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# Justice Sotomayor's Undemocratic Dissent in *Schuetz v. Coalition to Defend Affirmative Action*

Adam Lamparello

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# Justice Sotomayor’s Undemocratic Dissent in *Schuette v. Coalition to Defend Affirmative Action*

Adam Lamparello\*

*“The way to stop discrimination on the basis of race is to stop  
discriminating on the basis of race.”*<sup>1</sup>

- CHIEF JUSTICE JOHN ROBERTS

*“The way to stop discrimination on the basis of race is to speak  
openly and candidly on the subject of race, and to apply the Constitution  
with eyes open to the unfortunate effects of centuries of racial  
discrimination.”*<sup>2</sup>

- ASSOCIATE JUSTICE SONYA SOTOMAYOR

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<sup>1</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

<sup>2</sup> *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting).

## I. INTRODUCTION

Does the Constitution *compel* states to desegregate their schools?

Yes.<sup>3</sup>

Does the Constitution *compel* states to recognize interracial marriages?

Yes.<sup>4</sup>

Does the Constitution *compel* states to recognize same-sex marriage?

Arguably, yes.<sup>5</sup>

Does the Constitution *compel* states to treat people differently on the basis of race?

No.

The way to stop judicial supremacy is for judges to stop acting like judicial supremacists. The way to ensure equal and accessible democratic processes is to make our democracy more equal and accessible. If the Constitution gave nine members of the Supreme Court the authority to undo the choices of millions simply to achieve better policy outcomes, then the Court would have the power to make constitutional laws unconstitutional and unconstitutional laws constitutional. That would lead to inequality in a manner far worse—and more undemocratic—than the alleged inequality that resulted from Michigan’s ban on race-based preferences. Citizens of all political persuasions would be subject to a federal judicial veto, regardless of the Constitution, or the results of democratic debate.

Justice Sotomayor’s provocative dissent in *Schuette v. Coalition to Defend Affirmative Action*<sup>6</sup>—called “courageous” by Attorney General Eric Holder<sup>7</sup>—rightfully argued for a candid discussion on race:

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<sup>3</sup> See *Brown v. Board of Education*, 347 U.S. 483 (1954); U.S. CONST., amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>4</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>5</sup> See *United States v. Windsor*, 133 S.Ct. 2675 (2013).

[W]e ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race does matter.<sup>8</sup>

While courageous, the dissent was not correct.

Race does matter. The Supreme Court, however, is not the proper venue to have this candid discussion. To imply that it should, and that the Constitution should be interpreted with “eyes open,”<sup>9</sup> is to suggest that “we” refers to nine unelected judges, and that “ought” should be defined by the federal judiciary. Neither view is healthy for democracy or equality. “We” refers to the citizens of every state, and “ought” belongs to the democratic process.

Justice Sotomayor’s dissent, although noble in purpose, is fundamentally undemocratic. As discussed below, the reasoning reflects a philosophy that gives courts the power to make normative policy judgments, and to condition constitutional *meaning* on subjective assessments regarding the wisdom of state policy. There is no such thing, however, as an unconstitutional *policy*. There is only an unconstitutional *law*. And laws must comport with the Constitution’s text, not the other way around.

By authoring such a pointed, political, and doctrinally suspect dissent, Justice Sotomayor made it more difficult to have a candid discussion about race. She also made it more difficult to believe that judges will respect the law—and the Constitution—even when it conflicts with their personal values. That not only undermines the public’s faith in the Court, but it demeans every citizen’s fundamental right to resolve divisive policy issues through democratic means. To be sure, it is one thing to invalidate democratically enacted laws that violate constitutional liberties. It is quite another, however, to manipulate, ignore, or unreasonably interpret the Constitution’s text to reach a desired policy outcome. The result does not lead to equality. It denies citizens of all races the ability to have a principled discourse on divisive

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<sup>6</sup> Schuette, 134 S. Ct. at 1651-83.

<sup>7</sup> Todd Ruger, *Sotomayor’s Dissent was ‘Courageous,’ Holder Says*, LEGAL TIMES (April 23, 2014 1:28 PM), <http://www.nationallawjournal.com/legaltimes/id=1202652279348/Sotomayor’s-Affirmative-Action-Dissent-Was-’Courageous,’-Holder-Says?slretur n=20140403144037> (accessed by searching for LegalTimes in LEXIS NEXIS, legal news).

<sup>8</sup> Schuette, 134 S.Ct. at 1676 (Sotomayor, J., dissenting) (alteration to original in quoted text).

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

social policy issues, and prevents citizens from being agents of change. Justice Sotomayor's dissent, therefore, highlights the problem of relying on the Court to create rights. With each decision removing an issue from the democratic process, power is a bit more centralized, and liberty a bit more federalized.

