the circumstances of certain racial minorities in the United States.⁴³

Eliminating injustice, then, sometimes necessitates a bifurcated policy solution to address dual causes. For example, ensuring equal access to educational advancement for African Americans does not heal the wounds of racism if identity-based discriminations are not addressed as well. Conversely, affording a racial minority the respect the group deserves does nothing to address the systemic problems which keep the group in question locked in pervasive poverty.⁴⁴ As Ingram points out, however, such solutions can seem confusing and difficult to develop because they simultaneously call upon our earlier conceptions of “equal treatment.” When individuals are treated in the exact same way, Ingram’s first definition, we create a solution to identity-based social injustice. However, when individuals are treated with difference in mind to create more equitable outcomes, as Ingram’s second definition proposes, we see policy solutions that address systemic social injustice. But how can these treatments be reconciled for groups who fall victim to both types of injustice? How is it possible to treat a group in the exact same manner as other groups yet in a different manner from other groups at the same time?

Ingram concludes the useful definitions and framework he has developed for thinking through our policy problem in question by juxtaposing affirmative policies solutions against transformative strategies. Affirmative remedies typically only target

oppression by redistributing goods and opportunity in society rather than directly targeting the power disparities that create discrimination. Regarding affirmative remedies, the author states that they

Work within the systemic and identity-based injustices of our current society...[and] take for granted the existence of a capitalist economic system and a fixed order of racial and gender identities. Thus they mitigate – but do not eliminate the social injustices that arise within this system and order. In short, they perpetuate differences of class, race, and gender.⁴⁵

Conversely, transformative remedies radically seek to equalize societies by dismantling private institutions and cultural identity constructions that create the hierarchies that cause discrimination. Neither remedy is perfect and both present their own unique problems.

Regarding affirmative remedies, we have already seen a significant objection to their implementation is that they perpetuate categorization of the individual in the social constructs that have caused him or her to face discrimination in the first place. They perpetuate their own forms of sexism, racism, and other problematic views when they assume that one's group membership informs one's desires or behavior.⁴⁶ Conversely, transformative remedies toss identity politics aside. Biologically speaking, group barriers do not matter and pragmatic solutions to inequity show no regard for them. Not only this, transformative policies would more closely mirror communism or socialism, rather than the democratic political institutions we as a society have chosen to govern ourselves. Because of the previous concern in addition to the fact that socially constructed group barriers have thus far served society well as a means of organization and prevention of chaos, policies that represent transformative remedies are unlikely to be implemented.⁴⁷

Ingram leaves us with a clear picture of the policy problems we face when it comes to social injustice. He identifies their various causes and creates a helpful framework for discussing their possible rectification. However, the author's discussion leaves us asking several questions. Is their worth in the field of identity politics? Are all social constructs bad? And, most relevantly to the discussion of this paper, are affirmative remedies of any use to us if they represent an incomplete solution?

Citizenship in Diverse Societies

Given the above discussion, we are confronted by an argument against affirmative remedies that is brought up both by Ingram and the plurality in the Michigan case. In the discourse of American politics and how best to represent the interests of citizens, some policymakers and philosophers would state that presuming an individual to hold certain ideological stances strictly based upon his or her physical characteristics is in and of itself discriminatory. Relating specifically to the topic of race, the Supreme Court stated in *Shaw v. Reno* that it was impermissible to assume that “members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls.”⁴⁸ To be sure, it would be ludicrous to see a member of a racial group on the street and draw explicit assumptions regarding said individual's ideological tendencies. The question then becomes, what is the role of race in determining the ways in which an individual participates in the American political process? This is one of the questions Will Kymlicka and Wayne Norman seek to address in their compilation of essays *Citizenship in Diverse Societies*.

Cultural Identity and Civic Responsibility

In his essay *Cultural Identity and Civic Responsibility*, Jeremy Waldron openly admits that existing in a multicultural democracy necessarily involves sacrifice on the part of all citizens involved. To Waldron, civic responsibility means

(1) participating in a way that does not improperly diminish the prospects for peace or the prospect that the inhabitants will in fact come to terms and set up the necessary frameworks and... (2) participating in a way that pays proper attention to the interests, wishes, and opinions of all the inhabitants of the country.⁴⁹

If this definition seems uncontroversial it is because, as Waldron acknowledges, its language is vague and open to interpretation. The precise definition of what equates to “proper attention” and what does not undoubtedly generates a myriad of definitions nearly as diverse and the author’s readership. Waldron finds that the most appropriate place to begin answering the “proper attention” question is in the light of understanding cultural identity.

Individual identity construction begins with the recognition of boundary markers. Simply put, we know who we are by looking at what we are not. Defining oneself against a generalized other inevitably leads one to find difference and commonality with various collectives in the context of multicultural society. Whether artificial or natural, identity markers such as gender, race or ethnicity, and religion inform both our experience and interpretation of experience while living alongside other members of the nation state. According to Waldron, it is the interplay between these characteristics and the particular social environment, rather than the explicit characteristics themselves that inform the individual experience. An example would be to acknowledge that the individual experiences and perspectives of a traditionally conceptualized “black person” who is a native of Ethiopia may be radically different than those of an African-American, despite

their shared identity marker. To this end, Waldon postulates that “people forge their identities in the crucible of the nation, culture, or *ethnos* in which they are reared or raised.”⁵⁰ Because individual identities are defined in the context of a social collective, they have a collective nature, and can be shared among individuals. Just as identity markers can define difference, they have the power to solidify similarity and mobilize individuals to achieve mutual goals. Indeed, the importance individuals place on their collective identities often supersedes their prioritization of their individual conception of the self. Waldron elaborates, stating “the most common basis for the most egregious affronts to people’s identities is thought to be hatred of a particular culture or ethnicity rather than disrespect for the particular identity an individual has crafted for himself within his culture or ethnicity.”⁵¹ Identity politics then, becomes a complex network of group interactions in which the stakes are high. The outcome of these interactions in multicultural democracy determines the allocation and distribution of social resources and opportunity.

