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A Preferable Way to Treat Preferential Treatment

Alex Akhavan

ABSTRACT

This Comment advocates for a particular definition of "preferential treatment." On April 22, 2014, the U.S. Supreme Court held that the State of Michigan's constitutional amendment forbidding preferential treatment based on race or gender was consistent with the U.S. Constitution. The case was *Schuette v. Coalition to Defend Affirmative Action*. The amendment, known as Proposal 2, has effectively banned affirmative action in Michigan, policies that favor minority representation in higher education. While both sides passionately argued whether Proposal 2 is constitutional, no one offered a detailed explanation of what exactly preferential treatment means.

This Comment argues for an intrinsic/extrinsic test in the context of higher education. An intrinsic quality is one that is valuable in and of itself to a university (such as leadership, initiative, and eagerness to learn). Extrinsic qualities are all other qualities that contribute to or are evidence of intrinsically valuable qualities to universities. For example, being captain of the high school soccer team may not be inherently valuable to a university, but qualities displayed by being a captain, such as leadership, can have such value. Hence, being a captain is an extrinsic quality that provides evidence of leadership, which is the intrinsic quality. Under my definition, granting preferential treatment based on race means considering race as an intrinsic quality. Thus, under Proposal 2, universities can no longer consider race as a plus factor in and of itself but can consider race extrinsically if a candidate's race contributed to activities that demonstrate other inherently valuable qualities. This definition is narrower than what the drafters of Proposal 2 intended, but a broader interpretation advocating complete race-blind admissions methods would be exceedingly impractical and potentially unconstitutional. This Comment argues that the Court in *Schuette* rightly upheld Proposal 2 as constitutional so long as preferential treatment is defined as narrowly as I have suggested. If preferential treatment is defined by the intrinsic/extrinsic test, universities can still consider an applicant's race extrinsically, thereby providing a small victory for affirmative action advocates.

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INTRODUCTION

Just as a professional athlete does after a big win, Michigan Attorney General Bill Schuette attended a press conference following his triumph before the U.S. Supreme Court.[1] The case was *Schuette v. Coalition to Defend Affirmative Action*.[2] He described the Court's decision as "a victory for the citizens of Michigan."[3] He also said that such a victory assures that applicants to Michigan's universities would only be considered through "constitutional means."[4] Yet, when asked exactly what "constitutional means" were, Schuette refused to specify, stating only that universities could not discriminate based on race.[5] After all of the time courts have spent grappling with this issue in Michigan (and even more in other states) to determine what admissions policies would survive a ban on preferential treatment, we still have ambiguity. This Comment seeks to resolve that ambiguity.

Schuette is the latest landmark affirmative action case. The venue was once again the state of Michigan.[6] The date was April 22, 2014.[7] The votes were 6–2 (Justice Kagan recused herself) in favor of the petitioner, Schuette. But rather than answering whether affirmative action policies themselves are constitutional, this time the Supreme Court addressed whether a state can prohibit a public institution from using such policies and concluded that it can.[8]

The journey began in 2006 when Michigan voters passed Proposal 2, a statewide referendum amending the Michigan Constitution.[9] Proposal 2 created Section 26 of the Michigan State Constitution, forbidding discrimination of or "preferential treatment" for any individual or group on the basis of race, sex, color, ethnicity, or national original in the operation of public employment and public education.[10] The amendment has been seen as effectively banning affirmative ac-

1. Brian Smith, *Affirmative Action Ruling: AG Schuette Calls Decision 'Monumental' and Victory for 'Citizens of Michigan'*, MLIVE (Apr. 22, 2014, 3:08 PM), http://www.mlive.com/lansing-news/index.ssf/2014/04/affirmative_action_ruling_ag_s.html.
2. *Id.*; Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014).
3. Smith, *supra* note 1.
4. *Id.*
5. *Id.*
6. Michigan universities were also the subject of other landmark affirmative action cases. *See infra* Part I. *See generally* BARBARA A. PERRY, THE MICHIGAN AFFIRMATIVE ACTION CASES (2007).
7. *Schuette*, 134 S. Ct. at 1623.
8. *Id.* at 1638.
9. Scott Jaschik, *Michigan Votes Down Affirmative Action*, INSIDE HIGHER ED (Nov. 8, 2006), http://www.insidehighered.com/news/2006/11/08/michigan.
10. MICH. CONST. art. 1, § 26.