A candid discussion about race, however, is essential. Discrimination—and its effects—exist throughout the country.<sup>10</sup> Inequality is real, not imagined. Affirmative action, while valuable to ensuring diversity in higher education, is an incomplete fix. It masks, but does not alleviate, the deeper racial injustices that continue to this day. Those injustices result from an inescapable truth: the promise of *Brown v. Board of Education*<sup>11</sup> has never been realized.<sup>12</sup> African-Americans continue to live in a world of unequal opportunity and, in some areas, segregated schools. Many live in poverty and receive an inadequate education. Enacting local, state, and federal policies that address the root causes of inequality is thus a civil and human rights imperative. A discussion that includes and empowers only nine judges, however, will be anything but candid, most likely divisive, and most certainly unproductive.

## II. SCHUETTE V. COALITION TO DEFEND AFFIRMATIVE ACTION

In *Schuette*, Justice Kennedy authored a plurality opinion upholding a constitutional amendment passed by Michigan voters (Proposition 2), that banned race-based preferences among state and governmental entities.<sup>13</sup> The Coalition to Defend Affirmative Action challenged the

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<sup>10</sup> *Schuette*, 134 S.Ct. at 1676 (Sotomayor, J., dissenting) (alteration to original in quoted text).

<sup>11</sup> *Brown*, 347 U.S. 483 (1954).

<sup>12</sup> See Rotan E. Lee, *Equality: Truth and Consequence*, 4 TEMP. POL. & CIV. RTS. L. REV. 263 (1995) (discussing post-*Brown* failures, including poverty, inadequate schooling, and segregation).

<sup>13</sup> See *Schuette*, 134 S. Ct. 1678 (2014) (Sotomayor, J., dissenting). Proposition 2 was passed by a fifty-eight to forty-two percent margin and became Article I, § 26, of the Michigan Constitution. Section 26 states, in relevant part, as follows:

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

(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

law, arguing that it violated the Equal Protection Clause by altering the political structure and making it more difficult for minorities to effect changes in policy.<sup>14</sup> Before voters passed Proposition 2, the governing bodies at Michigan's public universities administered affirmative action programs.<sup>15</sup> After Proposition 2 passed, minority groups could only seek change through a statewide ballot initiative.<sup>16</sup>

The district court granted summary judgment in favor of Michigan, holding that its voters were permitted to limit the means by which minority groups could secure advantages based on racial classifications.<sup>17</sup> By a 2-1 vote, the Sixth Circuit reversed, holding that Proposition 2 violated the equal protection clause.<sup>18</sup> On re-hearing en banc, a divided Sixth Circuit affirmed.<sup>19</sup> The Court granted certiorari, and reversed.

### A. *The Plurality Opinion*

#### 1. Deference to the Democratic Process

Justice Kennedy's plurality opinion emphasized that the issue "is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education."<sup>20</sup> Instead, it concerned "whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions."<sup>21</sup> At its core, *Schuette* was about *who* should decide: the Court or the democratic process; however, it was about much more. The tide is beginning to turn against living constitutionalists and policy-driven jurists. Even Justice Kennedy, who has often crafted opinions filled with sweeping language about liberty, agreed.

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(3) For the purposes of this section 'state' includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.

<sup>14</sup> *Id.* at 1682.

<sup>15</sup> *Coalition to Defend Affirmative Action v. Regents of University of Mich.*, 539 F. Supp. 2d 924, 933 (E.D. Mich. 2008), *overruled by* *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623 (2014).

<sup>16</sup> *Coalition to Defend Affirmative Action*, 539 F. Supp. 2d at 957.

<sup>17</sup> *Schuette*, 134 S. Ct. at 1630; *see also* *Coalition to Defend Affirmative Action*, 539 F. Supp. 2d at 933.

<sup>18</sup> *Schuette*, 134 S. Ct. at 1630 (the Sixth Circuit relied, in part, on *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1998)).

<sup>19</sup> *Id.* at 1630; *see also* *Coalition to Defend Affirmative Action v. Regents of University of Mich.*, 701 F.3d 466 (6th Cir. 2012).

<sup>20</sup> *Schuette*, 134 S. Ct. at 1630.

<sup>21</sup> *Id.*

The plurality held that the United States Constitution gives this choice to Michigan's voters. Relying on *Grutter v. Bollinger*,<sup>22</sup> where the Court upheld the University of Michigan Law School's affirmative action program,<sup>23</sup> Justice Kennedy emphasized "the significance of a dialogue regarding this contested and complex policy question among and within states."<sup>24</sup> Michigan's decision to ban race-based preferences, "reflect[ed] in part the national dialogue regarding the wisdom and practicality of race-conscious admissions in higher education."<sup>25</sup>

Furthermore, by "enabling greater citizen involvement in democratic processes,"<sup>26</sup> the Constitution gave citizens the authority to make these choices. Justice Kennedy explained as follows:

This case is not about how the debate about racial preferences should be resolved. *It is about who may resolve it.* There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters . . . Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate.<sup>27</sup>

In short, the democratic process "is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues."<sup>28</sup>

The plurality also recognized that excessive judicial intervention undermines personal liberty. Justice Kennedy wrote that "our constitutional system embraces . . . the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure."<sup>29</sup> Liberty, therefore, is not defined solely by outcomes, but also "embraces the right, indeed the duty, to engage in a rational, civic

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<sup>22</sup> Coalition to Defend Affirmative Action, 539 U.S. 306 (2003).