The Case for Affirmative Action on Campus: Concepts of Equity, Considerations for Practice

Thus far we have discussed the potential for phenotypic differences between individuals to become the identity boundary markers of the psyche, leading to social collectives that may have common interests and goals. For the purposes of our discussion we have extrapolated this principle to argue that racial minorities in the United States qualify as discreet groups that have common political goals. The burden of proof in our discussion now demands we illustrate probable cause that a common political goal of

racial minorities would be increased representation in the realms of higher education. Exploring this concept is one of the tasks undertaken by the editors of *The Case for Affirmative Action on Campus: Concepts of Equity, Considerations for Practice*.

A fact that is without contest in the affirmative action discourse is that, in comparison to white students, African American, Hispanic, and other disenfranchised students have not participated in postsecondary education at the same rates. The authors postulate this is the result of barriers that have prevented racial minorities from accessing the same educational and cultural capital as mainstream Americans. These barriers include “financial constraints, academic deficiencies, and poor standardized test performance” and as a result “certain groups of individuals have not found traditional baccalaureate degree education readily available.”⁵²

Universities are important places because they give an individual access to capital, which the authors define as “an ability to generate wealth and promote means of production through social relationships.”⁵³

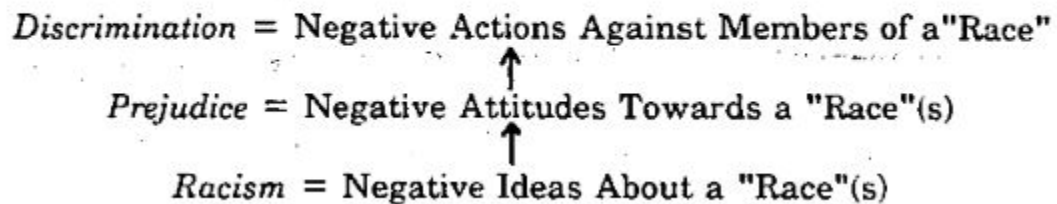
Rethinking Racism: Towards a Structural Interpretation

While race may possess psychological origins and find itself rooted in the arbitrary selection of identity markers, it is not merely a psychological phenomenon. In his paper *Rethinking Racism: Towards a Structural Interpretation*, Eduardo Bonilla-Silva argues that scholarly research has not gone far enough to interpret racism within a structural framework and it should instead be viewed as “the ideological apparatus of a racialized social system.”⁵⁴ Bonilla-Silva defines racialization as the “social creation of racial categories” and contends that this process influences the way societies are structured. Theorizing the nature of these structural shifts is of critical importance to the

author. Bonilla-Silva addresses problems with the dominant scholarly view of racism, highlights the importance of what he terms “racial contestation,” and proposes a new interpretation of the nature of racism that he believes will help combat “New Racism.”

Thus far, Bonilla-Silva finds scholarly interpretation of racism has fallen largely within the definition established by Ruth F. Benedict in her 1942 work *Race and Racism*. Benedict defines racism as “the dogma that one ethnic group is condemned by nature to congenital inferiority and another group is destined to congenital superiority...It is, like a religion, a belief that can only be studied historically.”⁵⁵ The figure below illustrates what Bonilla-Silva introduces as the “idealist” view.⁵⁶

Figure 1



This formulaic presentation of “idealist racism” demonstrates an understanding of racism as progressing from individuals’ independent discriminatory views and progressing to racist action. However, perceiving racism in this manner reduces the field to a segment of social psychology⁵⁷ and proves problematic for several reasons. Bonilla-Silva cites the work of William Julius Wilson to demonstrate that, more than a set of ideals, racism causes – and is replicated through – structural changes in a society. Wilson describes these shifts stating,

...as American racial history so clearly reveals, racial norms tend to change as the structural relations between racial groups change. And the main sources of this

variation have been the alteration of the system of production and changing policies of the state.⁵⁸

Merely viewing racism as an ideology limits discussion in a way that hinders our ability to analyze its impact on society. Bonilla-Silva offers a list of weaknesses he finds in the idealist perspective:

1. *Racism is excluded from the foundations or structure of the social system*⁵⁹
2. *Racism is ultimately viewed as a psychological phenomenon to be analyzed at the individual level*⁶⁰
3. *Racism is treated as a static phenomenon*⁶¹
4. *Analysts defining racism in an idealist manner view racism as “incorrect” or “irrational thinking” and thus label “racists” as irrational actors*⁶²
5. *Racism is understood as a matter of overt behavior*⁶³

Defining racism as the collective impact of individual, psychological views grants immunity to social institutions from the label of “racist” and keeps the structures of the state from being explicitly defined by the pejorative. Bonilla-Silva believes a society plagued by racism retains racist institutions as a component, rather than an exclusive composition of racist individuals. Moreover, racism need not be considered a deviant psychopathology because institutions performing racist action are often rational actors. Finally, racism in many cases may have a *covert* manifestation rather than *over* action such as lynching or hate speech. A structural interpretation of racism is required to incorporate the contemporary realities of discrimination in a multicultural democracy such as the United States.

