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## SCHUETTE AND ANTIBALKANIZATION

Samuel Weiss\* and Donald Kinder\*\*

### ABSTRACT

In *Schuette v. Coalition to Defend Affirmative Action*, Justice Kennedy's controlling plurality revised the political process doctrine and ended the practice of affirmative action in Michigan. In this opinion, Kennedy followed in the Court's tradition of invoking antibalkanization values in equal protection cases, making the empirical claims both that antibalkanization motivated the campaign to end affirmative action in Michigan and that the campaign itself would, absent judicial intervention, have antibalkanizing effects.

Using sophisticated empirical methods, this Article is the first to examine whether the Court's claims on antibalkanization are correct. We find they are not. Support for the Michigan ballot initiative banning affirmative action arose principally from feelings of racial resentment, not a desire for racial comity. The ballot initiative did not mitigate racial divisiveness but did just the opposite, exacerbating racial division in the state. We conclude by considering what *Schuette* and these empirical findings mean for affirmative action, for the political process doctrine, and for the antibalkanization principle.

### INTRODUCTION

On November 7, 2006, the voters of the State of Michigan enshrined into their constitution an amendment that prohibited the use of affirmative action in higher education admissions.<sup>1</sup> The voter-ballot initiative, "Proposal 2," passed with approximately 58% of the vote after a year of contentious debate.<sup>2</sup> Civil rights groups quickly filed suit, alleging that the amendment violated the Federal Constitution's Equal Protection Clause under the political restructuring doctrine, which forbids states from

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\*\* Philip E. Converse Distinguished University Professor, University of Michigan. Thanks to Phoebe Ellsworth, Sam Gross, and Emma Kaufman for helpful comments. Some of the data and analysis here first appeared in an amicus brief to the Supreme Court in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), and we thank Catherine Carroll, Joshua Salzman, and Stuart Allen for their guidance in drafting the brief. The brief can be read in its entirety at Brief of Amici Curiae Political Scientists Donald R. Kinder, et al. in Support of Respondents, *Schuette*, 134 S. Ct. 1623 (No. 12-682).

<sup>1</sup> See *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 539 F. Supp. 2d 924, 930 (E.D. Mich. 2008), *aff'd in part, rev'd in part*, 701 F.3d 466 (6th Cir. 2012) (en banc), *rev'd sub nom. Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

<sup>2</sup> *Id.* at 931.

placing undue burdens on minority groups' access to the political process.<sup>3</sup> Nearly eight years later, the United States Supreme Court concluded the litigation by finding in *Schuette v. Coalition to Defend Affirmative Action*<sup>4</sup> that the amendment banning affirmative action was constitutionally permissible.<sup>5</sup>

Justice Kennedy's controlling plurality began by reiterating the existence of the political restructuring doctrine but limiting its application.<sup>6</sup> This move was foreseeable given the ambiguous scope of the political restructuring doctrine and the ambitious claim of the amendment's challengers—that affirmative action, a practice the Court “barely tolerate[d],”<sup>7</sup> would receive Constitutional protection from a direct vote seeking to eliminate it.

Kennedy concluded his opinion with a lengthy ode to the merits of political debate, particularly on the contentious issue of race.<sup>8</sup> He wrote:

An informed public can, and must, rise above [racial division].  
The idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people.<sup>9</sup>

Amidst the soaring rhetoric in his coda, Kennedy made two empirical claims on the relationship between voters and Proposal 2. First, Kennedy claimed that the Amendment arose from opposition to racial divisiveness.<sup>10</sup> It “was adopted, we must assume, because the voters deemed a preference system to be unwise, on account of what voters may deem its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it.”<sup>11</sup>

Second, Kennedy claimed that citizens respond to campaigns like the ones for and against Proposal 2 by speaking, debating, and learning before acting.<sup>12</sup> Rational deliberation “rise[s] above” racial divisiveness.<sup>13</sup> Judicial intervention into this sensitive area would invite “rancor or discord based on race” while public debate would “avoid” it.<sup>14</sup>

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<sup>3</sup> See *id.* at 932–34.

<sup>4</sup> 134 S. Ct. 1623 (2014) (plurality opinion).

<sup>5</sup> *Id.* at 1638.

<sup>6</sup> *Id.* at 1634.

<sup>7</sup> David E. Bernstein, *Schuette v. Coalition to Defend Affirmative Action and the Failed Attempt to Square a Circle*, 8 N.Y.U. J.L. & LIBERTY 210, 212 (2013).

<sup>8</sup> *Schuette*, 134 S. Ct. at 1636–38 (plurality opinion).

<sup>9</sup> *Id.* at 1637.

<sup>10</sup> *Id.* at 1638.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1626.

<sup>13</sup> *Id.* at 1637.

<sup>14</sup> *Id.* at 1635.

Kennedy's empirical claims about the relationship between public referenda and racial sentiments may appear tangential to the political restructuring doctrine, but they are consistent with a line of Fourteenth Amendment cases that "reason[] from antibalkanization values."<sup>15</sup> The decisive opinions in a number of the most significant race cases of the past several decades have upheld racial classifications but restricted them, expressly demonstrating the concern for social disharmony that "both extreme racial stratification and unconstrained racial remedies can engender."<sup>16</sup> Antibalkanization as a Fourteenth Amendment principle helps to explain why in 2003 the Court forbade quantitative affirmative action for the University of Michigan's undergraduate admissions but permitted qualitative affirmative action in its law school admissions,<sup>17</sup> and why race-conscious remedies have been held permissible in school desegregation cases where facially racial remedies were not.<sup>18</sup>

Early in 2006, as the Proposal 2 campaign began to gather steam, one of us, as a political scientist, was interested in the same questions of the relationship between public campaigns and racial sentiments that years later would occupy the Court. Kinder and his colleague Nancy Burns designed a pair of coordinated and simultaneous surveys, one carried out in the state of Michigan, the other carried out in the country as a whole.<sup>19</sup> Polimetrix, Inc., of Palo Alto, California, conducted interviews with representative samples of the Michigan and American electorates, before and then again after the 2006 elections.<sup>20</sup> Both studies included batteries of standard measures of political and racial attitudes.<sup>21</sup>

Analysis of the two surveys enables us to carry out a sharp test of Kennedy's empirical claims. Both are incorrect. First, we show that the vote on Proposal 2 cannot be understood as a decision to prohibit affirmative action in the interests of racial comity. On the contrary, whites and blacks were deeply divided over Proposal 2;<sup>22</sup> white support came principally from feelings of racial resentment,<sup>23</sup> and black opposition came principally from feelings of racial solidarity.<sup>24</sup> Second, contrary to Kennedy's claim, the Proposal 2 campaign did not rise above racial divisiveness but had just the opposite effect.<sup>25</sup> As they moved to the polls, whites and blacks alike

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<sup>15</sup> Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1278 (2011).

<sup>16</sup> *Id.*

<sup>17</sup> Compare *Grutter v. Bollinger*, 539 U.S. 306 (2003), with *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>18</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>19</sup> See *infra* Part II.

<sup>20</sup> See *infra* Part II.

<sup>21</sup> See *infra* Part II.

<sup>22</sup> See *infra* Part II.

<sup>23</sup> See *infra* Part II; Table 2.

<sup>24</sup> See *infra* Part II; Tables 3 & 4.

<sup>25</sup> See discussion *infra* Part II.

were more divided, and more consumed by considerations of race, than they would have been in the absence of a campaign.<sup>26</sup>

Part I of this Article describes *Schuette* and the history of the antibalkanization principle. Part II provides the background and methodology of our empirical findings and details our results. Part III considers the aftermath of *Schuette*.

### I. SCHUETTE AND THE ANTIBALKANIZATION PRINCIPLE

In the spring of 2003, for the first time in a generation, the Supreme Court heard arguments over affirmative action in university admissions.<sup>27</sup> In a pair of cases, white students denied admission to the University of Michigan's undergraduate college and law school sued the University, arguing that the affirmative action provisions in the University's admissions procedures violated the Equal Protection Clause of the Fourteenth Amendment.<sup>28</sup>

The University argued that its admissions policies were narrowly tailored, and that they were in the service of advancing the State's compelling interest in racial diversity in educational environments.<sup>29</sup> Microsoft, General Motors, IBM, and scores of the country's most important corporations urged the Court to uphold the University's admissions plans.<sup>30</sup> A group of retired military leaders, including Norman Schwarzkopf and Wesley Clark, filed a brief arguing that affirmative action in the service academies, ROTC, and the military was indispensable to an effective fighting force.<sup>31</sup>

By a vote of 6–3, the Court declared the University's undergraduate policy unconstitutional.<sup>32</sup> Chief Justice Rehnquist issued the majority opinion.<sup>33</sup> Race can be taken into account, the Chief Justice declared, but it cannot be a “decisive” factor.<sup>34</sup> The undergraduate policy was insufficiently narrowly tailored and therefore unconstitutional.<sup>35</sup> At the same time, by a vote of 5–4, the Court ruled in favor of the law school's policy.<sup>36</sup> Writing for the majority, Justice Sandra Day O'Connor argued, “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>37</sup> Furthermore, O'Connor wrote, “the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race

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<sup>26</sup> See discussion *infra* Part II.

<sup>27</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>28</sup> *Grutter*, 539 U.S. 306 (law school); *Gratz*, 539 U.S. 244 (undergraduate).

<sup>29</sup> *Grutter*, 539 U.S. at 327–28, 334.

<sup>30</sup> See, e.g., *id.* at 330–31.

<sup>31</sup> See *id.* at 331.

<sup>32</sup> *Gratz*, 539 U.S. at 251.

<sup>33</sup> *Id.* at 249.

<sup>34</sup> *Id.* at 270–72.

<sup>35</sup> *Id.* at 275.

<sup>36</sup> *Grutter*, 539 U.S. at 343.

<sup>37</sup> *Id.* at 332.

in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”<sup>38</sup>

Two weeks after the Court issued its decisions, Ward Connerly announced the formation of an organization to place an initiative on the Michigan ballot that would prohibit the use of race in admissions and hiring throughout the state.<sup>39</sup> Connerly, a successful businessman and a critic of affirmative action, was instrumental both in ending affirmative action at the University of California in 1996 and in spearheading the successful passage of Proposition 209 a year later, which eliminated affirmative action from all public employment, education, and contracting in the State of California.<sup>40</sup> Connerly’s organization collected the requisite number of signatures, thereby placing the “Michigan Civil Rights Initiative” (MCRI) on the state’s November 2006 ballot as Proposal 2.<sup>41</sup> The MCRI proposed that neither the state nor any public school shall “discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting.”<sup>42</sup> The MCRI passed, winning 57.9% of the vote.<sup>43</sup>

The next day, the Coalition to Defend Affirmative Action filed suit challenging the MCRI, claiming that it was a straightforward violation of the Fourteenth Amendment, as its intent was to reduce the population of African-American, Latino, and female students.<sup>44</sup> The activist group supplemented this ambitious claim with others, arguing that Proposal 2 violated the First Amendment and was preempted by both the Civil Rights Act of 1964 and Title IX of 1972.<sup>45</sup> A month later, another group of students and faculty filed suit against the law, represented by a litany of mainstream progressive legal organizations including the American Civil Liberties Union and the National

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<sup>38</sup> *Id.* at 343.

<sup>39</sup> Ritu Kelotra, *Affirmative Action Efforts Strong in 2003: Connerly Goes to Michigan*, LEADERSHIP CONF. (Jan. 13, 2004), <https://web.archive.org/web/20061127082312/https://civilrights.org/issues/affirmative/details.cfm?id=17854>.

<sup>40</sup> *See About Mr. Ward Connerly*, AM. C.R. INST., <http://acri.org/about-ward-connerly/> [<https://perma.cc/7UCU-WRVL>] (last visited Feb. 21, 2018).

<sup>41</sup> *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 539 F. Supp. 2d 924, 931 (E.D. Mich. 2008), *aff’d in part, rev’d in part*, 701 F.3d 466 (6th Cir. 2012) (en banc), *rev’d sub nom.* *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014). The signature-gathering process was not without controversy of its own, as the MCRI engaged in voter fraud by telling signers of the petitions and even some of its own volunteers that the Initiative supported affirmative action, instead of prohibiting it. *See Operation King’s Dream v. Connerly*, No. 06-12773, 2006 WL 2514115, at \*2 (E.D. Mich. Aug. 29, 2006).

<sup>42</sup> *Coal. to Defend Affirmative Action*, 539 F. Supp. 2d at 931.

<sup>43</sup> *Id.*

<sup>44</sup> Plaintiff Coalition to Defend Affirmative Action et al.’s (BAMN’s) Second Amended Class-Action Complaint for Injunctive and Declaratory Relief at 20–21, *Coalition*, 539 F. Supp. 2d 924 (No. 06-15637).

<sup>45</sup> *Coal. to Defend Affirmative Action*, 539 F. Supp. 2d at 935.