<sup>23</sup> *Id.* at 343.

<sup>24</sup> Schuette, 134 S.Ct.at 1630 (plurality opinion).

<sup>25</sup> *Id.* (alteration to original in quoted text).

<sup>26</sup> *Id.* (quoting *Bond v. United States*, 132 S. Ct. 2355 (2011)).

<sup>27</sup> *Id.* at 1638.(emphasis added)

<sup>28</sup> *Id.* at 1637.

<sup>29</sup> Schuette, 134 S.Ct. at 1637.

discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people.”<sup>30</sup>

## 2. Rejecting an Unprincipled Expansion of the Political Process Doctrine

The Court rejected an expansive reading of the political process doctrine,<sup>31</sup> and distinguished three earlier cases that the petitioner and Sixth Circuit had deemed controlling. First, in *Reitman v. Mulkey*,<sup>32</sup> voters amended the California Constitution to prohibit the state from interfering with an owner’s decision to refuse to sell residential property, regardless of the reason.<sup>33</sup> The Court held that the amendment violated equal protection principles because the “immediate design and intent”<sup>34</sup> of the amendment was to “establis[h] a purported constitutional right to privately discriminate.”<sup>35</sup> It also “significantly encourage[d] and involve[d] the State in private racial discriminations.”<sup>36</sup>

In *Hunter v. Erickson*,<sup>37</sup> the Court created the political process doctrine, which prohibits states from “alter[ing] the procedures of government to target racial minorities.”<sup>38</sup> The *Hunter* Court invalidated a voter-approved amendment to the city charter requiring that all anti-discrimination laws be passed through the referendum process.<sup>39</sup> Voters passed the amendment in response to a fair housing ordinance that prohibited discrimination on the basis of race,<sup>40</sup> in an area “where widespread racial discrimination . . . led to segregated housing, forcing many to live in ‘unhealthful, unsafe, unsanitary and overcrowded conditions.’”<sup>41</sup> Given this context, the Court rejected the city’s argument that the amendment was “simply . . . a public decision to move slowly in

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<sup>30</sup> *Id.*

<sup>31</sup> *See, e.g.,* *Hunter v. Erickson*, 393 U.S. 385, 392 (1967) (“Like the law requiring specification of candidates’ race on the ballot . . . § 137 places [a] special burden on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others.”) (alteration to original in quoted text).

<sup>32</sup> *Reitman v. Mulkey*, 387 U.S. 369 (1967).

<sup>33</sup> *Schuetz*, 134 S. Ct. at 1631 (plurality opinion).

<sup>34</sup> *Id.* (quoting *Reitman*, 387 U.S. at 374).

<sup>35</sup> *Id.* (alteration in original).

<sup>36</sup> *Id.* (alterations in original).

<sup>37</sup> *Hunter*, 393 U.S. at 385 (1969).

<sup>38</sup> *Schuetz v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1632 (2014) (plurality opinion).

<sup>39</sup> *Hunter*, 393 U.S. at 391.

<sup>40</sup> *Schuetz*, 134 S. Ct. at 1640 (Scalia, J., concurring) (quoting *Hunter*, 393 U.S. at 391).

<sup>41</sup> *Id.*



the delicate area of race relations.”<sup>42</sup> Instead, it was a thinly veiled justification to continue discriminatory practices.<sup>43</sup> Also, by requiring that only anti-discrimination ordinances be approved by referendum, the amendment “place[d] [a] special burden on racial minorities within the governmental process.”<sup>44</sup>

Finally, in *Washington v. Seattle School District No. 1*,<sup>45</sup> voters passed a state initiative that prohibited busing to desegregate schools.<sup>46</sup> In doing so, the initiative “remov[ed] the authority to address a racial problem—and only a racial problem—from the existing decision making body, in such a way as to burden minority interests.”<sup>47</sup> Specifically, the initiative forced busing advocates to “seek relief from the state legislature, or from the statewide electorate,”<sup>48</sup> by using the “racial nature of a decision to determine the decision making process.”<sup>49</sup> Moreover, the initiative “was carefully tailored to interfere only with desegregative busing,”<sup>50</sup> and thus resulted in an “aggravation of the very racial injury in which the State itself was complicit.”<sup>51</sup>

Thus, in *Washington v. Seattle School District No. 1* and other cases, the laws at issue presented a “serious risk, if not purpose, of causing specific injuries on account of race,”<sup>52</sup> and made it more difficult to achieve change through the legislative process. In *Schuette*, however, neither discrimination nor the likelihood of serious injury to minority groups was reducible from a color-blind policy.<sup>53</sup> Furthermore, the plurality refused to construe the political process doctrine so broadly that it would apply strict scrutiny to “any state action with a ‘racial focus’<sup>54</sup> that makes it ‘more difficult for certain racial minorities than for other groups’ to ‘achieve legislation that is in their interest.’”<sup>55</sup> That would force the Court to identify interests that were common to particular minority groups, and risk precisely the type of “impermissible racial

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<sup>42</sup> *Id.*

<sup>43</sup> *Schuette*, 134 S. Ct. at 1640 (Scalia, J., concurring).