tion policies that, among other things, favor minority representation in higher education.[11] As a result, the Coalition to Defend Affirmative Action (CDAA) filed suit claiming that the amendment violates the U.S. Constitution. CDAA argued that the amendment is discriminatory not just because it disparately impacts minorities, but also because it severely burdens the political process rights of minority groups.[12] In response, Schuette defended the law, claiming that it is not discriminatory and puts all races on the same playing field.[13] The Sixth Circuit awarded victory to CDAA by striking down the law in 2012, and the U.S. Supreme Court granted certiorari.[14]

Yet while both sides passionately argued whether the amendment is consistent with the U.S Constitution and prior case law, neither party offered a detailed explanation of what "preferential treatment" and its prohibition exactly mean for the state of Michigan.[15] For instance, perhaps the amendment forbids the University of Michigan from preferring Latino students by increasing their chances of being admitted for simply being Latino. On the other hand, preferential treatment could be read more broadly so that when a school looks favorably upon a student's involvement in extracurricular activities, such as being the founder of a racial or cultural student group, the school is giving preference to that experience and by extension that race. The wide range of possible interpretations of preferential treatment is left quite open yet a clear definition would have made this case easier to decide and would have clarified what admissions policies are allowed under Proposal 2.

This Comment advocates for a particular definition of preferential treatment, focusing on higher education. Part I provides background information on the status of affirmative action case law and the subsequent statewide referendum known as Proposal 2. Part II articulates each side's arguments in *Schuette* and how the Court analyzed those arguments without defining preferential treatment. Part III argues for an intrinsic/extrinsic test in the context of university admissions, defining preferential treatment narrowly to remain consistent with existing case law and to avoid impractical admissions methods. Under this test, considering race as an inherent quality would constitute preferential treatment but viewing race extrinsically as a means to another quality would not. Part IV explains how defining preferential treatment with this test would have impacted

11. Jaschik, *supra* note 9.
12. Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466 (6th Cir. 2012); Coalition Respondents' Brief on the Merits, *Schuette*, 134 S. Ct. 1623 (No. 12-682) [hereinafter Respondents' Brief].
13. Brief for Petitioner at 4, *Schuette*, 134 S. Ct. 1623 (No. 12-682).
14. Respondents' Brief, *supra* note 12, at 1–2.
15. *Id.* at 54–55.

each of the respondents' and petitioner's arguments regarding whether the amendment violates the U.S. Constitution and suggests next steps for Michigan universities to take in light of the Court's holding. This Comment concludes by explaining that as long as the definition is narrow, such as under the intrinsic/extrinsic test, the amendment was rightly upheld as constitutional but does not significantly change how Michigan universities can take race into account, providing a small victory for both sides of this issue.

I. BACKGROUND: THE EVOLUTION OF AFFIRMATIVE ACTION

A brief account of how the Supreme Court has viewed affirmative action in the past is necessary to establish whether and how Proposal 2 would change affirmative action practices in Michigan. Three landmark cases are most relevant: *Regents of the University of California v. Bakke*,[16] *Gratz v. Bollinger*,[17] and *Grutter v. Bollinger*.[18]

In *Bakke*, the court held that the University of California at Davis's (UCD) admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.[19] The plaintiff, Allan P. Bakke, was a white male and had been denied admission to UCD's medical school.[20] The school had reserved sixteen out of one hundred places in the class for members of certain minority races.[21] The Supreme Court found that whether or not the selection of minority students constituted a quota or a goal, the admissions policy drew a line on the basis of race and ethnic status.[22] Although the plaintiff could not prove he would have been admitted but for the policy,[23] the holding of *Bakke* established that a system designed to have a specific number of minority students in higher education was unconstitutional.[24] The Court, however, did leave open the possibility that a policy considering race as a plus factor as part of several different qualification measures might be constitutional.[25]

16. 438 U.S. 265 (1978).
17. 539 U.S. 244 (2003).
18. 539 U.S. 306 (2003).
19. 438 U.S. at 266–67.
20. *Id.* at 276.
21. *Id.* at 275.
22. *Id.* at 289.
23. *Id.* at 320.
24. *Id.*; *see also* Akhil Reed Amar & Neal Kumar Katyal, Bakke*'s Fate*, 43 UCLA L. REV. 1745, 1751 (1996) ("[A] university could not use a strict quota or a rigid set-aside in an attempt to enhance diversity. It must look instead to the whole person.").
25. *See* 438 U.S. at 317 ("In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant . . . .").