Association for the Advancement of Colored People, and constitutional law professors Erwin Chemerinsky and Lawrence Tribe.<sup>46</sup> The District Court quickly consolidated the two cases.<sup>47</sup>

The second group of plaintiffs brought a more modest challenge to Proposal 2 as applied to university admissions, claiming that it violated the Equal Protection Clause's "political restructuring" doctrine by not merely banning affirmative action but also changing the political process by which the decision could be undone.<sup>48</sup> The Supreme Court had first articulated the doctrine in *Hunter v. Erickson*.<sup>49</sup> The City of Akron, Ohio, had enacted a fair housing ordinance to forbid racial discrimination.<sup>50</sup> In response to the ordinance, the citizens of Akron amended the city charter to require a majority vote in a referendum before any ordinance could regulate racial discrimination in housing.<sup>51</sup> The Supreme Court found that this amendment, despite being facially neutral, singled out the issue of race from any other form of property regulation and was therefore itself a racial classification.<sup>52</sup> As Akron had no compelling government interest in how it had structured the political process, the Court struck down the amendment as unconstitutional.<sup>53</sup>

The Supreme Court took up the doctrine again in *Washington v. Seattle School District No. 1*.<sup>54</sup> In March 1978, the School Board of the Seattle School District had adopted the "Seattle Plan," which sought to eliminate racial isolation in its schools through an aggressive desegregation program.<sup>55</sup> Opponents of the plan placed Initiative 350 on the Washington ballot, which sought to eliminate forced busing for racial integration.<sup>56</sup> In November 1978, the voters of the State of Washington passed Initiative 350 "by a substantial margin."<sup>57</sup>

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<sup>46</sup> *Id.* at 929.

<sup>47</sup> *Id.* at 932. The tension between the activist and mainstream organizations continued all the way to the United States Supreme Court, where time for oral argument was split between the two organizations. See [*Schuette v. Coalition to Defend Affirmative Action*] *Oral Argument*, C-SPAN (Oct. 15, 2013), <https://www.c-span.org/video/transcript/?id=53815> [<https://perma.cc/4L8H-Z247>]. The Coalition's demand for a reinterpretation of the Fourteenth Amendment clashed with the ACLU's more modest argument that a straightforward application of the political process doctrine would render Proposal 2 unconstitutional. See *id.*

<sup>48</sup> See *Coal. to Defend Affirmative Action*, 539 F. Supp. 2d at 933.

<sup>49</sup> 393 U.S. 385 (1969).

<sup>50</sup> *Id.* at 386.

<sup>51</sup> *Id.* at 387.

<sup>52</sup> *Id.* at 391–92.

<sup>53</sup> *Id.* at 392–93.

<sup>54</sup> 458 U.S. 457 (1982).

<sup>55</sup> *Id.* at 461.

<sup>56</sup> *Id.* at 463.

<sup>57</sup> *Id.* The full text of this ballot measure is available online through the Washington Secretary of State: <https://www.sos.wa.gov/elections/initiatives/text/i350.pdf> [<https://perma.cc/UXP8-9WYQ>] (last visited Feb. 21, 2018).



The Court found Initiative 350 unconstitutional under the same principle articulated in *Hunter*.<sup>58</sup> While “all other student assignment decisions, as well as . . . most other areas of educational policy, remain[ed] vested in the local school board,” those seeking an end to school desegregation had to seek relief from a higher, statewide body.<sup>59</sup> The Initiative thus “remove[d] the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body,” restructuring the political process “to burden minority interests.”<sup>60</sup>

To the second group of plaintiffs, the challenge to Proposal 2 required only a straightforward application of *Hunter* and *Seattle*.<sup>61</sup> Michigan’s Constitution states that an elected Board of Regents will control each of the state’s public universities, with “general supervision of its institution and the control and direction of all expenditures from the institution’s funds.”<sup>62</sup> Proposal 2 took away one decision, and only one decision, from the Regents: whether to use affirmative action in admissions.<sup>63</sup> While advocates for changes in how the University of Michigan admitted athletes, musicians, or legacy students could go straight to the Regents, advocates for affirmative action were forced to take the much more arduous step of repealing a constitutional amendment.<sup>64</sup> Proposal 2 therefore did not merely ban affirmative action—it singled out affirmative action for a separate political process.<sup>65</sup> This singling out was itself a racial classification, and the State had failed to provide a compelling governmental interest for its political restructuring.<sup>66</sup>

The Eastern District of Michigan agreed with many of plaintiffs’ premises: that the governance of a university is part of the political process; that a political restructuring claim requires no finding of intentional discrimination; and that Proposal 2 had a racial focus.<sup>67</sup> But the court disagreed overall, based on one critical distinction between the laws at issue in *Hunter* and *Seattle* and in the present case.<sup>68</sup> Unlike the policies at issue in *Hunter* and *Seattle*, affirmative action did not protect against unequal treatment on the basis of race but instead sought advantageous treatment on the basis of race.<sup>69</sup> There was a “fundamental[ ]” difference, the court argued, between

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<sup>58</sup> *Seattle*, 458 U.S. at 474.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *See generally* Brief for Respondents Chase Cantrell et al. at 4, *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (No. 12-682), 2013 WL 4587968.

<sup>62</sup> MICH. CONST. art. VIII, § 5.

<sup>63</sup> *See* Brief for Respondents Chase Cantrell et al., *supra* note 61, at 5.

<sup>64</sup> *See id.*

<sup>65</sup> *See id.* at 2 (stating that the Sixth Circuit determined that Proposal 2 “effected a significant change in the ordinary political process and that it was fundamentally about race”).

<sup>66</sup> *See id.* at 6.

<sup>67</sup> *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 539 F. Supp. 2d 924, 955–57 (E.D. Mich. 2008), *aff’d in part, rev’d in part*, 701 F.3d 466 (6th Cir. 2012) (en banc), *rev’d sub nom.* *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

<sup>68</sup> *See id.* at 953–58.

<sup>69</sup> *Id.* at 956–57.



“affirmative action programs not mandated by the obligation to cure past discrimination” and “laws intended to protect against discrimination.”<sup>70</sup> Restructuring the political process to prevent minorities from obtaining equal protection was prohibited, but restructuring the political process to prevent minorities from obtaining advantageous treatment was not.<sup>71</sup>

The Sixth Circuit reversed.<sup>72</sup> Judge Guy Cole found no meaningful distinction between the prohibition of preferential treatment and the prohibition of discrimination.<sup>73</sup> As there is no freestanding right to be free of discrimination, the district court’s distinction essentially meant that an enactment violates the political restructuring doctrine only if it undermines state action that is constitutionally mandatory as opposed to constitutionally permissible.<sup>74</sup> The behavior in both *Hunter* and *Seattle*, however, was *not* mandatory.<sup>75</sup> The Court in *Hunter* found that neither the 1968 Civil Rights Act nor traditional equal protection analysis decided the case.<sup>76</sup> The busing in *Seattle* was even more clearly constitutionally permissible state action, as the desegregation effort was a voluntary, ameliorative measure designed to reduce the impact of *de facto* desegregation.<sup>77</sup> And indeed, it is only logical that the political restructuring doctrine would cover legislation in the interest of minorities, not simply legislation designed to stamp out already unconstitutional action.<sup>78</sup> Otherwise, Cole wrote, the doctrine would be nothing but a “backstop against already unconstitutional action.”<sup>79</sup>

The Sixth Circuit en banc affirmed for the same reasons, with Cole again writing for the majority.<sup>80</sup> Judge Gibbons dissented, arguing, like the district court, for a distinction between racial and gender preferences and other laws that inure to the interest

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<sup>70</sup> *Id.* at 957.

<sup>71</sup> *Id.* The court also dismissed the conventional Equal Protection challenge from the other group of plaintiffs, holding that there was no discriminatory intent from the people of the State of Michigan. *Id.* at 952 (“Proposal 2 was a ballot initiative. To impugn the motives of 58% of Michigan’s electorate, in the absence of extraordinary circumstances which do not exist here, simply is not warranted on this record.”).

<sup>72</sup> *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 652 F.3d 607, 610 (6th Cir. 2011) (en banc), *rev’d sub nom.* *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

<sup>73</sup> *Id.* at 626.

<sup>74</sup> *Id.* at 627 (differentiating between constitutionally mandated “discrimination” and constitutionally permissible “preference”).

<sup>75</sup> *Id.* at 627–28.

<sup>76</sup> *Id.* at 627 (citing *Hunter v. Erickson*, 393 U.S. 385, 388–89 (1969)).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 629.

<sup>79</sup> *Id.* Finding Proposal 2 unconstitutional under the political restructuring doctrine, the Sixth Circuit did not reach the question of whether it was unconstitutional under a traditional Equal Protection analysis. *Id.* at 631.

<sup>80</sup> *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 701 F.3d 466, 470 (6th Cir. 2012) (en banc), *rev’d sub nom.* *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

of minorities through banning discrimination.<sup>81</sup> *Seattle*, she argued, only failed to make this point explicitly because of changes in the law after the case was decided.<sup>82</sup> *Seattle* concerned a racially conscious student assignment system, which while constitutional at the time, would in later cases be held to be subject to strict scrutiny and almost certainly struck down.<sup>83</sup> The Court in *Seattle* had therefore, with its different premises, failed to make the obvious inference that presumptively invalid preference programs, constitutional in only the most limited circumstances, did not receive the same protections from political restructuring that antidiscrimination laws like those in *Akron* did.<sup>84</sup>

Judge Sutton also dissented, raising an interesting hypothetical: Michigan interprets its state equal protection clause to require race-based classifications to survive strict scrutiny, just as the federal one does.<sup>85</sup> If the state was to interpret the state clause as broader than the analogous one,<sup>86</sup> it might reasonably decide to invalidate *any* racial preferences in university admissions.<sup>87</sup> Were the Michigan Supreme Court to do so, the outcome would be identical—while the Regents would make all other decisions regarding admissions, affirmative action could only return with an amendment to the state constitution.<sup>88</sup> Judge Griffin went further in dissent, writing that the political restructuring doctrine, mentioned in only a few Supreme Court cases ever, should be consigned to the annals of judicial history.<sup>89</sup>

The Supreme Court reversed.<sup>90</sup> Kennedy, joined by Justice Alito and Chief Justice Roberts, wrote the controlling plurality.<sup>91</sup> The plurality made a doctrinal argument

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<sup>81</sup> *Id.* at 494 (Gibbons, J., dissenting).

<sup>82</sup> *Id.* at 496–97 (“*Seattle* did not consider that the underlying policy affected by the challenged enactment was presumptively invalid.”).

<sup>83</sup> *See id.* at 496 (citing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007)).

<sup>84</sup> *See id.*

<sup>85</sup> *Id.* at 509–10 (Sutton, J., dissenting) (arguing that requiring “a member of a racial minority who wants a governmental privilege [to] . . . identify a compelling state interest that supports its provision” is required by the Equal Protection Clause and the plaintiffs’ assertions therefore “cannot be right”).

<sup>86</sup> For the argument that states should look to cognate clauses in their own constitutions to seek broader rights than their equivalents in the federal constitution, although not in the context imagined here, see generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). The logic is particularly compelling in areas, like education, in which federal courts are tepid in approach due to federalism concerns. See Samuel Weiss, Note, *Into the Breach: The Case for Robust Noncapital Proportionality Review Under State Constitutions*, 49 HARV. C.R.-C.L. L. REV. 569, 591 (2014).

<sup>87</sup> *Coal. to Defend Affirmative Action*, 701 F.3d at 509 (Sutton, J., dissenting).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 512 (Griffin, J., dissenting).

<sup>90</sup> *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014) (plurality opinion).

<sup>91</sup> *Id.* at 1629.

first,<sup>92</sup> then an appeal to broader principles.<sup>93</sup> On the doctrinal front, Kennedy recast the political process cases in a different light.<sup>94</sup> As to *Hunter*, he wrote, “Central to the Court’s reasoning in *Hunter* was that the charter amendment was enacted in circumstances where widespread racial discrimination in the sale and rental of housing led to segregated housing.”<sup>95</sup> *Hunter*, Kennedy wrote, “rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities.”<sup>96</sup> The principle is unremarkable but is not what *Hunter* rested on; *Hunter* could have relied on a traditional equal protection analysis if it had found that the city had *targeted* racial minorities, by altering procedures or otherwise.<sup>97</sup> It did not.<sup>98</sup> Instead, the Court struck down the amendment to the city’s charter because of how it had structured an internal government process on the subject of race, regardless of the intention in its enactment.<sup>99</sup>

Kennedy’s treatment of *Seattle* was more dubious still. He wrote that the case “[wa]s best understood as [one] in which the state action in question (the bar on busing enacted by the State’s voters) had the serious risk, if not purpose, of causing specific injuries on account of race.”<sup>100</sup> He later wrote that the Court “found that the State’s disapproval of the school board’s busing remedy was an aggravation of the very racial injury in which the State itself was complicit.”<sup>101</sup> As David Bernstein notes, however,

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<sup>92</sup> *Id.* at 1629–36.

<sup>93</sup> *Id.* at 1636–38.

<sup>94</sup> *See id.* at 1629–36 (summarizing a history of the Court’s Equal Protection jurisprudence).

<sup>95</sup> *Id.* at 1632.

<sup>96</sup> *Id.*

<sup>97</sup> *See generally* *Hunter v. Erickson*, 393 U.S. 385 (1969).