<sup>44</sup> *Id.* (alterations to original in quoted text).

<sup>45</sup> *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

<sup>46</sup> *Schuette*, 134 S. Ct. at 1632-33 (plurality opinion).

<sup>47</sup> *Id.* at 1633 (quoting *Washington*, 458 U.S. at 454, 474 (1982)) (alteration to original in quoted text).

<sup>48</sup> *Id.* (quoting *Washington*, 458 U.S. at 474).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (quoting *Washington*, 458 U.S. at 471).

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

<sup>52</sup> *Schuette*, 134 S. Ct. at 1633.

<sup>53</sup> *See, e.g., Sailors v. Board of Ed. of Kent County*, 387 U.S. 105, 109 (1967) (“Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs.”).

<sup>54</sup> *Schuette*, 134 S. Ct. at 1634 (citing *Hunter*, 385 U.S. at 395).

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

stereotyp[ing]”<sup>56</sup> that equal protection principles prohibit. Justice Kennedy stated as follows:

Were courts to embark upon this venture not only would it be undertaken with no clear legal standards or accepted sources to guide judicial decision but also it would result in, or at least impose a high risk of, inquiries and categories dependent upon demeaning stereotypes, classifications of questionable constitutionality on their own terms.<sup>57</sup>

The plurality refused to assume that “members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.”<sup>58</sup> Indeed, if “it were deemed necessary to probe how some races define their own interest in political matters, still another beginning point would be to define individuals according to race.”<sup>59</sup> Therefore, a broad application of the political process doctrine had “no principled limitation . . . [or] support in precedent.”<sup>60</sup> It would be difficult, if not impossible, to identify laws that “inures primarily to the benefit of the minority”<sup>61</sup> or are “in their interest.”<sup>62</sup>

The plurality emphasized that issues involving affirmative action, and other matters of social policy that cannot be said to violate the Constitution, should be resolved through the democratic process. By banning race-based preferences, “the Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power.”<sup>63</sup> In so holding, the plurality recognized that “freedom does not stop with individual rights . . . [and] consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power.”<sup>64</sup> Thus, “courts may not disempower the voters

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<sup>56</sup> *Id.* (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)) (alteration to original in quoted text).

<sup>57</sup> *Id.* at 1634-35.

<sup>58</sup> *Id.* (citing *Shaw*, 509 U.S. at 647).

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

<sup>60</sup> *Schuetz*, 134 S. Ct. at 1634.

<sup>61</sup> *Id.* at 1635 (quoting *Washington*, 458 U.S. at 472, 474) (alteration to original in quoted text).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1636-37.

<sup>64</sup> *Id.* (alteration to original in quoted text).

from choosing which path to follow [on the use of race-based preferences].”<sup>65</sup>

### B. *Justice Sotomayor’s Blistering Dissent*

Justice Sotomayor began her uncharacteristically pointed dissent by writing that “[w]e are fortunate to live in a democratic society,”<sup>66</sup> and discussed the perils of judge-made law.<sup>67</sup> Then, she did exactly what she cautioned against.

To begin with, Justice Sotomayor wrote that Proposition 2 reflected the “last chapter of discrimination,”<sup>68</sup> in a long and disgraceful history that she reminded the Court of in great detail. After discussing the “long and lamentable record of stymieing the right of racial minorities to participate in the political process,”<sup>69</sup> Justice Sotomayor emphasized that “our Constitution places limits on what a majority of the people may do.”<sup>70</sup> In this case, despite conceding that Proposition 2 did not invidiously discriminate and would not necessarily have a disparate impact on minority groups,<sup>71</sup> Justice Sotomayor argued that the Equal Protection Clause imposed those limits.

Instead, Proposition 2 violated a “strand of our equal protection jurisprudence [that] focuses on process, securing to all citizens the right to participate meaningfully and equally in self-government.”<sup>72</sup> As Justice Sotomayor explained, the Equal Protection Clause prohibits a political structure that “subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.”<sup>73</sup> That doctrine applied here because Michigan’s voters “changed the basic rules of the political process . . . by amending the Michigan Constitution to enact Art. I, § 26 . . . .”<sup>74</sup>

The change Justice Sotomayor spoke against was change in a *democratic* sense. The Michigan Constitution, like its federal counterpart, gave voters the right to seek change through the amendment process. To Justice Sotomayor, the amendment process was the wrong

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<sup>65</sup> *Id.* (emphasis added).

<sup>66</sup> *Id.* at 1651 (Sotomayor, J., dissenting).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1652.

<sup>69</sup> *Id.* at 1651.

<sup>70</sup> Schuette, 134 S. Ct. at 1634.

<sup>71</sup> *Id.* at n.1 (Sotomayor, J., dissenting) (“I of course do not mean to suggest that Michigan’s voters acted with anything like the invidious intent . . . of those who historically stymied the rights of racial minorities.”).

<sup>72</sup> *Id.* at 1651 (emphasis added).

<sup>73</sup> *Id.* at 1653 (citing *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982)).