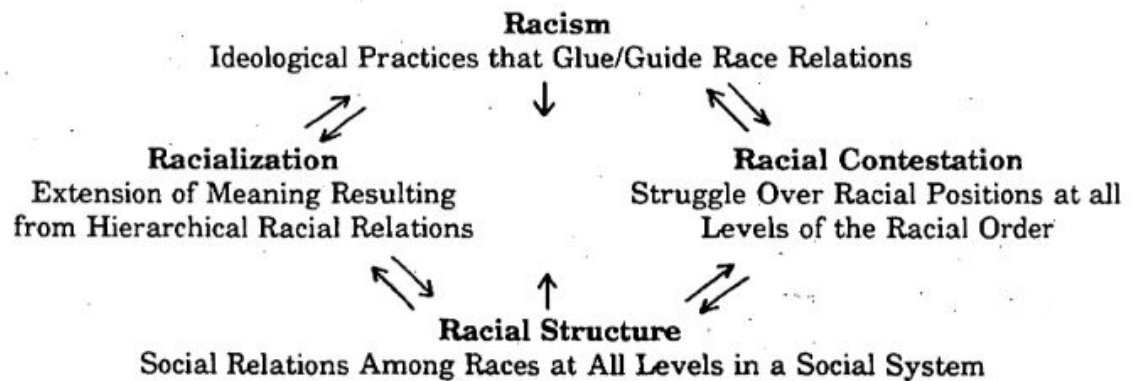
Challenges to the idealist perspective arose in the decades following its conception, but failed to take pervasive hold in academia. Arising from the Civil Rights

Movement of the 1960s, the *institutionalist* perspective found the need to separate *overt* and *covert* racist action. In their book *Black Power*, scholars Carmichael and Hamilton defined racism as “the predications of decisions and policies on considerations of race for the purpose of subordinating a racial group and maintaining control over that group.”⁶⁴ Moving away from the micro-perspective of individual-to-individual interaction, the institutionalist perspective took a macro-perspective that recognized “institutional racism,” or “the covertly racial outcomes produced through the ‘normal’ operations of American institutions.”⁶⁵ Jim Crow law provide an excellent example for ways in which mechanisms of the state were able to keep minority groups subjugated. While the institutionalist perspective made valuable contributions to academic dialogues surrounding racism, the majority oppressor group is still assigned a psychological sense of superiority.⁶⁶ Because of these ideological underpinnings, Bonilla-Silva argues the institutionalist perspective does not go far enough in its departure from the idealist perspective, necessitating further reinterpretation in academe.

The Civil Rights Movement serves as one of many examples in which societal conflict has centered on the boundary marker of race. The ability for racial groups to politically mobilize has historically proven essential for the promotion of justice and equitable distribution of resources in American society. The Black Lives Matter movement makes readily apparent the contemporary importance of such mobilization. When the nature of social strife precipitates a “*distinct* racial character,” Bonilla-Silva postulates the action should be categorized as *racial contestation*.⁶⁷ Racial contestation is defined in the literature as “the struggle of racial groups for systemic changes regarding their position at one or more levels.”⁶⁸ Many forms of contestation in society occur on an

individual level, with disconnected actors and discordant action. However, when the nature of contestation becomes collective and cohesive, systemic changes in social structure become more likely to transpire. Further, in the case of racial contestation, fundamental change cannot occur unless “the struggle reaches the point of overt protest.”⁶⁹ According to Bonilla-Silva, overt protest through racial contestation serves as the mechanism to combat covert manifestations of contemporary racism. In the absence of history’s overt racist action, combating modern structural racisms necessitates the organization of minority groups and advocacy for systemic change. Summarily, “racial contestation is the logical outcome of a society with racial hierarchy.”⁷⁰ The figure below illustrates the role racial contestation plays in social dialogue.⁷¹

Figure 2



Moving towards a structural view of racism offers several advantages over the idealist perspective, as enumerated by Bonilla-Silva.

1. *Racial phenomena are regarded as the “normal outcome” of the racial structure of a society*⁷²

2. *The changing nature of what analysts label as “racism” is explained as the normal outcome of racial contestation in a racialized social system*⁷³
3. *A structural framework allows analysts to explain overt as well as covert racial behavior*⁷⁴
4. *Racially motivated behavior, whether the actors are conscious of it or not, is regarded as “rational,” that is, as based on the different interests of the races*⁷⁵
5. *The reproduction of racial phenomena in contemporary societies is explained in this framework by reference not to a long distant past but to its contemporary structure*⁷⁶

Structurally framing racial dialogues nuances the discussion of contemporary racism in a manner befitting the obstacles that remain in modern multicultural democracies such as the United States. Bonilla-Silva spends a chapter contextualizing the historic progression of racialization in the United States. He begins with the conquest of native lands and chattel slavery, moves through Jim Crow and the Civil Rights movement, and arrives at the present which labels as the era of “New Racism.”⁷⁷ While the Great Migration of African-Americans from the rural, segregated South to the more open-minded North allowed the “successful challenge of their socioeconomic position,”⁷⁸ previous and current disparity in the allocation of social and cultural capital has resulted in persistent structural obstacles for minority groups in the United States. Housing discrimination, racialized wage gaps, and a host of other formative phenomena demonstrate contemporary racism still plays a role in American society, despite its covert nature.⁷⁹ Racial contestation and symbolic incorporation of minority groups have largely extinguished culturally-acceptable overt racism. The structural obstacles that remain fall

under Bonilla-Silva's category of "New Racism." The following figure illustrates the argued progression and current character of the racialized social system of the United States.⁸⁰