<sup>98</sup> *See id.* at 396–97 (Black, J., dissenting) (protesting the use of the Equal Protection Clause to bar the States from repealing laws that courts want the states to retain).

<sup>99</sup> David E. Bernstein notes that Kennedy could have reached a similar result by a slightly different route by simply stating that while the Supreme Court could have and did not explicitly state that the referenda in question were both motivated by discriminatory intent and had discriminatory effects, it was its underlying rationale, rendering the case a traditional equal protection case. David E. Bernstein, “Reverse *Carolene Products*,” *the End of the Second Reconstruction, and Other Thoughts on Schuette v. Coalition to Defend Affirmative Action*, 2014 CATO SUP. CT. REV. 261, 264.

For approximately 34 years, the Supreme Court saw as part of its mission an alliance with the civil rights movement in general—and more specifically with the aspirations of African Americans for full and equal citizenship. But the Court did so not with fiery denunciations of southern or general American racism and by threatening to upend the entire system to combat that racism, but by inventing novel doctrines that allowed the movement to succeed incrementally. The advent of the political process doctrine should be understood in that context.

*Id.* at 280.

<sup>100</sup> *Schuette*, 134 S. Ct. at 1633 (plurality opinion).

<sup>101</sup> *Id.*

the opinion in *Seattle* “betrays no indication that the Court saw the case as involving the narrow issue of targeting minorities through political restructuring, rather than as involving the invalidation of legislation that inures to the benefit of minorities via political restructuring.”<sup>102</sup>

Kennedy only got to this reading of *Seattle* through significant revisionism. He found that although technically there had been no finding of de jure segregation in Seattle, “it appears as though school segregation in the district in the 1940’s and 1950’s may have been the partial result of school board policies.”<sup>103</sup> This was simply not the holding of *Seattle*, as the validity of the busing plan did not rely on a court’s finding of de jure segregation.<sup>104</sup> As Scalia wrote, concurring in the judgment, “this describes what our opinion in *Seattle* might have been, but assuredly not what it was.”<sup>105</sup>

Having revised the history of the political process doctrine, Kennedy went on to revise its test. In *Seattle*, the Court had held that strict scrutiny is required whenever (1) a state policy inures primarily for the benefit of the minority; (2) minority groups consider it to be in their interest; and (3) a state action places effective decision-making authority over that policy at a higher level of government.<sup>106</sup> Kennedy, calling this straightforward articulation of the case “the broad reading of *Seattle*,” wrote that “that reading must be rejected.”<sup>107</sup> An additional prong, reread into *Hunter* and *Seattle*, was that the laws have the serious risk or purpose of causing injury on account of race.<sup>108</sup>

The Court left unclear what exactly is an injury on account of race. The Court’s position “that the fact that many of the minority applicants who would have gained admission to the state’s top universities no longer would be able to do so is a not a ‘specific injury on account of race,’ says a great deal about how the Court regards affirmative action.”<sup>109</sup> And with the test’s critical new term left undefined, it is unclear when the political process doctrine applies, if ever.<sup>110</sup>

After making his doctrinal argument, Kennedy continued his opinion by evoking broader principles: with a lengthy account of the merits of political debate and the dangers of judicial intervention on the subject of affirmative action.<sup>111</sup> He wrote

<sup>102</sup> Bernstein, *supra* note 99, at 267.

<sup>103</sup> *Schuetz*, 134 S. Ct. at 1633 (plurality opinion).

<sup>104</sup> See generally *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

<sup>105</sup> *Schuetz*, 134 S. Ct. at 1642 (Scalia, J., concurring in the judgment).

<sup>106</sup> *Seattle*, 458 U.S. at 472, 474.

<sup>107</sup> *Schuetz*, 134 S. Ct. at 1634 (plurality opinion).

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

<sup>109</sup> Evan Gerstmann, *Foreword: The Roberts Court in 2013–14—Looking Beyond the Rhetoric*, 48 LOY. L.A. L. REV. 319, 333 (2014).

<sup>110</sup> *Fourteenth Amendment—Equal Protection Clause—Political-Process Doctrine—Schuetz v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*, 128 HARV. L. REV. 281, 286 (2014) (stating that Kennedy’s plurality leaves “unclear what is left” of the political-process doctrine (quoting *Schuetz*, 134 S. Ct. at 1664 (Sotomayor, J., dissenting))).

<sup>111</sup> *Schuetz*, 134 S. Ct. at 1636–38 (plurality opinion).

that an “inherent” risk in adopting the *Seattle* test was that “racial antagonisms and conflict tend to arise” when courts define groups by race.<sup>112</sup> “Racial division would be validated, not discouraged, were the *Seattle* formulation . . . to remain in force.”<sup>113</sup> He continued, “In the realm of policy discussions the regular give-and-take of debate ought to be a context in which rancor or discord based on race are avoided, not invited.”<sup>114</sup> He also expressed concern that the Sixth Circuit potentially uprooted political arrangements on affirmative action, one that “voters deem it wise to avoid because of its divisive potential.”<sup>115</sup>

Kennedy continued by explaining that he believed that the rights at stake were not only those of the plaintiffs, but also those of all citizens as participants in Michigan’s democracy:

[C]itizens [have the right] to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure. Here Michigan voters acted in concert and statewide to seek consensus and adopt a policy on a difficult subject against a historical background of race in America that has been a source of tragedy and persisting injustice. That history demands that we continue to learn, to listen, and to remain open to new approaches if we are to aspire always to a constitutional order in which all persons are treated with fairness and equal dignity. Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate; or that the policies at issue remain too delicate to be resolved save by university officials or faculties, acting at some remove from immediate public scrutiny and control; or that these matters are so arcane that the electorate’s power must be limited because the people cannot prudently exercise that power even after a full debate, that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process.

The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus

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<sup>112</sup> *Id.* at 1635.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1636.

removed from the realm of public discussion, dialogue, and debate in an election campaign. Quite in addition to the serious First Amendment implications of that position with respect to any particular election, it is inconsistent with the underlying premises of a responsible, functioning democracy. One of those premises is that a democracy has the capacity—and the duty—to learn from its past mistakes; to discover and confront persisting biases; and by respectful, rational deliberation to rise above those flaws and injustices. That process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues. It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.

...

What is at stake here is not whether injury will be inflicted but whether government can be instructed not to follow a course that entails, first, the definition of racial categories and, second, the grant of favored status to persons in some racial categories and not others. The electorate's instruction to governmental entities not to embark upon the course of race-defined and race-based preferences was adopted, we must assume, because the voters deemed a preference system to be unwise, on account of what voters may deem its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it. Whether those adverse results would follow is, and should be, the subject of debate. Voters might likewise consider, after debate and reflection, that programs designed to increase diversity—consistent with the Constitution—are a necessary part of progress to transcend the stigma of past racism.<sup>116</sup>

Amidst the elevated rhetoric in this coda, Kennedy made two empirical claims on the relationship between voters and Proposal 2.<sup>117</sup> First, Kennedy claimed that the amendment “was adopted, we must assume, because the voters deemed a preference system to be unwise, on account of what voters may deem its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it.”<sup>118</sup> He added, “Michigan voters acted in concert and statewide

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<sup>116</sup> *Id.* at 1636–38.

<sup>117</sup> *See id.* at 1635–38.

<sup>118</sup> *Id.* at 1638.



to seek consensus.”<sup>119</sup> Finally, Kennedy stated that “voters deem[ed] it wise to avoid” affirmative action “because of its divisive potential.”<sup>120</sup> In total, the sentiments that produced voter support for Proposal 2, Kennedy assumed, were those that opposed racial divisiveness.<sup>121</sup>

Second, Kennedy claimed that citizens respond to campaigns like the one for Proposal 2 by speaking, debating, and learning before acting.<sup>122</sup> Public debate would result in the “ris[ing] above” of racial divisiveness.<sup>123</sup> While judicial intervention into this sensitive area would invite “rancor or discord based on race,” public debate would “avoid[ ]” it.<sup>124</sup>

Kennedy’s inclusion of these empirical claims about the relationship between laws and political attitudes on race may appear tangential to the political restructuring doctrine, but they are consistent with a line of Fourteenth Amendment cases that “reason[ ] from antibalkanization values.”<sup>125</sup> As we are about to show, this line of cases demonstrates the importance of the relationship between Proposal 2 and voters’ sentiments on race and highlights the importance of whether Kennedy’s empirical claims are correct.<sup>126</sup>

Professor Reva Siegel has written that the dispute about the Fourteenth Amendment “[is often] described as a debate between the anticlassification principle and the ant子subordination principle.”<sup>127</sup> In this model, conservatives advocate for the former principle, intolerant of any racial classification; liberals advocate for the latter principle, concerned with harm to members of marginalized groups.<sup>128</sup> As Siegel notes, however, swing justices have both upheld and restricted race-conscious action, justifying their moderation with a concern for the social disharmony that “both extreme racial stratification and unconstrained racial remedies can engender.”<sup>129</sup> Siegel posits that the swing justices, including Kennedy, “reason from antibalkanization concerns.”<sup>130</sup>

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<sup>119</sup> *Id.* at 1637.

<sup>120</sup> *Id.* at 1636.

<sup>121</sup> *Id.* at 1638.

<sup>122</sup> *See id.*

<sup>123</sup> *Id.* at 1637.

<sup>124</sup> *Id.* at 1635.

<sup>125</sup> *See Siegel, supra* note 15, at 1278, 1300–03.

<sup>126</sup> *See infra* Part II.

<sup>127</sup> Siegel, *supra* note 15, at 1287.

<sup>128</sup> *See id.* at 1287–89.

<sup>129</sup> *Id.* at 1278.

<sup>130</sup> *Id.* at 1350 & n.10. We describe the antibalkanization principle without defending it. Limiting social divisiveness seems like a worthy enough goal and one somewhat related to the Equal Protection Clause’s principle of equality, but we agree that “antibalkanization may be best understood as a pragmatic set of ad hoc compromises between anticlassification and ant子subordination, rather than a theory on which to build antidiscrimination law.” Samuel R. Bagenstos, *Bottlenecks and Antidiscrimination Theory*, 93 TEX. L. REV. 415, 417 (2014) (reviewing JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* (2014)).



In *Regents of the University of California v. Bakke*,<sup>131</sup> four Justices opposed admissions policies that were conscious of race and four Justices insisted that overcoming minority underrepresentation justified the use of racial quotas.<sup>132</sup> Justice Powell, the decisive fifth vote, upheld affirmative action while limiting it.<sup>133</sup> Powell rejected an asymmetrical view of the Fourteenth Amendment that took discrimination against whites less seriously, writing, “Disparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them.”<sup>134</sup> Powell also expressed concern that ethnic whites, who had suffered their own history of discrimination, would feel a “perception of mistreatment” towards a system that allocated benefits on the basis of skin color.<sup>135</sup> Yet Powell upheld affirmative action under the rationale of “diversity,” finding that if the medical schools eliminated quotas and replaced them with individualized consideration of all applicants, any rejected student “would have no basis to complain of unequal treatment.”<sup>136</sup> The Court would later ratify the diversity framework in *Grutter v. Bollinger*<sup>137</sup> and *Fisher v. University of Texas at Austin*.<sup>138</sup> Powell sought a balance that both limited antagonism between racial groups and ensured that any rejected student would not be able to impugn the legitimacy of the university.<sup>139</sup>

Powell was not the only Justice to worry about racial polarization due to race-conscious government actions.<sup>140</sup> Concurring in part with the Court’s upholding of a redistricting plan under the Voting Rights Act, Brennan wrote that “we cannot well ignore the social reality that even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely affected by a given classification.”<sup>141</sup>

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Given the current importance of antibalkanization to the outcome in race equality cases, however, we find the empirical validity of the Court’s judgments as significant whatever the principle’s theoretical weaknesses.

<sup>131</sup> 438 U.S. 265 (1978).

<sup>132</sup> *See id.* at 357 (Brennan, J., concurring in the judgment in part and dissenting in part). Brennan’s opinion, joined by White, Marshall, and Blackmun, states: “Unquestionably we have held that a government practice . . . which contains ‘suspect classifications’ [such as racial quotas] is to be subject to ‘strict scrutiny’ and can be justified only if it furthers a compelling government purpose . . . .” *Id.*

<sup>133</sup> *Id.* at 272 (majority opinion).

<sup>134</sup> *Id.* at 298–99.

<sup>135</sup> *Id.* at 294 n.34.

<sup>136</sup> *Id.* at 318.

<sup>137</sup> 539 U.S. 306, 325 (2003).

<sup>138</sup> 133 S. Ct. 2411, 2417 (2013) (“We begin with the principal opinion authored by Justice Powell in *Bakke*.”).

<sup>139</sup> *See Regents of the Univ. of Cal.*, 438 U.S. at 318.

<sup>140</sup> *See, e.g., United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 174 (1977) (Brennan, J., concurring in part).