<sup>74</sup> *Id.* at 1653-54 (emphasis added).

kind of democracy solely because the *result* “uniquely disadvantaged racial minorities.”<sup>75</sup> Therefore, the solution was to restrict, not expand, the channels by which voters could seek change. Indeed, Justice Sotomayor argued that voters could petition “each institution’s governing board,<sup>76</sup> whose members were “nominated by political parties and elected by the citizenry in statewide elections.”<sup>77</sup> This included “persuad[ing] existing board members to change their minds through individual or grassroots lobbying efforts, or through general public awareness campaigns.”<sup>78</sup> But nowhere else, and certainly not through the democratic process.

What makes this particularly alarming is that “Michigan’s elected boards ‘delegated admissions-related decision making authority to unelected university faculty members and administrators.’”<sup>79</sup> As Justice Breyer wrote in his concurrence, even if there was a change in the political process, it was to remove this issue from “unelected actors and place it in the hands of the voters.”<sup>80</sup> Tellingly, Justice Sotomayor found fault with an inherently democratic process that she equated to “stacking the political process against minority groups permanently, forcing the minority alone to surmount unique obstacles in pursuit of its goals.”<sup>81</sup> Make no mistake, Justice Sotomayor wanted to cut off the amendment process *for only those voters seeking to ban race-conscious admissions policies*, and to compel them to seek policy change solely from unelected—and unaccountable—faculty members. Anyone who has been to a faculty meeting knows that change in this forum is like trying to convince an originalist that the Constitution’s meaning is best understood by looking to the European Court of Human Rights.

Put differently, Justice Sotomayor would have placed specific limits on the *then-minority’s* ability to “participate meaningfully and equally in self-government.”<sup>82</sup> In so doing, Justice Sotomayor targeted a specific group in the same manner that she deemed unconstitutional when applied to the group she favored. And she used the political process doctrine to make the political process less accessible to voters and those who opposed affirmative action. This violated the precedent upon which Justice Sotomayor relied, and the principle—equality—that she sought to protect.

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<sup>75</sup> *Id.* at 1652.

<sup>76</sup> *Id.*

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

<sup>78</sup> Schuette, 134 S. Ct. at 1653 (alteration to original in quoted text).

<sup>79</sup> *Id.* at 1650 (Breyer, J., concurring).

<sup>80</sup> *Id.* at 1664 (Sotomayor, J., dissenting).

<sup>81</sup> *Id.* at 1654.

<sup>82</sup> *Id.* at 1651.

To be sure, although the administration of race-conscious policies was “in the hands of each institution’s governing board,”<sup>83</sup> it did not prevent citizens from seeking policy change through an amendment process that had been in place for nearly a century.<sup>84</sup> In doing precisely that, voters changed *what* the law said, not *how* changes to the law could be made. Moreover, the notion that voters were “stacking the political process against minority groups”<sup>85</sup> also begged the question why voters would “undertake the daunting task of amending the State Constitution,”<sup>86</sup> as the preferred method to execute such a plan. As Justice Scalia noted in his concurrence, if the voters sought to ban race-conscious policies through the university’s governing boards, “it would have made it *harder* not easier, for racial minorities favoring affirmative action to overturn that decision.”<sup>87</sup> Indeed, “voting in a favorable board (each of which has eight members) at the three major public universities requires electing by majority vote at least 15 different candidates, several of whom would be running during different election cycles.”<sup>88</sup>

Ultimately, Justice Sotomayor’s dissent embraced a results-driven jurisprudence that, although courageous and well-intentioned, was not supported by the Court’s precedent nor by the Constitution’s text. Furthermore, the reasoning would have led to an unreasonable, unworkable, and unconstitutional expansion of the political process doctrine. Coming from a life-tenured and unelected judge, that makes it dangerous—and undemocratic. Unlike *Reitman*, *Hunter*, and *Washington*, where voters *prohibited* the state from remedying discrimination, *barred* new anti-discrimination laws (except by referendum), and *banned* a practice intended to desegregate schools, Michigan’s voters did not restructure the political processes in a way that disadvantaged certain minority groups seeking change. The voters did not block the state from enforcing or expanding anti-discrimination efforts. As Justice Breyer explained in his concurring opinion, *Hunter* and *Seattle* involved efforts to “manipulate the political process in a way not here at issue.”<sup>89</sup> Furthermore, by attacking Chief Justice Roberts, Justice Sotomayor wrote with the wrong kind of candor.

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<sup>83</sup> Schuette, 134 S. Ct. at 1651.

<sup>84</sup> *Id.* at 1645-47 (Scalia, J., concurring).

<sup>85</sup> *Id.* at 1654 (Sotomayor, J., dissenting).

<sup>86</sup> *Id.* at 1653.

<sup>87</sup> *Id.* at 1645 (Scalia, J., concurring).

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

<sup>89</sup> Schuette, 134 S. Ct. at 1650 (Breyer, J., concurring).