Figure 3 – Main Features of U.S. Racial Structure, 17th to 20th Century

Slavery	Apartheid	New Racism
<i>Economic</i>		
-Slaves -Free blacks systematically received the worst deal	-Sharecropping (1860s-1910s) -Exclusion from top jobs -"Nigger Jobs" (1920s-1960s)	-Mostly in the lower tiers of the occupational structure and experience -Occupational <i>sedimentation</i>
<i>Political</i>		
-Exclusion	-Almost total exclusion	-Symbolic integration -Deracialization of nonwhite politicians
<i>Social</i>		
-Almost complete social degradation of nonwhites -No need for rigid racial separation	-Rigid racial separation *Housing covenants *Laws against inter-marriage *Separate and unequal	-Covert racial practices *Meritocracy *Limited integration *Worst schools and tracking
<i>Ideological</i>		
-Simple ideology No need for a highly developed ideology because of the thorough character of racial domination.	-Elaborate ideology Need for an ideology to order/explain the "place" of nonwhites in society.	-Sophisticated ideology Ideology in accordance with new covert practices. The new ideology revolves around the issue of "reverse racism" ('they' are taking 'our' jobs) and "equal opportunity" (why should 'they' have any advantages over 'us').

In short, through *Rethinking Racism*, Bonilla-Silva proposes we need a less static view of racism. As culture shifts and the nature of obstacles to racial harmony evolves, we should examine the impacts of structural inequalities rather than view racism as merely a psychological perversion. The power of social and political institutions to perform and replicate contemporary racisms must be acknowledged if amelioration of inequities and pursuit of justice are to be achieved. Finally, understanding the essential functional role of racial contestation in cultural dialogue, appropriate jurisprudence should refrain from suppressing the ability of minority groups to mobilize around their existent, shared goals.

For Discrimination

We have thus far traced the theoretical bases and foundations that have motivated minority and marginalized groups to historically mobilize. It is a fact of this history that affirmative action has been employed for several decades as a strategy to rectify disparities in educational and social capital between these groups and the majority. On the whole these methods have attempted to apply a salve of equity to the painful social wounds of racism and discrimination, and in their pursuit have met with some degree of success. Yet some theorists believe there is a better way to mitigate the discord between racial groups: colorblindness. Have we outgrown affirmative action and entered into a post-racial society? Is adopting a philosophy of colorblindness a viable policy alternative for the present and the future? These are two of the questions Randall Kennedy seeks to answer in his book *For Discrimination: Race, Affirmative Action, and the Law*.

“All men are created equal” are the words held so dear by the American populace. They represent the aim and longing – at least in theory – of our collective hearts for unity

among those who choose to build a life here. However, we vary in our interpretation of what the execution of this idea looks like in practice. Kennedy begins his chapter “The Color-Blind Challenge of Affirmative Action” by attaching several broad labels to competing ideologies of equality as they pertain to colorblindness. To begin with, there are those who favor the employment of colorblindness and those who do not. As we have seen at the outset of this paper through the words of Justices Roberts and Sotomayor, the divide of opinion reaches to the highest realms of power and intellect within our society. Kennedy breaks down the colorblindness advocacy camp further into two subsets: the colorblindness gradualists and the colorblindness immediatists.⁸¹ Gradualists are pithily described as identifying with Justice Harry Blackmun’s quote “in order to get beyond racism, we must first take account of race”⁸² while immediatists are more drawn to the words of William Van Alstyne:

One gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one’s own life – or in the life or practices of one’s government – the differential treatment of other human beings by race. ...[this] is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong.⁸³

Not all immediatists think affirmative action has been an inherently flawed practice, Kennedy points out. Of those favoring an immediate move to standardized treatment of all individuals, some believe affirmative action has been an effective intervention in the past, but does more harm than good in modern society.⁸⁴ What we are left with is a vast spectrum of ideologies that range from “this was never a good idea” to “this is an idea that should never be challenged” to somewhere in between. Where along this continuum does justice reside?

Colorblindness, when described simplistically, bears what American political journalist Michael Kinsley refers to as the “bumper sticker advantage.”⁸⁵ “Treat everyone the same” is a short, simple concept – one which might be easily translated from theory to practice and casts off the cumbersome gradations of reconciling our simultaneous common humanity with innate individual difference. We see this to be a philosophy that has been applied by the Court for many years with varying degrees of success. While current societal consensus has rendered “separate but equal” to be deplorable, the words of Justice John Marshall Harlan in his *Plessy v. Ferguson* dissent of 1896⁸⁶ ring eerily similar to arguments used by the Court today – over a one hundred years later – to guide discussion on justice in a multicultural society.⁸⁷ Kennedy cites a litany of Supreme Court cases in which constitutional colorblindness has been referenced as a bedrock principle in rulings that in practice perpetuated discrimination against disenfranchised groups. These cases include *Plessy v. Ferguson* which upheld “separate but equal” practices across the country, *Korematsu v. United States* which found no fault with the domestic internment of Japanese Americans during World War II, and *Swain v. Alabama* which affirmed racially discriminatory jury selection processes.⁸⁸ In the words of Kennedy, when it comes to constitutional colorblindness there is historic reason for “skepticism regarding the capacity of courts to suitably distinguish between permissible and impermissible types of racial discrimination.”⁸⁹

While many of these grievous oversights in the execution of justice were corrected by subsequent rulings by the Court, it remains clear that, as an ideology, colorblindness can enhance rather than reduce discriminatory treatment of the marginalized. While broad legal principles and platitudes are necessary to standardize

implementation of the law in such a large country, a myriad of examples exist that demonstrate exceptions to these models of justice simply cannot be applied in every situation. Kennedy points to the words of Professor Nathan Glazer:

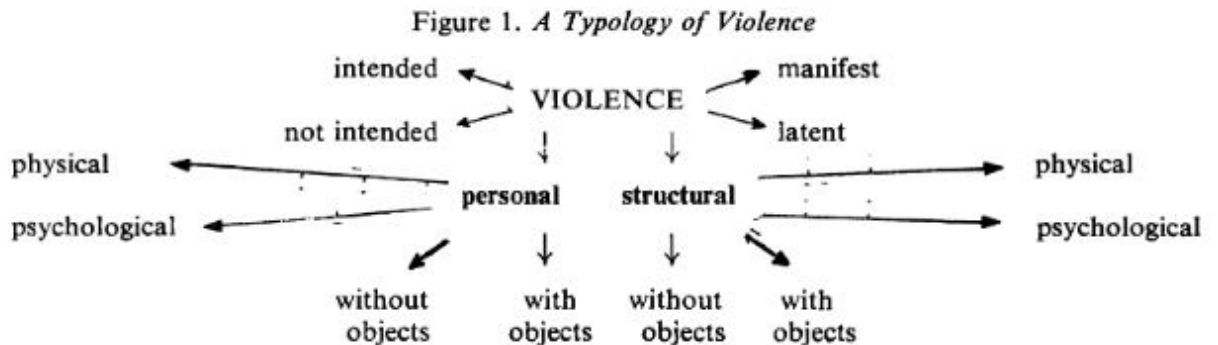
General principles that mean justice are often suspended to correct special cases of injustice, as when the immigration laws are suspended to let in a body of political refugees, or moneys are made available to those suffering from floods or other disasters. Negroes are victims of a man-made disaster more serious than any flood.⁹⁰

What Kennedy is advocating for is an acknowledgement that strictly applied colorblindness is overly simplistic in its vision for a just America. While the discussion of whether or not the United States will ever become a post-racial society is beyond the scope of this thesis, Kennedy's work demonstrates that colorblind immediatists currently sitting on the bench represent an invidious threat to justice across the country. At least for now, colorblindness also renders us sightless to the racial discrimination it perpetuates.

Violence, Peace, and Peace Research

Thus far we have referred to the negative impacts of exclusion and marginalization with terms such as “discrimination” or “injustice.” However, some scholars might describe navigating dialogue in this manner as a conversation for milquetoasts. Indeed, in his work *Violence, Peace, and Peace Research*, sociologist Johan Galtung postulates that in many instances the negative impacts we have been discussing can, and should, be referred to as acts of violence, and for our purposes – “structural violence.” In his defining of violence, Galtung states “violence is present when human beings are being influenced so that their actual somatic and mental realizations are below their potential realizations.”⁹¹ Summarily, violence is “the cause of

the difference between the potential and the actual.”⁹² When social and political institutions begin to engage in behaviors and decisions that limit, directly or indirectly, the autonomy of individuals in living their desired human experience, we may say that structural violence is present. He arrives at the following typology of violence:⁹³



Conceptualized here is the idea that violence does not strictly refer to physical, injurious acts, but can take a variety of forms. Violence involves an actor, an object to be acted upon, and the action itself. Galtung explicitly describes social injustice as has been described throughout this literature review as a form of violence.⁹⁴ Describing violence as limiting of autonomy to realize potential shows that the disenfranchisement of minorities and shifting of power structures to exclude particular groups can be described as nothing short of brutality.

Race, Structural Violence, and the Neoliberal University: The Challenges of Inhabitation

While Galtung defines structural violence in the broad sense, a study by Jennifer Hamer and Clarence Lang proves instructive when we conceptualize the reality of structural violence in the university environment. In *Race, Structural Violence, and the Neoliberal University: The Challenges of Inhabitation*, the authors offer a compelling directive that talking about the existence of racial disparity neither ameliorates historic

discrimination nor promotes inclusivity. In conducting their examination of structural violence in the campus setting, Hamer and Lang intentionally link its existence with a neoliberal context. The study defines neoliberalism as “the economic and social philosophy that imposes free-market fundamentalism on all human interaction.”⁹⁵ The authors focus on Irit Rogoff’s idea of “inhabitation” in scholarship, the study of a scholar’s relationship to his or her subject of study.⁹⁶ The main thought is that researchers often conduct projects within the physical environment of academia with an outward focus but rarely pause to understand their relationship with these subjects as they affect institutions of higher education. As minorities face obstacles in American society, the authors find it essential that we understand how these obstacles are replicated in the college setting. Hamer and Lang contend that “rather than simply intervening ‘in the world,’ so to speak, scholars who write against structural violence must inhabit their research by fostering... ‘insubordinate spaces’ that unsettle existing power relations and promote meaningful racial equity and access in the halls of academe.”⁹⁷

Neoliberalism in Academe

Hamer and Lang track the character of disparity in American society through black-white wealth gap origins and racialized perceptions of poverty. From the roots of discrimination to the rise of the black lower to lower-middle class during the 1970s and beyond,

The black working-class poor have served as a potent condensation symbol in popular white anxieties and resentments regarding race, class, gender, deviance, and dependency...through this framing, black people are fashioned as predatory ‘takers’ threatening the independence and safety of virtuous white ‘makers’ – hence the latter’s indifference to police misconduct in black communities...in this manner, race has performed the dirty work of justifying the retrenchment of the social safety net, promoting a reactionary white fortress mentality.⁹⁸

In the view of Hamer and Lang, the racial climate of American society today remains far from Justice Kennedy's "blurred lines."⁹⁹ Localizing to the cultural microcosm that is the American university, the scholars postulate that structural violence is pervasive. According to a study as recently as 2012, African Americans and Hispanics are found to be less likely to attend or complete college despite the fact that parents of these minority groups were measured as more likely to hold their children accountable for homework than white and Asian American parents.¹⁰⁰ Among 9th graders surveyed, African Americans reported ambitions to complete a bachelors or professional degree in higher numbers than their white peers. As the authors conclude, "the critical point is that successful outcomes in higher education are not simply about valuing education, but also a matter of resources and campus environment." Whereas black students were already more likely than their fellow white students to work 15+ hours a week and take on debt to pay for school, African American enrollment at historically white institutions has been declining in the face of rising tuition rates. Such drops can have their own host of negative side effects for the students who remain.