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

In *Shaw v. Reno*,<sup>142</sup> the Court held that an allegation that a piece of redistricting legislation was so irregular that it could only be an attempt to segregate by race was a cognizable equal protection claim.<sup>143</sup> O'Connor wrote for the majority:

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. . . . Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.<sup>144</sup>

O'Connor feared not only antagonism between racial groups, but also the potential of racial classifications to divide blacks and whites into different political coalitions.<sup>145</sup>

In *Bush v. Vera*,<sup>146</sup> another redistricting case, O'Connor wrote that significant deviations from traditional districting principles “cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial.”<sup>147</sup> The bizarre shaping of districts cutting across traditional divisions “disrupts nonracial bases of political identity and thus intensifies the emphasis on race.”<sup>148</sup> O'Connor was again expressing worry over political sentiments that arise from and can be predicted by race.<sup>149</sup>

O'Connor's concern over factions may also help to explain her decision to uphold affirmative action. In *Grutter*, she wrote:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have

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<sup>142</sup> 509 U.S. 630 (1993).

<sup>143</sup> *Id.* at 642.

<sup>144</sup> *Id.* at 657.

<sup>145</sup> The use of the term “faction” evoked James Madison's concern in Federalist No. 10 that diversity in political opinions would cause citizens to split into competing and self-interested political factions. THE FEDERALIST NO. 10, at 77–78 (James Madison) (Clinton Rossiter ed., 1961).

<sup>146</sup> 517 U.S. 952 (1996).

<sup>147</sup> *Id.* at 980.

<sup>148</sup> *Id.* at 980–81.

<sup>149</sup> *See id.*

confidence in the openness and integrity of the educational institutions that provide this training. . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity . . . .<sup>150</sup>

She later noted that minority students can bring their “unique experience of being a racial minority” to the classroom, but they do so only because “race unfortunately still matters.”<sup>151</sup> She appeared to be confirming the fear she expressed in *Shaw* of blacks and whites split into political factions, while also expressing the worry that the black community would not view a university system with few black students as legitimate.<sup>152</sup>

Kennedy dissented in *Grutter* due to the majority’s alleged failure to apply rigorous judicial review, but he echoed the majority’s concern of a balkanized America.<sup>153</sup> He wrote, “Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.”<sup>154</sup>

Kennedy reiterated his concerns in his decisive vote in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>155</sup> Kennedy struck down the school districts’ attempts to use racial classifications to promote diversity but insisted that they may use race-conscious but facially neutral policies in an attempt to integrate.<sup>156</sup> He explained the basis for his distinction between direct and indirect means, writing:

Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process. On the other hand race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree.<sup>157</sup>

The language echoed O’Connor’s language of factions.<sup>158</sup>

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<sup>150</sup> *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

<sup>151</sup> *Id.* at 333.

<sup>152</sup> *See id.* at 332–33.

<sup>153</sup> *Id.* at 387–88 (Kennedy, J., dissenting).

<sup>154</sup> *Id.* at 388.

<sup>155</sup> 551 U.S. 701, 782–84 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>156</sup> *Id.* at 789.

<sup>157</sup> *Id.* at 797.

<sup>158</sup> *See supra* notes 144–52 and accompanying text.

*Ricci v. DeStefano*<sup>159</sup> did not address the Equal Protection Clause,<sup>160</sup> and even its statutory holding was, in Siegel's words, "remarkably unclear,"<sup>161</sup> but Kennedy's opinion gives further content to his idea of antibalkanization.<sup>162</sup> White and Hispanic firefighters sued the City of New Haven for violating Title VII after the fire department threw out the results of a promotional examination due to the poor performances from black firefighters.<sup>163</sup> The Court ruled for the white firefighters, with Kennedy writing that employers can consider the racial effect of an exam before the administration of the test but not after,<sup>164</sup> which—like the distinction between facial and indirect race-conscious measures in *Parents Involved*—is hard to grasp unless antibalkanization is its underlying principle. Discussion of race preadministration can ensure a test free of discriminating against minorities, "the very racial animosities Title VII was intended to prevent."<sup>165</sup> By invalidating the test after its administration, however, the fire department was "upsetting an employee's legitimate expectation not to be judged on the basis of race."<sup>166</sup> Although difficult to parse, Kennedy's opinion nods to a model of antibalkanization that is concerned with the legitimacy of institutions for the losers of race-conscious actions.<sup>167</sup> Kennedy worries blacks will not acknowledge the system as legitimate if few are promoted—justifying the use of race preadministration—but that whites will resent the system if they are denied promotions "once [the] process has been established," barring the use of race postadministration.<sup>168</sup>

Most recently, the Court again upheld the practice of affirmative action with Kennedy still concerned about social cohesion.<sup>169</sup> In *Fisher*, the Court found that the University's admissions program survived strict scrutiny, although the Court noted that "[t]he Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement."<sup>170</sup> The University was obligated, the Court reasoned, to reassess constantly the constitutionality of its admissions programs while considering that "[f]ormalistic racial classifications . . . when used in a divisive manner, could undermine the educational benefits the University values."<sup>171</sup>

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<sup>159</sup> 557 U.S. 557 (2009).

<sup>160</sup> See generally *id.*

<sup>161</sup> Siegel, *supra* note 15, at 1325.

<sup>162</sup> See *Ricci*, 557 U.S. at 583.

<sup>163</sup> *Id.* at 562–63.

<sup>164</sup> *Id.* at 583–85.

<sup>165</sup> *Id.* at 584.

<sup>166</sup> *Id.* at 585.

<sup>167</sup> See *id.*

<sup>168</sup> See *id.*

<sup>169</sup> Yuvraj Joshi, *Bakke to the Future: Affirmative Action After Fisher*, 69 STAN. L. REV. ONLINE 17, 24 (2016).

<sup>170</sup> *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2215 (2016).

<sup>171</sup> *Id.* at 2210.

Social cohesion and racial antagonism, the two core antibalkanization values considered crucial to these Equal Protection cases, seemed to be at play in the campaign over Proposal 2.<sup>172</sup> The Proposal and the accompanying campaign could have undermined social cohesion by dividing the races into different political coalitions, widening the division that existed prior to Proposal 2; and could have activated feelings of racial hostility (among whites) and racial separation (among African Americans), turning the vote on Proposal 2 into a referendum on race. And indeed, this is precisely what the data show.<sup>173</sup>

## II. EMPIRICAL ANALYSIS DEMONSTRATES THE BALKANIZING EFFECTS OF THE PROPOSAL 2 CAMPAIGN

We note, as others have, that “[c]onstitutional law is chock full of questions and assumptions that beg for empirical analysis,”<sup>174</sup> but that “[a]lthough constitutional law is riddled with empirical judgments, this fact seems to be lost on most constitutional law scholars.”<sup>175</sup> Darren Lenard Hutchinson has argued that the Court has not supported its antibalkanization reasoning with empirical research and that its conclusions have no empirical basis.<sup>176</sup> We attempt to use empirical methods to evaluate the Court’s antibalkanization claims in the context of *Schuette*.

To assess the effect of the Proposal 2 campaign, we designed a pair of coordinated and simultaneous surveys, one carried out in Michigan, the other carried out in the country as a whole. Both were administered by Polimetrix, Inc., of Palo Alto, California, and were conducted as part of the 2006 Cooperative Congressional Election Study (CCES), a cooperative venture of research teams from thirty-eight major universities.<sup>177</sup> Interviews were conducted online with representative samples of the Michigan and American electorates, before and after the 2006 midterm elections. Both studies—one based on a sample of Michigan voters, the other based on a sample of American voters—include a deliberate oversampling of African Americans. Had we selected respondents following a simple random sampling procedure, we would have ended up with too few African Americans to sustain the kinds of analysis we needed to undertake.<sup>178</sup>

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<sup>172</sup> See discussion *infra* Part II.

<sup>173</sup> See discussion *infra* Part II.

<sup>174</sup> Lee Epstein et al., *Foreword: Testing the Constitution*, 90 N.Y.U. L. REV. 1001, 1009 (2015).

<sup>175</sup> *Id.* at 1006.

<sup>176</sup> Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL’Y & L. 1, 7 (2015).

<sup>177</sup> The 2006 CCES data, which we used to calculate the following statistics, can be found at <https://dataverse.harvard.edu/file.xhtml?fileId=2438384&version=RELEASED&version=.0> [<https://perma.cc/Y6EC-VNRG>].

<sup>178</sup> The Principal Investigator for the 2006 CCES was Steve Ansolabehere (MIT); the Study Director was Lynn Vavreck (UCLA); and the Design Committee was made up of

The evidence is consistent with the conclusion that Proposal 2 widened the political divide between blacks and whites. As we will show, whites voted decisively in favor of Proposal 2, while blacks voted overwhelmingly against it. The racial difference over Proposal 2 in Michigan in 2006 is exceptional: greater than differences associated with other social cleavages, greater than the racial difference over a hypothetical ballot initiative worded identically to Proposal 2 posed to our national sample in 2006, greater than we would have expected given the social and economic characteristics of Michigan, greater than racial differences over affirmative action reported in contemporaneous surveys, and greater than racial differences reported by national surveys over the most contentious racial issues of the last fifty years.<sup>179</sup>

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Ansolabehere, Vavreck, Robert Erickson (Columbia), Elizabeth Gerber (Michigan), Donald Kinder (Michigan), Jeremy Pope (Brigham Young), Wendy Rahn (Minnesota), Douglas Rivers (Polimetrix and Stanford), and John Sides (George Washington). Respondents were selected by sample matching. Lynn Vavreck & Douglas Rivers, *The 2006 Cooperative Congressional Election Study*, 18 J. ELECTIONS, PUB. OPINION & PARTIES 355, 357 (2008) (U.K.). See generally Douglas Rivers, *Sampling for Web Surveys* (Aug. 1, 2007) (paper prepared for 2007 Joint Statistical Meetings, Salt Lake City, Utah). Sample weights are applied throughout the analysis. On the relative advantages and disadvantages of internet-based surveys, see generally Stephen Ansolabehere & Douglas Rivers, *Cooperative Survey Research*, 16 ANN. REV. POL. SCI. 307 (2013); Stephen Ansolabehere & Brian F. Schaffner, *Does Survey Mode Still Matter? Findings from a 2010 Multi-Mode Comparison*, 22 POL. ANALYSIS 285 (2014); Linchiat Chang & Jon A. Krosnick, *National Surveys Via RDD Telephone Interviewing Versus the Internet: Comparing Sample Representativeness and Response Quality*, 73 PUB. OPINION. Q. 641 (2009); Neil Malhotra & Jon A. Krosnick, *The Effect of Survey Mode and Sampling on Inferences About Political Attitudes and Behavior: Comparing the 2000 and 2004 ANES to Internet Surveys with Nonprobability Samples*, 15 POL. ANALYSIS 286 (2007); Seth J. Hill et al., *The Opt-In Internet Panel: Survey Mode, Sampling Methodology and the Implications for Political Research* (Apr. 12, 2007) (paper presented at the Annual Meeting of the Midwest Political Association, Chicago, Illinois); and Douglas Rivers & Delia Bailey, *Inference from Matched Samples in the 2008 U.S. National Elections* (Aug. 3, 2009) (paper presented at 2009 Joint Statistical Meetings, Washington, D.C.). The 2006 CCES data are high quality, furnishing the empirical foundation for articles published in top journals, in political science and in law. See, e.g., Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1742–43 (2008); Alan S. Gerber & Gregory A. Huber, *Partisanship, Political Control, and Economic Assessments*, 54 AM. J. POL. SCI. 153, 156 (2010); Michael A. Neblo et al., *Who Wants to Deliberate—And Why?*, 104 AM. POL. SCI. REV. 566, 571 (2010).

<sup>179</sup> Here is the exact question:

This November's ballot contained a proposition called the Michigan Civil Rights Initiative. This initiative would make it illegal for state and local governments to give preferential treatment to any individual or group on the grounds of race, sex, color, ethnicity, or national origin. This would affect hiring and promotion, college admissions, and the selection of government contractors. Did you vote on this ballot measure—the Michigan Civil Rights Initiative? Yes/No



Whites voted decisively in favor of Proposal 2; blacks voted overwhelmingly against it. According to our Michigan survey, of those who said they had participated in the election, 65.2% of whites but only 13.8% of blacks reported that they had voted for Proposal 2. Proposal 2 generated a racial difference of 51.4 percentage points.

Of course, race was not the only social category associated with the vote. According to the Michigan survey, Proposal 2 was more popular among men than among women, more popular among Catholics than among Protestants, and more popular among those with relatively little formal education than among those with relatively extensive formal education.<sup>180</sup> But these differences pale in comparison to the racial difference. No other social category comes close to race in dividing the Michigan electorate over Proposal 2 so decisively.

Respondents to the Michigan survey were asked whether they had voted for or against the MCRI; respondents to our national survey were asked whether they would have supported or opposed a hypothetical ballot initiative presented so as to parallel the MCRI.<sup>181</sup> This hypothetical version of Proposal 2 posed to the national sample also produced a large racial divide. Among those who said they would have voted on the ballot proposal, 83.2% of whites said they would have supported it, as against 40.6% of blacks, a racial difference of 42.6 percentage points. This is a large difference, though not as large as the racial divide generated by Proposal 2 in Michigan. This suggests that the campaign surrounding Proposal 2 polarized the Michigan electorate along racial lines.<sup>182</sup>

If YES: How did you vote on the Michigan Civil Rights Initiative?