### C. Justice Scalia's Concurrence

Justice Scalia's concurrence argued that, absent a discriminatory intent, impact, or a true subversion of the democratic process, laws that treat people equally do not violate the Equal Protection Clause:

Does the Equal Protection Clause of the Fourteenth Amendment *forbid* what its text plainly *requires*? Needless to say (except that this case obliges us to say it), the question answers itself. “The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.” It is precisely this understanding—the correct understanding—of the federal Equal Protection Clause that the people of the State of Michigan have adopted for their own fundamental law. By adopting it, they did not simultaneously *offend* it.<sup>90</sup>

On the other hand, if “a public university . . . stake[d] its defense of a race-based-admissions policy on the ground that it was designed to benefit primarily minorities (as opposed to all students, regardless of color, by enhancing diversity), *we would hold the policy unconstitutional.*”<sup>91</sup>

As Justice Scalia recognized, the political process doctrine cannot lead to a workable equal protection jurisprudence. Specifically, “[t]he problems with the political-process doctrine begin with its triggering prong, which assigns to a court the task of determining whether a law that reallocates policymaking authority concerns a ‘racial issue.’”<sup>92</sup> To answer that question, judges would be required to “focus their guesswork on their own juridical sense of what is primarily for the benefit of minorities,”<sup>93</sup> and ask whether “minorities may consider the policy in question to be ‘in their interest.’”<sup>94</sup> Such a task necessarily “involves judges in the dirty business of dividing the Nation ‘into racial blocs’ . . . [and] promotes the noxious fiction that, knowing only a person’s color or ethnicity, we can be sure that he has a predetermined set of policy ‘interests.’”<sup>95</sup> Moreover, it “reinforc[es] the perception that

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<sup>90</sup> *Id.* at 1639 (Scalia, J., concurring) (emphasis added).

<sup>91</sup> *Id.* at 1640 (alteration to original in quoted text).

<sup>92</sup> Schuette, 134 S. Ct. at 1643 (quoting *Washington v. Seattle Sch. Dist.*, 458 U.S. 457, 473 (1982)).

<sup>93</sup> *Id.* (Scalia, J., concurring).

<sup>94</sup> *Id.* (quoting *Washington*, 458 U.S. at 474).

<sup>95</sup> *Id.* (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 60, 610 (1990)) (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)) (alteration to original in quoted text).

members of the same racial group . . . think alike, [and] share the same political interests.”<sup>96</sup> Perhaps Justice Sotomayor is better situated to identify minority interests because she is a member of a minority group. But to make that suggestion is to harbor assumptions that are born of ignorance, stereotype, and prejudice. It has no place in the world of constitutional jurisprudence—or anywhere else.

Additionally, the dissent failed to explain “why the election of a university’s governing board is a ‘political process which can ordinarily be expected to bring about repeal of undesirable legislation,’ but why Michigan voters’ ability to amend their Constitution is not.”<sup>97</sup> Justice Scalia stated as follows:

It seems to me quite the opposite. Amending the Constitution requires the approval of only “a majority of the electors voting on the question.” Mich. Const., Art. XII, § 2. By contrast, voting in a favorable board (each of which has eight members) at the three major public universities requires electing by majority vote at least 15 different candidates, several of whom would be running during different election cycles . . . So if Michigan voters, instead of amending their Constitution, had pursued the dissent’s preferred path of electing board members promising to “abolish race-sensitive admissions policies,” . . . it would have been *harder*, not easier, for racial minorities favoring affirmative action to overturn that decision.<sup>98</sup>

Scalia also questioned Justice Sotomayor’s argument that “amending Michigan’s Constitution is simply not a part of that State’s ‘existing’ political process.”<sup>99</sup> He stated as follows:

What a peculiar notion: that a revision of a State’s fundamental law, made in precisely the manner that law prescribes, by the very people who are the source of that

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<sup>96</sup> *Id.* at 1644 (Scalia, J., concurring) (quoting *Shaw*, 509 U.S. at 647) (alteration to original in quoted text).

<sup>97</sup> *Id.* at 1645 (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938) (Justice Scalia challenged Justice Sotomayor’s reliance on *Carolene Products*, where in “famous footnote four” Justice Harlan Stone stated that “prejudice against discrete and insular minorities” merits “more exacting judicial scrutiny.” Because there was no evidence to conclude that Michigan’s voters had, in fact, acted with prejudice, Justice Scalia deemed *Carolene Products* inapposite).

<sup>98</sup> *Schuette*, 134 S. Ct. at 1645 (Scalia, J., concurring).

<sup>99</sup> *Id.* at 1646.

law's authority, is not part of the "political process" which, but for those people and that law, would not exist. This will surely come as news to the people of Michigan, who, since 1914, have amended their Constitution 20 times.<sup>100</sup>

The amendment did not alter "the basic rules of the political process in . . . the middle of the game,"<sup>101</sup> but instead used an essential part of that process, "through which citizens could seek legislative change."<sup>102</sup> Michigan's voters chose to create a color-blind society; it would be "shameful for us to stand in their way,"<sup>103</sup> and "doubly shameful to equate 'the majority' behind § 26 with 'the majority' responsible for Jim Crow."<sup>104</sup> As Justice Scalia stated, "no good can come of such random judicial musing."<sup>105</sup>