For African American students, declining numbers translate into increased racial isolation in predominantly white classrooms, residence halls, cafeterias, libraries, and the mostly white towns and cities in which many of these campuses are located. Predominantly white campuses can often be alienating environments for students of color. They are less likely to have interactions with faculty members who are supportive of their classroom participation and academic success...African American students also commonly report their experiences with microaggressions, or the 'subtle insults (verbal, nonverbal, and/or visual) directed towards people of color automatically or unconsciously.¹⁰¹

The Evidence for Racial Disparities

Minorities in Higher Education

More than ever before, becoming a successful member of the American workforce requires a college education. Thus, it follows reasonably that to eliminate disparities between white Americans and racial minorities and facilitate achievement for all citizens, adequate access to postsecondary education is essential. According to a 2011 report by the American Council on Education Minorities in Higher Education, rates of college enrollment have increased over the past several decades among all racial groups. While superficially this appears to be good news, closer analysis revealed that the disparity between African American enrollment and white enrollment actually widened between 1990 and 2009 by two percentage points. African American enrollment also increased at one of the slowest rates when compared to those of other racial minorities such as Hispanics and Asian Americans.¹⁰² While whites and Asian Americans demonstrated a higher level of achievement than their elders, African Americans did not.¹⁰³ With the knowledge that minorities have historically attained the lowest levels of education, these groups should be targeted as groups whose access must be improved.

The Case for Reparations

An examination of the circumstances and policies that have created and perpetuated racial disparity in American society grants nuance to the divisions seen in the present day. While early policy solutions such as the Voting Rights Act of 1865 and *Brown v. Board of Education* were intended to remedy the injustices of slavery in the United States, new laws were often bent or broken by white Americans with greater

political and social capital to such an extent that conditions improved little for African Americans until the mid to late 1900s. Jim Crow laws, poll taxes, lynching, and other horrors in the American South caused a mass exodus of nearly 6 million African Americans to the North over the course of the 20th century known as the Great Migration. Migrants believed they would find the equal legal protection granted them under the 14th Amendment but in fact discovered they were trading one hell for another. This new terror was encompassed in a single word: redlining. In his article for The Atlantic The Case for Reparations, Ta-Nehisi Coates describes the plight of African Americans seeking to become homeowners between the 1930s and 1960s:

The Federal Housing Authority had adopted a system of maps that rated neighborhoods according to their perceived stability. On the maps, green areas, rated 'A,' indicated 'in demand' neighborhoods that, as one appraiser put it, lacked 'a single foreigner or Negro.' These neighborhoods were considered excellent prospects for insurance. Neighborhoods where black people lived were rated 'D' and were usually considered ineligible for FHA backing. They were colored in red. Neither the percentage of black people living there nor their social class mattered. Black people were viewed as a contagion. Redlining went beyond FHA-backed loans and spread to the entire mortgage industry, which was already rife with racism, excluding black people from most legitimate means of obtaining a mortgage.¹⁰⁴

With the home ownership movement of the 20th century came one of the most concentrated accumulations of wealth in American history. However, redlining effectively barred African Americans from stability of such asset acquisition, turning an already wide wealth disparity between races into a veritable chasm. As Coates states, "If you sought to advantage one group of Americans and disadvantage another, you could scarcely choose a more graceful method than housing discrimination."¹⁰⁵

Black Wealth/White Wealth

In their book *Black Wealth/White Wealth*, Melvin L. Oliver and Thomas M. Shapiro describe the long-lasting effects of housing discrimination on the black community. They found that “it generally takes years and years to accumulate substantial wealth assets” and noted a “powerful connections between wealth accumulation and the life cycle.”¹⁰⁶ African American parents who were interviewed by the authors described that their primary desire for their children was “to have the chance to get a good education, to go to the right college, and to start their lives on the ‘right track.’ Assets were viewed as crucial to fulfilling these desires.”¹⁰⁷ And after centuries of discrimination and a seemingly endless game of catch-up, who can blame them?

The Shape of the River

In their book, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*, authors William G. Bowen and Derek Bok empirically look at the legacies left by race-conscious university admissions policies.¹⁰⁸ Bowen and Bok utilized the College and Beyond database to study and observe long-term education outcomes for over 45,000 students with a wide variety of racial identities. These students all attended college at some point between the 1970s and 1990s. Their study places particular emphasis on the paths of minority students admitted to top universities as the result of race-conscious admissions policies, examining graduation rates, academic performance, subsequent career success, and involvement in their future communities. In short, their findings were that African-American students, the minority group given the most attention, have performed well in the classroom, including applicants with lower test scores that are admitted due to affirmative action admissions.