Favor/Oppose

<sup>180</sup> 56.4% of men voted for Proposal 2 compared to 40.4% of women (a difference of 16.0 percentage points); 64.0% of Catholics voted for Proposal 2 compared to 55.2% of Protestants (a 8.8 percentage point difference); and 62.1% of those whose formal education ended with a high school diploma or less voted for Proposal 2 compared to 39.2% of those whose formal education included postgraduate work (a difference of 22.9 percentage points).

<sup>181</sup> Here is the question posed to the national sample:

Some states have recently proposed ballot initiatives that would make it illegal for state and local governments to give preferential treatment to any individual or group on the grounds of race, sex, color, ethnicity, or national origin. This would affect hiring and promotion, college admissions, and the selection of government contractors. If such a proposition had appeared on the election ballot in your state this November, how do you think you would have voted?

Favor/Oppose/Not Sure/Wouldn't Have Voted

<sup>182</sup> The difference between the racial divide over Proposal 2 in Michigan (51.4 percentage points) and the racial divide over the hypothetical version of Proposal 2 posed to our national sample (42.6 percentage points) is statistically significant ( $p < .01$ ).

Notice that the real proposal to end affirmative action (MCRI in Michigan) was less popular than the hypothetical proposal posed to the country as a whole, among blacks and whites alike, though especially among blacks. This would seem to be another consequence



Michigan is not the nation. It could be that racial differences in opinion over matters of race in Michigan are *generally* greater than in the country as a whole; perhaps the campaign surrounding Proposal 2 had nothing to do with it.

To investigate this possibility, we made use of the Common Content component of the 2006 CCES, administered to nearly 36,000 Americans. The sample was drawn to be representative of state populations, and the Common Content component included a question on affirmative action.<sup>183</sup> This design allows us to analyze opinions on affirmative action across states as a consequence of state social and economic characteristics.

Our regression analysis estimates the effect of Race (percentage African American), Education, Unemployment (percentage unemployed), Income (median family annual income in 2006 inflation-adjusted dollars), Poverty (percentage of families with income below poverty level), Region, and Unionization (percentage of employed who are members of a union).<sup>184</sup> We set aside states, like Alaska and Wyoming, with tiny black populations.<sup>185</sup> We also set aside Michigan. Our purpose here is to predict what the racial divide over affirmative action in Michigan would be, in light of economic and social characteristics, and in the absence of the Proposal 2 campaign.

The results, summarized in Table 1, show that economic and social characteristics of states are systematically related to public opinion on affirmative action. Whites living in states where education is relatively high and unionization is relatively strong tend to be more liberal on affirmative action; whites living in states that are relatively affluent and contain a relatively large percentage of blacks tend to be more conservative on affirmative action. At the same time, blacks living in states characterized by relatively high levels of education and relatively high levels of unemployment tend to lean liberal on affirmative action.

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of the campaign, which entailed, in part, a concerted effort to articulate the real consequences of Proposal 2 should it pass.

<sup>183</sup> The question reads:

Some people think that if a company has a history of discriminating against blacks when making hiring decisions, then they should be required to have an affirmative action program that gives blacks preferences in hiring. What do you think? Should companies that have discriminated against blacks have to have an affirmative action program?  
Support Strongly/Support/Support Slightly/Mixed/Oppose Slightly/  
Oppose/Oppose Strongly

<sup>184</sup> The information on states is taken from the *Labor Force Statistics from the Current Population Survey*, BUREAU LAB. STAT., <https://www.bls.gov/CPS/#data> [<https://perma.cc/U55G-PMKB>], and the American Community Survey conducted by the Census Bureau (<https://www.census.gov/programs-surveys/acs/guidance/comparing-acs-data/2006.html> [<https://perma.cc/9TG6-A5KL>]), all as of 2006.

<sup>185</sup> Using the CPS table creator, <https://www.census.gov/cps/data/cpstablecreator.html> [<https://perma.cc/GJA2-E2DU>], blacks only accounted for 3.2% of Alaska's total population and only 0.78% of Wyoming's total population in 2006.

**Table 1**  
**Social and Economic Characteristics of States as Predictors of the Magnitude of the Racial Divide Over Affirmative Action<sup>186</sup>**

Least Squares Regression Coefficients  
 (standard errors in parentheses)

<i>Characteristics of States</i>	<i>White Opinion</i>	<i>Black Opinion</i>
Income	0.004** (0.002)	0.001 (0.003)
Unionization	-0.235 (0.157)	0.001 (0.310)
Education	-0.844** (0.329)	-10.055 (0.652)
Deep South	0.002 (0.036)	-0.056 (0.071)
Rim South	0.001 (0.025)	-0.017 (0.049)
Border	0.012 (0.020)	-0.060 (0.039)
Northeast	-0.016 (0.017)	-0.015 (0.034)
West	0.014 (0.018)	0.047 (0.035)
Unemployment	-0.352 (0.954)	-2.900 (1.890)
Poverty Rate	0.612 (0.506)	-0.030 (1.003)
Percentage Black	0.210* (0.111)	0.022 (0.220)
Constant	0.732*** (0.143)	0.802** (0.284)
Observations	31	31
R-squared	0.831	0.505
***p<0.01, **p<0.05, *p<0.1		

<sup>186</sup> Note that each column represents a separate regression equation.

Based on the results shown in Table 1, we can predict the magnitude of the racial divide over affirmative action in Michigan, and more precisely, we can predict the magnitude of the racial divide over affirmative action in a state with the identical economic and social characteristics of Michigan. That predicted value is 47.7 percentage points (with a standard error of 6.1). This figure is a bit higher than the national average. Across the states (excluding Michigan and states with tiny black populations), the observed average racial divide over affirmative action is 43.7 percentage points. And so, by virtue of its social and economic characteristics, we should expect to see a somewhat larger racial divide over affirmative action in Michigan than countrywide.

We excluded Michigan from this exercise in prediction, but the 2006 CCES Common Content of course included interviews in Michigan and asked the same affirmative action question we have been analyzing. This means we can simply and directly measure the racial difference in Michigan. On the Common Content affirmative action question, the *observed* racial difference in Michigan is 55.3 percentage points, well above the national average and, more to the point, well above the predicted value for Michigan based on social and economic characteristics. These results lend additional support to the conclusion that the campaign surrounding Proposal 2 polarized the Michigan electorate along racial lines.

There is nothing surprising in our finding that blacks and whites differ over Proposal 2. What is notable and instructive is the magnitude of the difference. In particular, the racial divide over Proposal 2 exceeds what we see in results from national surveys on affirmative action taken at about the same time. This is shown in Table 2, which summarizes findings on public opinion on affirmative action from the American National Election Study (ANES) and the General Social Survey (GSS).<sup>187</sup>

**Table 2**  
**Support for Affirmative Action by Race National Samples (circa 2006)**

	<i>Whites</i> (%)	<i>Blacks</i> (%)
Government should make special efforts to help blacks (ANES)		
2004	35.4	61.0
2008	30.8	61.2

<sup>187</sup> As noted, these data come either from the American National Election Studies (ANES), carried out by the Institute for Social Research at the University of Michigan (data available at [http://www.electionstudies.org/studypages/download/datacenter\\_all\\_NoData.php](http://www.electionstudies.org/studypages/download/datacenter_all_NoData.php) [<https://perma.cc/WDT4-FDGR>]), or by the General Social Survey (GSS), carried out by the National Opinion Research Center at the University of Chicago (data available at <http://gss.norc.org/> [<https://perma.cc/X3WU-6AE6>]). The ANES and the GSS are widely regarded to be the nation's best surveys in the domain of public opinion. Christopher D. Bader & Roger Finke, *Evaluating Survey Measures Using the ARDA's Measurement Wizard*, in FAITHFUL MEASURES: NEW METHODS IN THE MEASUREMENT OF RELIGION 140, 153 (Roger Finke & Christopher D. Bader eds., 2017).

	<i>Whites</i> (%)	<i>Blacks</i> (%)
Racial preferences in hiring and promotion (GSS)		
2002	17.5	49.8
2004	18.7	51.2
2006	17.1	46.4
2008	19.1	50.8
2010	19.3	49.3
Affirmative action in employment (ANES)		
2004	15.9	56.7
2008	14.2	56.3
Government has a special obligation to improve blacks' standard of living (GSS)		
2002	30.8	61.5
2004	29.5	61.9
2006	31.6	63.7
2008	31.0	63.8
2010	30.7	56.7

Table 2 reveals large racial differences in every instance—large, but not as large as what we see in the case of Proposal 2.<sup>188</sup> The racial differences displayed in Table 2 average 32 percentage points, ranging from a low of 26 percentage points over whether the federal government has a special obligation to improve the standard of living of black Americans (in 2010), to a high of 42 percentage points over the desirability of affirmative action in hiring and promotion (in 2008). Racial differences over affirmative action are substantial in Table 2, but not as substantial as the racial differences generated by Proposal 2 in Michigan.

The racial divide over Proposal 2 exceeds that of even the most contentious racial issues of the last 60 years. Consider these examples, all taken from the benchmark ANES<sup>189</sup>:

- *School Integration*. In 1956, shortly after the historic *Brown v. Board of Education*<sup>190</sup> decision, 46% of whites and 66% of blacks supported the idea that the government in Washington should step in to ensure that

<sup>188</sup> See *infra* Tables 3 & 4. The benchmark ANES contains only raw data, which we then extrapolated into the statistics contained in the following notes.

<sup>189</sup> See *supra* note 187.

<sup>190</sup> See *generally* 349 U.S. 294 (1955).

black and white children could attend school together (a racial difference of 20 percentage points).

- *Public Accommodations.* In the fall of 1964, near the height of America's 20th century racial crisis, and just following Congressional passage of the Civil Rights Act,<sup>191</sup> 49% of whites and 92% of blacks endorsed the policy of the federal government insuring black people the freedom to enter hotels and restaurants (a racial difference of 43 percentage points).
- *Urban Riots.* In the aftermath of the riots in Watts<sup>192</sup> and Detroit<sup>193</sup> and hundreds of other American cities, large and small, 52% of whites and 80% of blacks said that the way to handle riots was to work on the underlying problems of poverty and unemployment that gave rise to the violence in the first place (a racial difference of 28 percentage points).
- *School Busing.* Busing to integrate the public schools was a major bone of contention in the 1972 Nixon-McGovern presidential campaign.<sup>194</sup> At the conclusion of the campaign, 13% of whites and 43% of blacks supported busing children to achieve school desegregation (a racial gap of 30 percentage points).

In each example, the racial differences, though large, are not nearly as large as the racial difference generated by Proposal 2.<sup>195</sup>

In sum, Proposal 2 divided the Michigan electorate along racial lines to an exceptional degree: more than school desegregation, the Civil Rights Act, the urban riots of the 1960s, or school busing; more than what we generally observe in opinion on affirmative action; more than would be expected from Michigan's social and economic characteristics; and more than a hypothetical version of Proposal 2 divided the national electorate.

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<sup>191</sup> See generally Civil Rights Act of 1964, Pub. L. No. 88-353, 78 Stat. 241.

<sup>192</sup> See generally, e.g., Elaine Woo, *Rena Price Dies at 97; Her and Son's Arrests Sparked Watts Riots*, L.A. TIMES (June 23, 2013), <http://articles.latimes.com/2013/jun/22/local/la-me-rena-price-20130623> [<https://perma.cc/6K6N-HJZR>].

<sup>193</sup> See generally SIDNEY FINE, *VIOLENCE IN THE MODEL CITY: THE CAVANAGH ADMINISTRATION, RACE RELATIONS, AND THE DETROIT RIOT OF 1967* (2007 ed. 1989).

<sup>194</sup> DAVID A. HOROWITZ, *AMERICA'S POLITICAL CLASS UNDER FIRE: THE TWENTIETH CENTURY'S GREATEST CULTURE WAR 194* (2003).

<sup>195</sup> As far as we have been able to determine, the racial divide over Proposal 2 is equaled in modern times in only two instances: racial differences in the vote generated by the 2008 and 2012 Obama presidential elections. See DONALD R. KINDER & ALLISON DALE-RIDDLE, *THE END OF RACE? OBAMA, 2008, AND RACIAL POLITICS IN AMERICA* 87–88, 88 n.30 (2012); Donald Kinder, Professor, Univ. of Mich., *Race Receding? Comparing the 2008 and 2012 U.S. Presidential Elections* (2017).

Next, we go deeper into the relationship between the motivations of voters and the nature of the Proposal 2 campaign. We present evidence consistent with the conclusion that the campaign on affirmative action in Michigan in 2006 exacerbated the degree to which Michigan voters—white and black—relied on considerations of race in deciding how to vote on Proposal 2. Among white voters, feelings of racial resentment were strongly associated with the vote: racially resentful whites voted decisively for Proposal 2 while racially sympathetic whites (fewer in number) voted decisively against Proposal 2. Furthermore, the relationship between racial feelings and the white vote on Proposal 2 was significantly stronger than the relationship between racial feelings and the white vote on a hypothetical ballot initiative worded identically to Proposal 2 posed to our national sample. Among black voters, feelings of racial group solidarity were significantly associated with the vote: racially identified blacks voted overwhelmingly against Proposal 2 while blacks less closely identified with their racial group voted less overwhelmingly against Proposal 2. Furthermore, the relationship between feelings of racial solidarity and the black vote on Proposal 2 was stronger than the relationship between racial solidarity and the black vote on a hypothetical ballot initiative worded identically to Proposal 2 posed to our national sample.