#### D. Chief Justice Roberts Concurs—and Responds to Justice Sotomayor

Chief Justice Roberts chastised Justice Sotomayor's dissent as "devot[ing] 11 pages to expounding its own policy preferences in favor of taking race into account in college admissions."<sup>106</sup> Roberts also highlighted the irony in the dissent's statement: it "do[es] not . . . suggest that the virtues of adopting race-sensitive admissions policies should inform the legal question before the Court."<sup>107</sup> He also questioned Justice Sotomayor's conclusion that governing boards may permissibly decide to ban race-based preferences in university admissions, "[b]ut others [voters] who might reach the same conclusion are failing to take race seriously."<sup>108</sup>

Finally, Chief Justice Roberts defended his statement that "the way to stop discriminating on the basis of race is to stop discriminating on the basis of race."<sup>109</sup> Roberts wrote that it was not "out of touch with reality

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<sup>100</sup> *Id.* at 1647.

<sup>101</sup> *Id.* (Scalia, J., concurring) (quoting Sotomayor, J., *infra* at 1653).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1648.

<sup>104</sup> Schuette, 134 S. Ct. at 1648, n. 11.

<sup>105</sup> *Id.* at 1643.

<sup>106</sup> *Id.* at 1638 (Roberts, C.J., concurring).

<sup>107</sup> Schuette, 134 S. Ct. at 1638 (alteration to original in quoted text).

<sup>108</sup> *Id.* (alterations to original in quoted text).

<sup>109</sup> *Id.* (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007)).



to conclude that racial preferences . . . do more harm than good.”<sup>110</sup> Roberts also wrote that disagreement “on the costs and benefits of racial preferences is not to ‘wish away, rather than confront’ racial inequality.”<sup>111</sup> Rather, “[p]eople can disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate.”<sup>112</sup>

### III. WHO WAS RIGHT, AND WHAT SHOULD HAPPEN NEXT?

No Justice was entirely correct, and none were entirely wrong. Justice Sotomayor correctly noted that racism and social inequality—both public and private—still exist. Their effects have, among other things, caused many to live in poverty, led to inequality in our educational system, and unequal treatment in the criminal justice system. Justice Sotomayor was wrong, however, to embrace a view of the equal protection clause that would have deprived Michigan from *not* discriminating, and to suggest that, in fact, they were *required* to discriminate. No reading of the Constitution, and no reasonable conception of equality, could support such a proposition. The equal protection clause does not *compel* the states to treat people differently on the basis of race. Nor does it *prohibit* states from passing laws that treat people the same, particularly where neither a discriminatory intent nor a strong likelihood of disparate impact is present.

Just as the Constitution constrains majorities, so too does it constrain the Court. Justice Sotomayor’s dissent was not about imposing *constitutional* constraints on democratic majorities. Those constraints, when properly applied, are an essential element of a constitutional democracy. Instead, her dissent imposed one Justice’s subjective constraints on the citizens of Michigan, and cast aspersions on the Court itself. If able, Justice Sotomayor might have imposed those constraints on an entire nation. That is not only a problem. It prevents real solutions.

The Supreme Court and our democratic process do not countenance such an arrangement. Indeed, if we allow the Court to manipulate—or ignore—the Constitution’s text, its own precedent, and duly enacted state laws then our system of governance will turn on its head. Citizens are left on the outside looking in, disempowered to act as change agents, and subject to policy preferences that depend on the Court’s composition, not

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<sup>110</sup> *Id.* at 1639 (Roberts, C.J., concurring) (Responding to Justice Sotomayor’s assertion that “[r]ace matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: ‘I do not belong here.’”).

<sup>111</sup> *Id.* (quoting Sotomayor, J., *infra*, at 1676).

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

constitutional law. Although Justice Sotomayor is correct that equal and accessible democratic processes are essential to ensuring liberty for all races, there is nothing equal or accessible about giving the Court unrestrained power to right every perceived wrong.

Ultimately, Justice Sotomayor's dissent highlights a deeper problem: we often look to the Court as a right-creating institution, even where the power to create the right in question is, at best, dubious. That approach threatens a participatory democracy because judges too often take the bait. To be sure, although much of the Constitution's text is ambiguous, judges cannot treat it like a political football and massage its language like clay when they prefer a particular outcome. The text does not mean what Justice Sotomayor wants it to mean, or what any judge thinks it should mean. To believe otherwise is to create a top-down system of governance where Justices can undo the choices of a democratic majority because they disagree with—or dislike—those choices. Sadly, disagreement with Michigan's decision to ban race-based preferences—not law—is precisely what drove Justice Sotomayor's dissent. What she tried to do was precisely what no judge should do, no matter how noble the purpose. As Justice Anthony Kennedy states, “[a]ny society that relies on nine unelected judges to resolve the most serious issues of the day is not a functioning democracy.”<sup>113</sup> It is no democracy at all.