Additionally, the study found that in the absence of race-conscious admittance policies, minority enrollment, particularly African American enrollment, would decline dramatically. With their belief that these policies have been the stepping stone behind creating the Hispanic and African-American middle classes in American society, their conclusion is that without such policies in place, minority groups will remain economically disadvantaged and have fewer avenues available to them for social and economic mobility. An interesting finding of the study is that while these policies have accounted for gains among minority groups due to reallocation of educational and cultural capital, they have also causally affected a rise in minority test scores. In the long term, these policies may not remain necessary but the study finds it evident that their presence has beneficially contributed to the closing of the racial achievement gap. *The Shape of the River* proves prescriptive because of its empirical insights into the efficacy of race-conscious university admissions policies.¹⁰⁹ While much of our analysis thus far has been limited to theoretical ideas and concepts, validating these concepts through collected and tangible data allows further analysis into potential policy interventions that address disparities in the American educational system, particularly the realms of academe represented by the field of higher education

CHAPTER THREE: CRITICAL ANALYSIS

We have now examined a wide range of sources and perspectives regarding the ontology and modality of racial identity within a multicultural democracy. Before moving further, let us briefly review the events in question. In 2006, Michigan voters passed Section 26, an amendment to the Michigan Constitution, via an established process for popular referenda. Placed on the ballot as “Proposal 2,” the amendment passed by 58% and prohibited Michigan’s public universities from employing any form of admissions criteria that bore a racial focus. Members of the state boards that govern Michigan’s public universities and select admissions criteria are elected for eight-year terms and have historically made personal stances on racially-focused admissions criteria a part of their campaign platforms. In the absence of ability to act on such views, racial groups are precluded from lobbying these public officials regarding legislation that serves their shared interests.

Proceeding forward we will utilize these references to critique the problematic epistemologies employed by Justice Kennedy and the plurality ruling in *Schuette v. Coalition to Defend Affirmative Action*. We will briefly return to a summary of Justice Kennedy’s argument to identify particular points for redress. Kennedy finds “this case is not about how the debate about racial preferences should be resolved [but] who may resolve it.”¹¹⁰ Such a focus is not problematic. The question of when the polity is and is not judged competent to rule itself lies at the very heart of *Schuette*. While both Kennedy and Sotomayor seek to answer this query, vastly different rationales lead to their opposing conclusions.

Two major ideas serve as the backbone for Kennedy's argument. The first of these deals with interpretation of precedent rulings by SCOTUS, in which he finds the Court historically has not and should not intervene in the absence of "specific injury" against a minority group with malicious intent. Justice Kennedy determines that such a motive has been present and active in historic precedent cases such as *Hunter* and *Seattle* but does not find comparable purposive action to be present when evaluating the modification of Section 26. As a result, the decisions made by the voters of Michigan should not be restricted.

Secondly, the plurality ruling determines that true racism is stereotyping racial groups to assume they have common political views. As he states in his opinion, "government action that classifies individuals on the basis of race is inherently suspect and carries the danger of perpetuating the very racial divisions the polity seeks to transcend."¹¹¹ The conclusion in this case is that it would be racist and outside appropriate jurisprudence to intervene when the intervention assumes any racial group to possess a certain view. In the analysis that follows, we will seek to confront and invalidate both objections respectively.

Point #1

The notion that invidious policies stemming from the nefarious motives of the majority must certainly demand judicial intervention is without contest. Kennedy categorizes these policies as causing real and specific injury to minority groups. Without question, the precedent cases referenced by both Sotomayor and Kennedy deal with historic, active discrimination. Their subsequent correction is to be lauded. Our task remains to provide a convincing argument contrary to the conclusion of the plurality in

Schuetz: that precluding minority groups from meaningful participation in the political process acts in itself to cause real and specific injury.

We will recall our earlier discussion of Ingram's "status-driven group rights," those assigned to particular minority groups according to various racial, ethnic, gendered, sexual, religious, and a multitude of other identities which may be subject to oppression from a societal majority. These interests seek to promote equal treatment, which in some cases involves treating every individual the same¹¹² but in others require different treatments for different group members to "respect individual difference no less than their common humanity."¹¹³ In contrast to oppression, domination is caused by "hierarchies of decision-making power that prevent some persons from exercising control over their lives"¹¹⁴ and may exist in many forms. Systemic versus identity-based social injustices refer to injustice imposed in a way that any individual can be affected (i.e. poverty) or because of individual/group identity, respectively. My argument in the case of *Schuetz* is that the actions of voters of Michigan have removed power from the hands of minorities based on their particular group membership, meeting the identified definitions for domination and identity-based social injustice.

Galtung's theories of structural violence run complementary to this defined framework. We will recall that structural violence is understood as existing when the autonomy of a group or individual is limited in such a way that full potential or desired outcomes for one's life cannot be pursued. Further, such active injury is accomplished through an actor, an object being acted upon, and the action itself. In the case of *Schuetz* we see all three functional components of structural violence at work. The people of Michigan, serving as the actor, actively limited the capability of minority groups, the

objects acted upon, from advocating for their particular desired outcomes in higher education through popular referendum, the action itself.

Worth noting here is Hamer and Lang's discussion of structural violence in the university setting, which demonstrates that minority groups face pervasive and unique challenges even when granted race-conscious consideration for admission.

Microaggressions on campus and lack of adequate resources make academic achievement more difficult for African Americans than their white peers. It is evident, then, that when African American's enter the context of higher education they face significant obstacles, yet the Michigan referendum functions to create even more obstacles for these students to arrive in the first place for them to get there in the first place. If the stated goal is a harmonious society, *Schuette* appears to be working backwards by creating rather than alleviating the structural violence that surrounds race and the American university.

Point #2

Certainly it would be erroneous to assume every member of a particular racial group possesses identical worldviews. Intersection of the racial identity with class, gender, religion, sexual orientation, and a variety of other lived experiences informs our perceptions of the world around us and helps determine the desired outcomes Galtung describes. The plurality in *Schuette* shares this viewpoint, recognizing the human identities to be complex. Kennedy sees assumptions founded upon a single dimension of an individual as both reductionist and deterministic. In many cases, such an outlook is applicable and worthy of praise. A multitude of individual attributes such as music taste, propensity towards crime, or vocational interest cannot be traced to one's racial identity. Similarly, individual ideologies, be they of political, religious, or another nature, are not

homogenous across minority groups. These views of the plurality have merit. However, our argument proceeding forward is to show that, in spite of the reasoning above, not all assumptions made about racial groups need be considered racist, specifically the assumption that minority groups desire access to higher education.