Why might we expect the Proposal 2 campaign to exacerbate racial differences? In a series of ingenious and influential experiments, Daniel Kahneman and Amos Tversky established (among other things) that the judgments people reach and the decisions they make are subject to systematic and pervasive framing effects.<sup>196</sup> Kahneman and Tversky are making an altogether general claim about framing, but one that may apply with special force to politics.<sup>197</sup> Presidents, members of Congress, interest groups, corporate publicists, activists, reporters and editors: all are perpetually engaged in efforts to “frame” current events.<sup>198</sup> Frames influence voters’ judgments and decisions by altering the relative salience of different aspects of the issue.<sup>199</sup>

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<sup>196</sup> See Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1449, 1458–60 (2003). See generally Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981). The Kahneman and Tversky experiments gave rise to an industry of research; spawned an entire new field (“behavioral economics”); and in time, delivered to Kahneman the Nobel Prize in Economic Science. (Kahneman was awarded the Nobel Prize in 2002 for the work he did with Tversky, who died in 1996. Cass R. Sunstein & Richard Thaler, *The Two Friends Who Changed How We Think About How We Think*, NEW YORKER (Dec. 7, 2016), <https://www.newyorker.com/books/page-turner/the-two-friends-who-changed-how-we-think-about-how-we-think>). For summaries and reviews of this work, see generally HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982). For applications of the principle of framing to political communication and public opinion, see generally Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103 (2007).

<sup>197</sup> See generally, e.g., Tversky & Kahneman, *supra* note 196.

<sup>198</sup> See Chong & Druckman, *supra* note 196, at 107, 109, 112, 117.

<sup>199</sup> Dietram A. Scheufele & David Tewksbury, *Framing, Agenda Setting, and Priming: The Evolution of Three Media Effects Models*, 57 J. COMM. 9, 15 (2007).

Frames highlight some features and ignore others.<sup>200</sup> Highlighted features are psychologically accessible and thereby disproportionately influential.<sup>201</sup> Which frames prevail can affect how citizens understand an issue, and, in the end, what their judgments and decisions turn out to be.<sup>202</sup>

The campaign surrounding Proposal 2 was framed in a way that highlighted race. Proponents of Proposal 2 portrayed the measure as seeking to eliminate “racial preference.”<sup>203</sup> They characterized affirmative action as an unfair and obsolete, a “racial spoils system.”<sup>204</sup> One supporter argued that “Michiganders . . . despise preference by race,” and cautioned that those opposed to Proposal 2 “wish to retain racial preferences . . . [o]r they hope to introduce new preferences for some ethnic groups.”<sup>205</sup>

The campaign against Proposal 2 also highlighted race.<sup>206</sup> Opponents warned that strides made by racial minorities and by women would be lost if the initiative passed. One editorial argued that enacting Proposal 2 “would send the wrong message about Michigan as a place of opportunity,” that Proposal 2 would “end[ ] opportunities for minorities and women,” and that “[a]ffirmative action is about equalizing opportunities” and “helping to create opportunities for segments of the population that have historically been denied them.”<sup>207</sup> Opponents also warned of the balkanization created by the Proposal 2 campaign.<sup>208</sup> In an interview, Linda Parker, director of the Michigan Department of Civil Rights, called the initiative “divisive,” one that exacerbated

<sup>200</sup> *Id.* at 11–12.

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

<sup>202</sup> See generally, e.g., DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* (1996); Thomas E. Nelson & Donald R. Kinder, *Issue Frames and Group-Centrism in American Public Opinion*, 58 J. POL. 1055 (1996); Ismail K. White, *When Race Matters and When It Doesn't: Racial Group Differences in Response to Racial Cues*, 101 AM. POL. SCI. REV. 339 (2007).

<sup>203</sup> Chastity Pratt & Dawson Bell, *Rights Groups File Prop 2 Lawsuit*, DETROIT FREE PRESS, Dec. 20, 2006, at 1.

<sup>204</sup> See, e.g., Thomas Bray, *Beware Using 'Racist' Label in Racial Preferences Battle*, DETROIT NEWS, Aug. 17, 2005, at 13A; George F. Will, Editorial, *A Fight to Define Equality*, WASH. POST, Sept. 24, 2006, at B07.

<sup>205</sup> Carl Cohen, *Aim for True Equality by Ending Preferences*, DETROIT FREE PRESS, July 17, 2005; see also David Littmann, Editorial, *Vote Yes: Affirmative Action Is Bad for State's Business Climate, True Equality*, DETROIT FREE PRESS, Oct. 2, 2006, at 6 (arguing “special preferences” and “special privileges to a chosen few at the expense of many” hamper the economy, and that “[t]hrough MCRI, individual effort and excellence are rewarded,” which will make markets thrive).

<sup>206</sup> See generally Editorial, *No Steps Back on Opportunity; MCRI State Proposal 06-2, Would Push Back Progress on Hiring and Access to College for Minorities*, DETROIT FREE PRESS, Oct. 8, 2006, at 1.

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

<sup>208</sup> See, e.g., Editorial, *Face It: Realities Demand Better Balance*, DETROIT FREE PRESS, Mar. 23, 2004, at 7A (stating that there are laws on the books, but Michigan is “not where [it] need[s] to be”).



Michiganders’ “continued failure to live together” as evident by Michigan’s place as “No. 2 in the country in terms of residential segregation,” and one “capitalizing on . . . fears” based on “negative assumptions about [race].”<sup>209</sup>

In short, race was a prominent feature in the framing of the Proposal 2 campaign.<sup>210</sup> We expect as a consequence racial considerations to weigh more heavily in voters’ decisions—but there is no guarantee that this is so. It is an empirical question. To answer the question, we must determine the relationship between the vote on Proposal 2 and racial prejudice (among whites), and the relationship between the vote and racial solidarity (among blacks). We take each up in turn.

Among others, George Fredrickson contends that a distinctive form of prejudice has recently arisen in the United States, one that emphasizes *cultural* as against *biological* differences.<sup>211</sup> The crucial point here is that prejudice does not require “an ideology centered on the concept of biological inequality.”<sup>212</sup> Discrimination, neglect, and exclusion can be justified just as well by what are understood to be “deep-seated cultural differences.”<sup>213</sup>

The emergence of a new, cultural form of prejudice is a reflection, in part, of dramatic transformations in American society: the passing of slavery and end of the plantation economy;<sup>214</sup> the great migration of African Americans out of the rural South into national urban centers;<sup>215</sup> and perhaps especially, the success of the modern civil rights movement in securing basic rights of citizenship and dismantling many of the legal foundations underpinning discrimination.<sup>216</sup> Many white Americans believed that discrimination had been eradicated and that if blacks would only try harder they could be just as well off as whites.<sup>217</sup> Instead of complaining about their problems and demanding special treatment, the new cultural form of prejudice suggested blacks should buckle down, work hard, and take advantage of the abundant opportunities now provided to them.<sup>218</sup>

<sup>209</sup> *Id.*

<sup>210</sup> See *supra* notes 203–09 and accompanying text.

<sup>211</sup> GEORGE M. FREDRICKSON, *RACISM: A SHORT HISTORY* 4 (2002).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> See KINDER & DALE-RIDDLE, *supra* note 195, at 15.

<sup>215</sup> See PATRICIA GURIN, SHIRLEY HATCHETT & JAMES S. JACKSON, *HOPE AND INDEPENDENCE: BLACKS’ RESPONSE TO ELECTORAL AND PARTY POLITICS* 24–25 (1989).

<sup>216</sup> See Christopher Tarman & David O. Sears, *The Conceptualization and Measurement of Symbolic Racism*, 67 J. POL. 731, 731 (2005).

<sup>217</sup> *Id.* at 733 (discussing a consistent view that “blacks are no longer discriminated against, so remaining disadvantages must result mostly from their own lack of effort”).

<sup>218</sup> See KINDER & SANDERS, *supra* note 202, at 6; Lawrence D. Bobo & Ryan A. Smith, *From Jim Crow Racism to Laissez-Faire Racism: The Transformation of Racial Attitudes*, in *BEYOND PLURALISM: THE CONCEPTION OF GROUPS AND GROUP IDENTITIES IN AMERICA* 182, 212–13 (Wendy F. Katkin et al. eds., 1998); David O. Sears & P. J. Henry, *Over Thirty Years*

A standard battery of questions developed to capture modern prejudice—what we will call racial resentment—was included in the pre-election interview of our Michigan survey (asked only of whites). The questions, written out in Table 3, emphasize several central themes: the unwillingness of blacks to work hard and apply themselves, the denial that discrimination still stands in the way, and the injustice of special treatment. Taken together, the questions distinguish between those whites who are generally sympathetic towards blacks from those who are generally unsympathetic, resenting the failure of blacks, as they see it, to demonstrate the virtues of self-reliance and hard work.

**Table 3**  
**Racial Resentment Among Michigan Whites**

Irish, Italians, Jews and many other minorities overcame prejudice and worked their way up. Blacks should do the same without any special favors.

Strongly agree	30.5%
Agree	34.5
Neither agree nor disagree	14.8
Disagree	13.0
Strongly disagree	7.3

Even today, government officials usually pay more attention to a complaint from a white person than from a black person.

Strongly agree	6.7%
Agree	23.4
Neither agree nor disagree	21.1
Disagree	27.2
Strongly disagree	21.7

If blacks would only try harder they could be just as well off as whites.

Strongly agree	13.4%
Agree	23.5
Neither agree nor disagree	26.7
Disagree	23.0
Strongly disagree	13.5

When it comes to good jobs and decent salaries, most blacks still end up with less than they deserve.

Strongly agree	6.5%
Agree	29.0
Neither agree nor disagree	28.9
Disagree	23.0
Strongly disagree	12.6

In America today, blacks still face plenty of discrimination because of their race.

Strongly agree	14.8%
Agree	40.3
Neither agree nor disagree	14.6
Disagree	18.7
Strongly disagree	11.6

It's true that blacks face real problems, but the way to solve these problems is to stop complaining and to get to work.

Strongly agree	21.9%
Agree	30.7
Neither agree nor disagree	20.7
Disagree	14.9
Strongly disagree	11.9

A first question for our empirical analysis is whether white voters responded to the various propositions set out in Table 3 consistently, as they should, if the propositions are getting at the same thing (here, the distinction between racial sympathy and racial resentment). They do.<sup>219</sup> Those whites who agreed that if blacks would only try harder they would be as well off as whites were also inclined to deny that slavery and discrimination created conditions that impede black progress, that blacks should work their way up without any special favors, and so on throughout the rest.<sup>220</sup> As intended, responses to the propositions reflect a coherent outlook on the character and culture of African Americans. A scale (made up simply by averaging responses across the six questions) does an excellent job discriminating between those whites who are racially resentful, those who are racially sympathetic, and all gradations in between.<sup>221</sup>

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<sup>219</sup> See *supra* Table 3.

<sup>220</sup> See *supra* Table 3.

<sup>221</sup> Consistency is tested by Cronbach's *alpha*, a measure of the reliability of the scale composed of answers to the six questions. In this case, *alpha* = .868, a very respectable figure. For comparable empirical tests, with comparable results, see generally Sears & Henry, *supra* note 218, and Tarman & Sears, *supra* note 216.

To determine the effect of racial resentment on the white vote on Proposal 2, our analysis must take into account not just racial resentment, but also other relevant factors as well. We are interested in the *independent* effect of racial resentment, holding other factors constant. For this reason, our analysis includes measures of three factors in addition to racial resentment: party identification; belief in limited government; and belief in equal opportunity. All three have been shown to be important in explaining white opinion on issues like affirmative action, and all three are well-measured in the pre-election interview in our Michigan survey.<sup>222</sup> Effects are estimated by multivariate probit regression and are presented in Table 4 (left-hand column).<sup>223</sup>

**Table 4**  
**The Effect of Racial Resentment on the White Vote Against Affirmative Action—**  
**in Michigan and in the Nation**

	Probit Coefficients (Standard Errors in Parentheses)	
	<i>Michigan</i>	<i>Nation</i>
Racial Resentment	2.785*** (0.427)	2.107*** (0.448)
Party Identification	0.597* (0.308)	0.061 (0.261)
Limited Government	0.556** (0.231)	0.048 (0.226)
Equal Opportunity	0.085 (0.406)	-1.107*** (0.390)
Constant	-1.658*** (0.452)	0.575 (0.414)
Observations	498	478

\*\*\* p<0.01, \*\* p<0.05, \*p<0.1

<sup>222</sup> On partisanship, see ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER: AN ABRIDGEMENT* 7 (1964) (discussing the political impact of identification with social class), and Larry M. Bartels, *Partisanship and Voting Behavior, 1952–1996*, 44 AM. J. POL. SCI. 35, 41 (2000) (analyzing the polarization of political parties along racial lines); on limited government, see Gregory B. Markus, *American Individualism Reconsidered*, in *CITIZENS AND POLITICS: PERSPECTIVES FROM POLITICAL PSYCHOLOGY* 401, 415, 416 (James H. Kuklinksi ed., 2001) (highlighting minority groups' voting tendencies); and on equal opportunity, see Stanley Feldman, *Structure and Consistency in Public Opinion: The Role of Core Beliefs and Values*, 32 AM. J. POL. SCI. 416, 418–19 (1988) (explaining political attitudes and beliefs among social classes).