Justice Sotomayor justifiably called for a candid discussion on race-related issues. The Court certainly has a role in this discussion. It should, for example, continue to invalidate laws, like those in *Hunter* and *Seattle School District* that targeted minority groups. In addition, the Court should take a more active role in enforcing fundamental constitutional rights. In *Gideon v. Wainwright*,<sup>114</sup> the Court held that indigent criminal defendants have a constitutional right to counsel.<sup>115</sup> Public defender systems, however, remain underfunded.<sup>116</sup> In *Strickland v. Washington*,<sup>117</sup> the Court created a two-pronged test for determining counsel's effectiveness at trial, but it has rarely found instances where counsel was, in fact, ineffective.<sup>118</sup> Furthermore, the Court can make the

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<sup>113</sup> Jonathan A. Adler, *Justice Kennedy on Judicial Intervention*, THE VOLOKH CONSPIRACY (Oct. 5, 2013, 10:32 AM), <http://www.volokh.com/2013/10/05/79365/> (alteration to original in quoted text).

<sup>114</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>115</sup> *Id.* at 344-45.

<sup>116</sup> See, e.g., Emily Chiang, *Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims*, 19 TEMP. POL. & CIV. RTS. L. REV. 443 (2010).

<sup>117</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>118</sup> See, e.g., Adam Lamparello, *Establishing Guidelines for Attorney Representation of Criminal Defendants at the Sentencing Phase of Capital Trials*, 62 ME. L. REV. 97, 101-02 (2010) (giving examples of incompetent representation at capital trials).

democratic process more equal by, among other things, allowing Congress to place reasonable limits on corporate and individual campaign contributions,<sup>119</sup> and placing reasonable limits on partisan redistricting efforts.<sup>120</sup> Equal processes lead to fairer outcomes, and allow citizens of diverse backgrounds and viewpoints to meaningfully participate in the lawmaking process. Of course, empowering citizens, not courts, may be the longer path to equality. But it will be the most enduring—and democratic—one.

Legislators at the state and federal level also have important roles to play. After *Brown*, there was much hope that the end of segregation would mark the beginning of an enduring equality among all races. Sadly, this has not happened. Many schools remain segregated, or are in the process of being re-segregated.<sup>121</sup> Many African-Americans live in poverty, receive inadequate education at the primary and secondary level and receive unfair treatment in the criminal justice system.<sup>122</sup> Thus, reforming failing public schools, and affirming each citizen's right to an equal education through, for example, voucher programs or increased spending, should be a legislative priority.<sup>123</sup> Adequately funding public defender systems, and ensuring that indigent criminal defendants receive effective legal representation, is also critical.<sup>124</sup> Likewise, legislators should aggressively curb state-sanctioned racial profiling, and courts should invalidate voter suppression laws, and unconstitutional gerrymandering schemes.<sup>125</sup> These are but a few examples to show that, yes, race still matters. So too does misguided judging.

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<sup>119</sup> See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010) (invalidating a statute that placed limits on corporate campaign contributions); *McCutcheon v. Fed. Election Comm'n*, 134 S.Ct. 1434 (2014) (invalidating aggregate limits on individual campaign contributions).

<sup>120</sup> See, e.g., Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781 (2005) (discussing the Supreme Court's reluctance to address partisan gerrymandering).

<sup>121</sup> See, e.g., Anne Randall, *Reclaiming Brown's Vision: A New Constitutional Framework for Mandating School Integration*, 10 GEO. J. ON POVERTY L. & POL'Y 363 (2003).

<sup>122</sup> See, e.g., Donna Coker, *Forward: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827 (2003).

<sup>123</sup> Randall, *supra* note 121, at 365.

<sup>124</sup> See, e.g., Emily Chiang, *supra* note 116, at 444-45.

<sup>125</sup> See, e.g., Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to An Elusive Problem*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 25 (2011); Robert Farley, *Preventing Unconstitutional Gerrymandering: Escaping the Intent/Effects Quagmire*, 38 SETON HALL L. REV. 397 (2008); see generally, Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343 (2010).

## IV. CONCLUSION

There are compelling reasons to support affirmative action programs. The effects of racial discrimination, and racism itself, remain prevalent throughout the country. Pretending otherwise would be to ignore reality. Arguing that the Equal Protection Clause compels a state to implement race-based affirmative action programs, however, would make a mockery of the Constitution. Former Supreme Court Justice Hughes famously stated, “at the constitutional level where we work, 90 percent of any decision is emotional.”<sup>126</sup> The remaining ten percent is “[t]he rational part . . . [that] supplies the reasons for supporting our predilections.”<sup>127</sup> It is time for this type of judging to end. Good intentions do not make good decisions, just like good results do not necessarily lead to good outcomes. The best outcomes are those that result from fair—and constitutional—processes. After all, “[i]t is a sordid business, this divvying us up by race.”<sup>128</sup> If we keep dividing, the country will never be united.

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<sup>126</sup> Bertell Ollman, Letter to the Editor, *Even Marxists are Protected by the Rule of Law*, N.Y. TIMES (Dec. 27, 1984), available at <http://www.nytimes.com/1984/12/27/opinion/1-even-marxists-are-protected-by-the-rule-of-law-175517.html>.

<sup>127</sup> *Id.* (alterations to original in quoted text).

<sup>128</sup> *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., dissenting).