Returning to Ingram, we will recall his discussion of the appropriate definition of “equal treatment.” Ingram finds two available definitions, one advocating for treating every individual the same and one insisting treating all equally may not mean a strategy of “sameness.” The latter finds as its basis the existent differences in society and it is this definition we will advocate for.

Without question, race informs the manner in which the individual or group participates in the American political process. We saw this in Waldon’s *Cultural Identity and Civic Responsibility*, where he describes identity politics as a complex network of group interactions which determine the manner in which a society’s resources are allocated. Zamani-Gallaher took us a step further in her examination of racial identity construction. Individuals perceive themselves through the process of categorization. Identified boundary markers create commonality and difference between certain members of a society. Consequently, in-groups and out-groups emerge as the social collective subdivides along these categorical lines. With a myriad of potential identity markers, a vast spectrum of diversity emerges in a multicultural democracy. One of the most pronounced identity markers around the world is phenotypic difference between the races. Because race is a socially constructed category, and no genetic or biological difference exists between individuals, one might assume Kennedy’s notion of treating all with a strategy of “sameness” to be just and reasonable. Zamani-Gallaher makes an

important distinction, in her point that identities are constructed within the context of a given nation and culture.

Thus, when we make assumptions about the shared goals of minority groups, we take into account the shared histories and lived experiences of this group within its given national context. The Civil Rights Movement of the 1960s serves as an example of a racial group mobilizing around its shared goals in a manner that effected systemic change. We will recall Bonilla-Silva's theory of racial contestation, which holds overt protest by minority groups to be of tantamount importance in the pursuit of structural change. We cannot, and must not, question the valid and proven possibility of a minority group identifying a salient issue or cause and sharing in its pursuit. Moreover, because discrimination and disparity have a near universal affect on African-Americans, we see that goals relating to the eradication of structural obstacles associated with Bonilla-Silva's "New Racism," in fact *must* be shared.

Without collective and cohesive mobilization by minority groups through over advocacy or protest, transformative change in our flawed social fiber cannot be realized. In response to the plurality's view, it is permissible to view the many aspects of individual identity as existing outside of, and independent from, arbitrary racial categories – this is beneficial. However, when these arbitrary categories directly impact and influence the lived experiences of all the individuals whom they contain, structural violence occurs when the ability of minority groups to *choose* a shared, salient policy pursuit is legally suppressed by the mechanizations of majority tyranny. The argument of this paper is that the people of Michigan created further structural barriers that tangibly

disadvantage minority groups by removing their access to racial contestation in a higher education system already plagued by racial disparity.

Schuette v. The Coalition to Defend Affirmative Action: Was Justice Served?

Moving forward from the above argued rebuttal of the *Schuette* plurality's problematic philosophies, we are ultimately left with the question of whether appropriate jurisprudence was exercised in the case of *Schuette v. The Coalition to Defend Affirmative Action*. The argument of this paper seeks to respond to this question with a resounding "no" for the following reason. The passage of Section 26 violates the political-process doctrine, the idea that all societal groups should have equal access to participation in the political process. Justice Sotomayor argues that many SCOTUS precedent cases have reaffirmed both this doctrine and "the right of minority members to participate meaningfully and equally in the political process" (citation). Examining the cases of *Hunter* and *Seattle*, the Court has specifically stated that policy interventions enacted by the popular majority that place "*special* burdens on racial minorities within the governmental process" such that it becomes "*more* difficult for certain racial minorities to achieve legislation in their interest" are in violation of the Constitution. This paper seeks to affirm Justice Sotomayor's argument that Section 26 "alters the political process in a manner that uniquely burdens racial minorities" and agree that SCOTUS precedent points towards a necessary overturning of the 2006 decision by the people of Michigan.

This paper is not designed to merely match precedent and Constitutional verbage with a logical verdict. Instead, my argument seeks to lay a theoretical foundation for *why* the *Schuette* ruling should be perceived as injustice. Unjust action equates to deeper

issues than mere misreading of precedents and our review of scholarly research surrounding the subjects of race and its role in a multicultural democracy demonstrate this. We will recall our earlier review of the works of Aristotle and the Doctrine of the Mean, which seeks to restore equitable balance when restructuring or theft creates disparity between parties. It is the idea that all should receive their “given due.” As may be seen in Michigan, Section 26 represents a nonneutral reallocation of power between racial groups that requires rectificatory justice to restore appropriate balance and protection under the political-process doctrine. In *Politics*, Aristotle delivers the analogy of the flautist, advocating that while all flute players may not be equal in merit or talent, all should have equal access to flute lessons and education. The political-process doctrine serves as a corollary; while equal outcomes are certainly not guaranteed, the right to equal access and participation is to be defended in an equitable and just society.

The immense necessity of enshrining the access of minority groups to political participation arises when we are able to objectively observe the continuing effects of racial disparity in American society. Bonilla-Silva’s discussions of New Racism show lingering structural violence and discrimination by social institutions against minority groups. Protecting the rights of minorities to engage in racial contestation provides the channels which can be effectively employed to effect systemic change in the social fabric of the United States. The passage of Section 26 by the people of Michigan and subsequent ruling by the plurality in *Schuette v. The Coalition to Defend Affirmative Action* seals off these channels and prevents disenfranchised groups from pursuing the equality granted to them by the Constitution. In response to this ruling, we must

respectfully disagree and advocate for prompt reassessment of the ideologies which contributed to its conveyance.

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