<sup>223</sup> The analysis uses *multivariate* regression because voting on Proposal 2 is a product of more than one factor, and *probit* regression because voting on Proposal 2 is a binary variable (scored 1 if the person votes for Proposal 2 and scored 0 if the person votes against Proposal 2).

Table 4 shows a statistically significant and substantively sizable effect of racial resentment on support for Proposal 2. Racially resentful whites were much more likely to vote for Proposal 2 than were racially sympathetic whites.<sup>224</sup>

Table 4 also reveals that Republicans were somewhat more likely to vote for Proposal 2 than were Democrats, and that those voters concerned about the scope and size of the federal government were somewhat more likely to vote for Proposal 2 than were those who said they believed in the necessity of a strong central government.

These two effects are real, but neither approaches the magnitude of the effect due to racial resentment.<sup>225</sup> By far, the most important factor influencing the white vote in Michigan in 2006 is racial resentment.<sup>226</sup>

The magnitude of this effect can be seen in Figure 1, which graphs the predicted white vote for Proposal 2 as a consequence of variation in racial resentment, holding constant the effects due to partisanship, limited government, and equal opportunity.<sup>227</sup>

**Figure 1**  
**Racial Resentment and White Support for Michigan's Proposal 2**

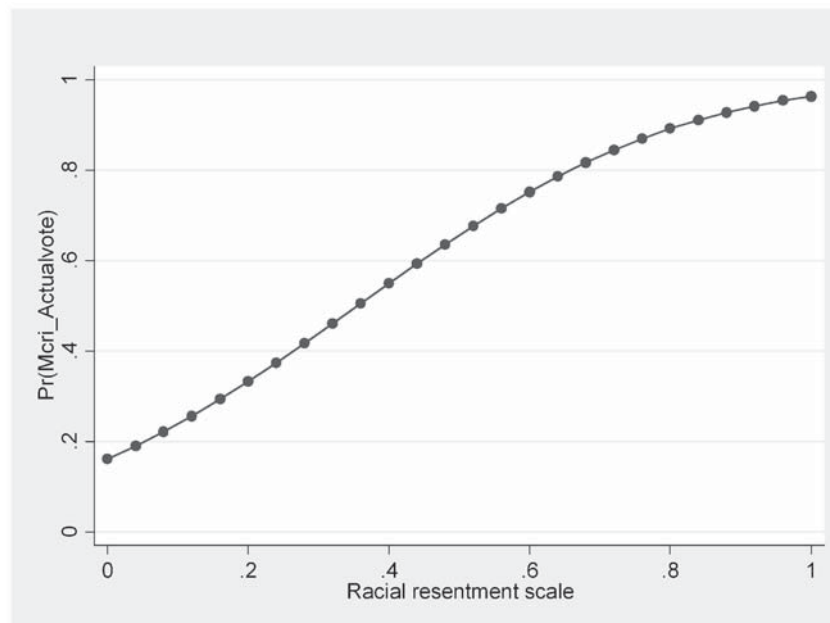


Figure 1 reveals how quickly support for Proposal 2 gathered strength with increasing racial sentiment scores. Racially sympathetic whites (a score of .25 on the

<sup>224</sup> See *supra* Table 4.

<sup>225</sup> See *supra* Table 4; *infra* Figure 1

<sup>226</sup> See *infra* Figure 1.

<sup>227</sup> The predictions displayed in Figure 1 assume a white voter who is a political Independent, with average views on limited government and equal opportunity.

0–1.0 racial resentment scale) voted decisively *against* Proposal 2 (by a margin of 63–37), while racially resentful whites (a score of .75 on the 0–1.0 racial resentment scale) voted even more decisively *for* Proposal 2 (83–17).<sup>228</sup> Among white voters in Michigan, Proposal 2 reduced essentially to a referendum on their sentiments toward African Americans.

A final test for the white vote addresses whether feelings of racial resentment played a larger role as a consequence of the campaign, given the explicitly racial framing of Proposal 2. To find out, we repeated the analysis we have just been discussing, this time running the analysis on our national sample. We designed the national study for this explicit purpose, and so we included the identical measures of racial resentment, partisanship, limited government, and equal opportunity that were part of the Michigan study. And as indicated earlier, we asked the national sample a question about a hypothetical ballot initiative in their state that mimicked Proposal 2 in Michigan.<sup>229</sup> The results of the national analysis are presented in Table 4 (right-hand column), alongside the corresponding results from Michigan.

The results show first of all, that the effect of racial resentment on white support for eliminating affirmative action is positive and statistically significant in the national sample, as it was in Michigan.<sup>230</sup> More to the point, Table 4 also shows that the effect of racial resentment on opposition to affirmative action was greater among Michigan voters than among voters in the country. The difference between the two—between the effect of racial resentment in Michigan and the effect of racial resentment in the country—is statistically significant.<sup>231</sup>

We turn now to the black vote. In explaining opinion and voting among African Americans, scholarship emphasizes one factor above all others: racial group solidarity.<sup>232</sup> Some blacks see their personal prospects linked with the fate of their racial group, while others do not, and this difference turns out to be important in explaining their opinions on racial policies and the intensity of their support for black candidates.<sup>233</sup>

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<sup>228</sup> See *supra* Figure 1.

<sup>229</sup> See *supra* note 181 and accompanying text.

<sup>230</sup> See *supra* Table 4.

<sup>231</sup>  $p < .05$ , one-tailed test. The result holds under alternative specifications: adding employment status and union membership to the analysis, or comparing the results for Michigan voters only to voters living in States that resemble Michigan (Illinois, Ohio, Indiana, Pennsylvania, New Jersey, and New York). The Proposal 2 campaign seemed to have multiple effects in addition to exacerbating the effect of racial resentment; enhancing the effect due to partisanship and limited government (both get connected up to the vote in Michigan, but not elsewhere); and overriding the effect due to equality of opportunity. This last result is especially interesting on the idea that equal opportunity is widely regarded as the most important of American values pushing white Americans towards a more color-blind society. See KINDER & SANDERS, *supra* note 202, at 6–7.

<sup>232</sup> See MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS 7–8 (1994).

<sup>233</sup> See *id.* at 8 (stating that race interests often outweigh class interest “because the social, economic, and political realities of whites and blacks differ substantially *because of race*”); see also GURIN, HATCHETT & JACKSON, *supra* note 215, at 223; KINDER & DALE-RIDDLE,

With this well-established result in mind, we included a standard battery of questions to measure racial group solidarity in our Michigan survey. Blacks were asked how often they felt pride over the accomplishments of blacks, how often they felt anger about the way blacks were treated, and how closely they saw their own fate bound up with the fate of blacks in general. The exact questions are presented in Table 5, along with the distribution of responses each question elicited. We created a racial group solidarity scale by averaging responses across the three questions.<sup>234</sup>

**Table 5**  
**Racial Group Solidarity Among Michigan Blacks**

How often do you find yourself feeling a sense of pride in the accomplishments of black people?

A lot	43.0%
Fairly often	32.9
Once in a while	23.6
Hardly ever	0.5

How often do you find yourself feeling angry about the way black people are treated in society?

A lot	42.4
Fairly often	34.4
Once in a while	21.0
Hardly ever	2.1

How much do you think that what happens to other black people in this country will have something to do with what happens in your life?

A lot	55.7
Some	33.2
Not very much	9.3
None at all	1.7

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*supra* note 195, at 20; KATHERINE TATE, FROM PROTEST TO POLITICS: THE NEW BLACK VOTERS IN AMERICAN ELECTIONS 21 (1993) (“Blacks are united politically by race . . .”).

<sup>234</sup> Cronbach’s *alpha* for the three-item racial solidarity scale is .450. This modest reliability means we are probably underestimating the real effect of racial group solidarity on the Proposal 2 vote.



To what extent is racial group solidarity associated with the black vote on Proposal 2? As in our analysis of racial resentment and the white vote, to obtain an unbiased estimate of the effect of racial group solidarity on the black vote on Proposal 2, our analysis must take into account other relevant factors. As before, we consider three: party identification; belief in limited government; and belief in equal opportunity. And as before, effects are estimated by multivariate probit regression. Results are presented in Table 6 (in the left-hand column).

**Table 6**  
**The Effect of Racial Group Solidarity on the Black Vote on Affirmative Action—**  
**in Michigan and in the Nation**<sup>235</sup>

	<i>Michigan</i>	<i>Nation</i>
Racial Solidarity	-1.134* (0.678)	-0.980** (0.410)
Party Identification	-0.669 (0.786)	0.495 (0.338)
Limited Government	1.378*** (0.331)	0.543** (0.268)
Equal Opportunity	-0.415 (0.865)	-0.675 (0.424)
Constant	-0.316 (0.718)	0.627 (0.466)
Observations	253	439

\*\*\* p<0.01, \*\* p<0.05, \*p<0.1  
Standard Errors in Parentheses

The results indicate a statistically significant and substantively sizable effect of racial group solidarity on opposition to Proposal 2.<sup>236</sup> Racially conscious blacks were more likely to vote against Proposal 2 than were blacks who did not identify with their racial group, controlling on partisanship, limited government, and equal opportunity.<sup>237</sup> The magnitude of the effect due to racial solidarity can be seen in Figure 2, which translates the coefficient results presented in Table 6 into graphical form. Figure 2 shows the predicted vote for Proposal 2 as a consequence of variation in racial group solidarity, holding constant the effects due to partisanship, limited government, and equal opportunity.<sup>238</sup>

<sup>235</sup> Note that each column represents a separate probit score.

<sup>236</sup> See *supra* Table 6.

<sup>237</sup> See *supra* Table 6.

<sup>238</sup> The predictions displayed in Figure 2 assume a black voter who is a political Independent, with average views on limited government and equal opportunity.

**Figure 2**  
**Racial Group Solidarity and Black Support for Michigan's Proposal 2**

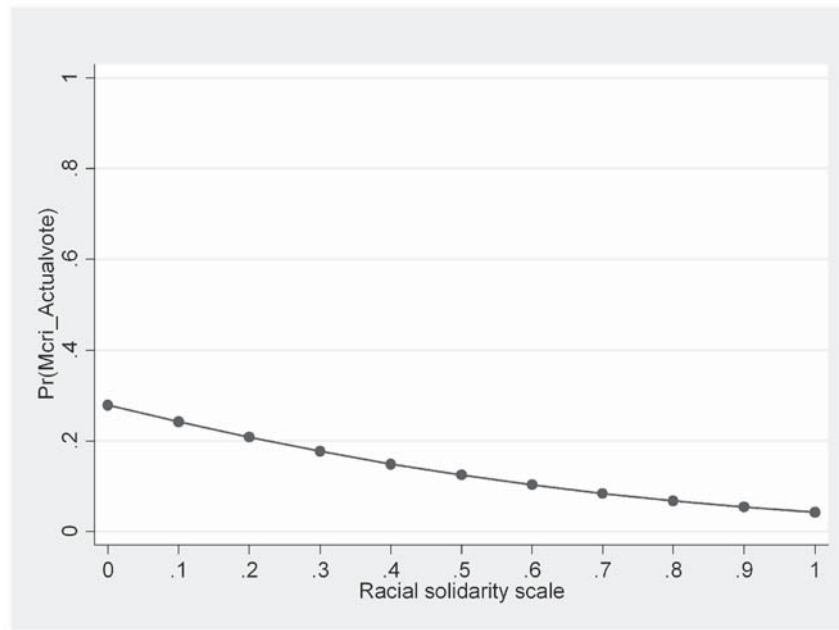


Figure 2 provides a reminder of how overwhelmingly black voters opposed Proposal 2. Even so, racial solidarity makes a difference. Opposition to Proposal 2 strengthens as racial group solidarity intensifies.<sup>239</sup>

Our next and final question is whether the effect due to racial group solidarity on black opposition to affirmative action is greater in Michigan than in the country as a whole, a consequence, presumably, of the racial framing of the ballot initiative. We ran the same analysis on our national study, which included the identical questions on racial group solidarity that were part of the Michigan study. The results of the national analysis are presented in Table 6 (right-hand column), side by side with the Michigan results.<sup>240</sup>

Table 6 shows that the effect of racial group solidarity on black opposition to eliminating affirmative action is positive and statistically significant in the national sample, just as it was in the Michigan sample. Table 6 also shows that the effect of racial group solidarity on opposition to affirmative action was greater among Michigan voters than among voters in the country. However, the difference between the two—between the effect of racial solidarity in Michigan and the effect of racial solidarity in the country—is modest and not statistically significant.<sup>241</sup> We cannot be sure that

<sup>239</sup> See *supra* Figure 2.

<sup>240</sup> See *supra* Table 6.

<sup>241</sup> See *supra* Table 6.

racial group solidarity played a larger role in motivating black opposition to the elimination of affirmative action in 2006 in Michigan than in the country as a whole.

Taken as a whole, the evidence presented here strongly suggests that Proposal 2 betrayed the antibalkanization values of the Fourteenth Amendment. First, Proposal 2 undermined social cohesion by dividing the races into different political coalitions, widening the division arising from the background politics of affirmative action. Second, Proposal 2 activated feelings of racial hostility among whites and perhaps did the same for feelings of racial separation among blacks, turning the vote on Proposal 2 into a referendum on race.

Whites voted decisively in favor of Proposal 2, while blacks voted overwhelmingly against it. The racial difference over Proposal 2 in Michigan in 2006 was greater than differences associated with other social cleavages; greater than the racial difference over a hypothetical ballot initiative worded identically to Proposal 2 posed to a national sample in 2006; greater than racial differences over affirmative action reported in contemporaneous national surveys; and greater than racial differences reported by national surveys over the most contentious racial issues of the last fifty years.

Among whites, feelings of resentment and sympathy toward blacks were strongly associated with the vote: racially resentful whites voted decisively for Proposal 2 while racially sympathetic whites voted decisively against Proposal 2. No other factor was as important. Moreover, the relationship between sympathy and resentment, on the one hand, and vote on Proposal 2, on the other, was significantly stronger than the parallel relationship between sympathy and resentment and vote on a hypothetical ballot initiative worded identically to Proposal 2 posed simultaneously to a national sample. The results are similar for black voters, though not as striking. Among black voters, feelings of racial group solidarity were significantly associated with the vote: racially identified blacks voted overwhelmingly against Proposal 2, while blacks less psychologically tied to their racial group were less lopsidedly opposed to Proposal 2. This relationship remains when other political factors are taken into account. Racial solidarity was the most important factor in the black vote on Proposal 2. And finally, the relationship between racial solidarity and the vote on Proposal 2 was stronger (though not significantly so) than the parallel relationship between racial solidarity and vote on a hypothetical ballot initiative worded identically to Proposal 2 posed to a national sample.

### III. AFTER *SCHUETTE*

*Schuette* attracted a large amount of public attention during briefing and argument due to its high stakes, with statewide bans of affirmative action hanging in the balance both in Michigan and across the country.<sup>242</sup> Following the Court's reversal of the Sixth Circuit, however, the case has largely receded from public view. We conclude

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<sup>242</sup> See Michael Kagan, "Unelected Faculty": *Schuette v. Coalition and the Limits of Academic Freedom*, 5 CALIF. L. REV. CIR. 286, 286 (2014).

by briefly considering the ramifications of *Schuetten*—for affirmative action, for the political process doctrine, and for the antibalkanization principle.

The implications for the practice of affirmative action itself seem minimal. Early in *Schuetten*, Kennedy wrote: “Before the Court addresses the question presented, it is important to note what this case is not about. It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education.”<sup>243</sup> Two years after *Schuetten*, the Supreme Court held that the University of Texas at Austin’s affirmative action program survived strict scrutiny and upheld it.<sup>244</sup> Notably, neither the majority opinion nor the two dissenting opinions so much as mentioned *Schuetten*.<sup>245</sup>

The implications for the political process doctrine seem minor as well. If before *Schuetten* the cases articulating the political process doctrine were “jurisprudential enigmas that seem to lack any coherent relationship to constitutional doctrine as a whole,”<sup>246</sup> after it they were more so. If both Kennedy’s revision of the doctrine and his characterization of *Hunter*<sup>247</sup> and *Seattle*<sup>248</sup> hold, “[t]he doctrine would only apply when voters overturn government policy meant to mitigate an unambiguous ‘racial injury’ identified by the Court.”<sup>249</sup> The category is likely nonexistent, leaving the political process doctrine “in essence defunct,”<sup>250</sup> resting in the graveyard alongside other doctrines created to advance civil rights objectives while avoiding addressing racism directly.

In one sense, however, Kennedy’s language about the political process doctrine<sup>251</sup> came down at an auspicious time. In June 2013, the Supreme Court struck down Section 3 of the Defense of Marriage Act, which violated the Due Process Clause by treating a subset of state-sanctioned marriages unequally—those of same-sex couples.<sup>252</sup> For the following twenty-four months, lower courts and ultimately the Supreme Court grappled with whether *United States v. Windsor*’s<sup>253</sup> holding rendered state-level bans on same-sex marriage unconstitutional, concluding when the Supreme Court held that they did in *Obergefell v. Hodges*.<sup>254</sup>

The facts of *Schuetten* were strikingly analogous to the Court’s debate over gay marriage. It involved a state ballot initiative that sought to amend the state’s constitution.<sup>255</sup>

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<sup>243</sup> *Schuetten v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1630 (2014) (plurality opinion).

<sup>244</sup> *Fisher II*, 136 S. Ct. 2198, 2214 (2016).

<sup>245</sup> See generally *id.*

<sup>246</sup> David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 561 (1999).

<sup>247</sup> See *supra* notes 94–99 and accompanying text.

<sup>248</sup> See *supra* notes 100–03 and accompanying text.

<sup>249</sup> Bernstein, *supra* note 99, at 283.

<sup>250</sup> *Id.*

<sup>251</sup> See *Schuetten v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014) (plurality opinion).

<sup>252</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

<sup>253</sup> 133 S. Ct. 2675, 2695 (2013) (explaining the *Windsor* holding).

<sup>254</sup> 135 S. Ct. 2584, 2604–05 (2015).

<sup>255</sup> *Schuetten*, 134 S. Ct. at 1629 (plurality opinion).

The amendment prevented the state from giving a benefit to a historically disadvantaged minority group.<sup>256</sup> The parties contested whether the amendment was driven by animus for the group itself, not its purported policy goal.<sup>257</sup> The issue sparked disagreement on the appropriateness of judicial intervention into a raging political debate.<sup>258</sup> Kennedy's language on the antibalkanizing merits of resolving disputes through the political process dropped in April 2014, in the throes of lower court litigation interpreting *Windsor*.<sup>259</sup>

It is therefore no surprise that litigants defending gay marriage bans quickly seized on the language of *Schuetz*. Attorneys representing Wisconsin told the Seventh Circuit that *Schuetz* affirmed "the importance of settling policy disputes through public debate and the ballot box."<sup>260</sup> Attorneys for Louisiana told the Fifth Circuit that affirmative action and gay marriage were such analogous issues that "*Schuetz* sp[oke] directly to the issue of state authority here."<sup>261</sup> Attorneys for Tennessee quoted to the Sixth Circuit *Schuetz*'s language on animus, that it would be "demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds."<sup>262</sup>

And indeed, while most courts in the aftermath of *Windsor* found gay marriage bans to be unconstitutional, the courts that upheld them virtually all cited to *Schuetz* in doing so.<sup>263</sup> The Sixth Circuit cited *Schuetz*'s language against presuming animus, writing that "[w]hat the Court recently said about another statewide initiative that people care passionately about applies with equal vigor here."<sup>264</sup> The District Court of Puerto Rico cited *Schuetz*'s antibalkanizing language at length in upholding its gay marriage ban.<sup>265</sup> The Eastern District of Louisiana did so as well, noting that the gay marriage "case shares striking similarities with *Schuetz*."<sup>266</sup>

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<sup>256</sup> *Id.* ("Under the terms of the amendment, race-based preferences cannot be part of the admissions process for state universities.").

<sup>257</sup> In its reply brief, the Office of the Attorney General noted that while respondents believed Michigan voters acted with discriminatory animus, Section 26 actually discriminates against discrimination. Reply Brief at 3, *Schuetz*, 134 S. Ct. 1623 (2014) (No. 12-682).

<sup>258</sup> See Kagan, *supra* note 242, at 286.

<sup>259</sup> See *Schuetz*, 134 S. Ct. at 1629–38 (plurality opinion).

<sup>260</sup> Wisconsin State Defendants' Reply Brief at 25, *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014), *aff'd sub nom.* *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (No. 14-2526).

<sup>261</sup> Brief of Appellees at 22, *Robicheaux v. Caldwell*, 791 F.3d 616 (5th Cir. 2015) (No. 14-31037).

<sup>262</sup> Brief of Defendants-Appellants at 23–24, *Tanco v. Halsam*, No. 14-5297 (6th Cir. May 7, 2014) (citing *Schuetz*, 134 S. Ct. at 1637) (plurality opinion)).

<sup>263</sup> See *infra* notes 264–66 and accompanying text.

<sup>264</sup> *DeBoer v. Snyder*, 772 F.3d 388, 409 (6th Cir. 2014), *rev'd sub. nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>265</sup> *Conde-Vidal v. Garcia-Padilla*, 54 F. Supp. 3d 157, 168 (D.P.R. 2014).

<sup>266</sup> *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 927 n.20 (E.D. La. 2014).

*Schuettes*'s fourteen months of prominence ended in June 2015, when the Court decided *Obergefell*, establishing the unconstitutionality of the gay marriage bans.<sup>267</sup> Confronted with his earlier ode to the democratic process, Kennedy wrote that *Schuettes* affirmed that "democracy is the appropriate process for change," but only "so long as that process does not abridge fundamental rights."<sup>268</sup> "Thus, when the rights of persons are violated, 'the Constitution requires redress by the courts,' notwithstanding the more general value of democratic decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity."<sup>269</sup>

The *Schuettes* plaintiffs would likely find this distinction to be mystifying, as they believed their fundamental rights *were* violated—their right to equal access to the political process.<sup>270</sup> The Court seemed to truly be invoking the distinction that divided lower court judges on *Schuettes* itself—that whether the case was fundamentally about protecting a fundamental right, equal access to the political process, turned on whether the amendment was delivering race-based benefits or protecting race-based equality.<sup>271</sup> Perhaps more notable, however, was that the Court in *Obergefell* rejected the antibalkanization frame, finding that fundamental rights had to be protected regardless of their effect on important and sensitive issues.<sup>272</sup>

Each of the four dissenting justices wrote separately, and two cited to *Schuettes* as support.<sup>273</sup> Roberts closely emulated Kennedy's antibalkanizing arguments from *Schuettes*.<sup>274</sup> He gestured to broad antibalkanization principles, writing: "Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept."<sup>275</sup> But he also proceeded to make one of the same empirical claims as Kennedy: "There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling."<sup>276</sup> Yet this invocation of the merits of antibalkanization did not carry the day.

The future of *Schuettes*'s vitality is unclear. Its complete absence in *Fisher II*<sup>277</sup> suggests that the courts do not find it relevant to the debate over the merits of affirmative action. With the exception of the gay marriage cases, it has gone virtually

<sup>267</sup> *Obergefell*, 135 S. Ct. 2584.

<sup>268</sup> *Id.* at 2605.

<sup>269</sup> *Id.* (quoting *Schuettes v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014) (plurality opinion)).

<sup>270</sup> *Schuettes*, 134 S. Ct. at 1629–30 (plurality opinion).

<sup>271</sup> *Id.* at 1639.

<sup>272</sup> *Obergefell*, 135 S. Ct. at 2605.

<sup>273</sup> *Id.* at 2624 (Roberts, C.J., dissenting); *id.* at 2627 n.2 (Scalia, J., dissenting).

<sup>274</sup> *Id.* at 2612 (Roberts, C.J., dissenting).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 2625.

<sup>277</sup> 136 S. Ct. 2198 (2016).

uncited in the Supreme Court or even the federal courts of appeals since its publication, demonstrating a lack of vitality in the political process doctrine, perhaps even preceding *Schuette* and certainly after it. The antibalkanizing language received its flurry of attention, but its failure to carry the day in *Obergefell* suggests that the antibalkanization principles of *Schuette* may be little more than another “ad hoc compromise[ ]” to be invoked by the Court when it is comfortable denying protected rights to minority groups, even when empirically incorrect.<sup>278</sup>

#### CONCLUSION

Kennedy’s controlling plurality opinion in *Schuette* followed a long line of Equal Protection cases in suggesting the relevance of antibalkanization values.<sup>279</sup> Kennedy found the campaign around Proposal 2, and its outcome being upheld by the courts, to further these antibalkanization values.<sup>280</sup>

Our empirical analysis finds the opposite. Proposal 2 and its campaign appeared both to undermine social cohesion and stoke racial antagonism.<sup>281</sup> Feelings of racial resentment among whites and racial solidarity among blacks powerfully predicted the vote.<sup>282</sup> Proposal 2 became a referendum not on the merits of a policy, aided by deliberate and rational debate, as Kennedy assumed. It was rather and primarily a case of racial tribalism, African Americans and whites deeply divided over the way forward.

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<sup>278</sup> See Bagenstos, *supra* note 130, at 417.

<sup>279</sup> See *supra* Part I.

<sup>280</sup> See *supra* notes 10–16 and accompanying text.

<sup>281</sup> See *supra* Tables 3–6 and accompanying text.

<sup>282</sup> See *supra* Tables 3–6 and accompanying text.