Twenty-five years after *Bakke*, Michigan hosted a double feature of affirmative action cases. In *Gratz*,[26] the Court addressed the constitutionality of the University of Michigan's undergraduate admissions policy, while in *Grutter*,[27] the Court considered the University's law school admissions policy. Although both cases were decided together, certain factual distinctions led to two disparate holdings.[28]

In *Gratz*, the Court held that the University of Michigan's point-based undergraduate affirmative action policy was unconstitutional.[29] The University had devised a complex system to calculate an artificial score for its applicants, dubbed a "GPA 2."[30] Points were awarded to applicants on the basis of a variety of criteria, such as the strength of the applicant's high school curriculum, an applicant's geographic residence, and an applicant's alumni relationships.[31] Points were then tallied to help determine which applicants to admit.[32] An applicant's race was also a possible basis for extra points, but if and only if the applicant was an underrepresented minority.[33] Thus, two applicants with otherwise the same admissions profile could have different GPA 2s—and thus, different admissions decisions—because of their respective races.[34] The court found that awarding extra points solely based on an applicant's minority status violated the Equal Protection Clause since the policy was not sufficiently narrowly tailored to achieve the compelling governmental interest of a diverse student body.[35] The Court mainly took issue with the fact that the University treated all applicants from the same race the same without considering each applicant's individualized experiences and qualities.[36]

26. 539 U.S. 244, 275 (2003).
27. 539 U.S. 306, 343 (2003).
28. *See* Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. L. REV. 517, 541 (2007) ("The two admissions programs at issue in *Grutter* and *Gratz* both considered a range of academic and nonacademic factors, including race and ethnicity, and sought to admit student bodies that were not only academically strong, but also diverse along many dimensions. The two admissions programs, however, used different mechanisms for making admissions decisions.").
29. 539 U.S. at 275.
30. *Id.* at 254.
31. *Id.*
32. For example, applicants who played sports in high school would receive points, as would students who did other extracurricular activities or were University legacies. *See, e.g.*, *id.*
33. *Id.* at 255.
34. *Id.*
35. *Id.* at 275; Ayres & Foster, *supra* note 28, at 542 (describing that the undergraduate school's program did not provide individual consideration, which is why it was not narrowly tailored enough).
36. *Gratz*, 539 U.S. at 276 (O'Connor, J., concurring).

Meanwhile, in *Grutter*, the Court held that the University of Michigan Law School's affirmative action policy was constitutional.[37] The Law School claimed that it considered each applicant holistically, treating race as a factor only insofar as applicants described the ways in which they would contribute to the diversity of the school.[38] The Court generally deferred to the Law School and its amici regarding the benefits that flow from student body diversity and held that a diverse learning environment was a compelling governmental interest.[39] Since the Law School neither had a quota for minority students nor awarded certain points based solely on an applicant's race, the Law School's policy was distinguishable from *Bakke* and *Gratz*.[40] The Court said that race could be considered when seeking to establish a class with diverse experiences and held that there was sufficient individualized consideration to be narrowly tailored.[41] The Court did note, however, that its holding was most likely and hopefully limited in time until an admissions policy would produce a diverse student body without any consideration of race.[42]

The holdings in *Gratz* and *Grutter* fueled the motivation behind Proposal 2.[43] In 2006, the people of Michigan held a vote to decide whether granting "preferential treatment" to anyone on the basis of race or gender should be prohibited, including in the context of higher education admissions.[44] Proposal 2

37. *Grutter*, 539 U.S. at 343.
38. *Id.* at 315.
39. *Id.* at 328–29. For the purposes of this Comment, I accept that a diverse student body is indeed a compelling governmental interest; it is, however, worth noting that some scholars challenge this assumption. *See, e.g.*, Stanley Rothman et al., *Does Enrollment Diversity Improve University Education?*, 15 INT'L J. PUB. OPINION RES. 8 (2003) (arguing that an increase in the number of demographics at certain universities did not improve the quality of education).
40. *Grutter*, 539 U.S. at 334.
41. *Id.*
42. *Id.* at 343.
43. *See* SUZANNE LOWE, MICH. SENATE FISCAL AGENCY, BALLOT PROPOSAL 06-2: AN OVERVIEW (Sept. 2006) (describing the existing law before Proposal 2 and noting that the U.S. Supreme Court has allowed some affirmative action policies while Proposal 2 would outlaw such policies entirely).
44. The full text of Section 26 of the Michigan Constitution as amended by Proposal 2 reads 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.
> (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,

was passed with approximately fifty-eight percent of the vote,[45] and the demographics of the participating voters demonstrate the racial divide over this issue in Michigan.[46]

The amendment's wording is nearly identical to a similar referendum in California, Proposition 209.[47] Although in both states the referenda have impacted admissions numbers and minority representation,[48] "preferential treatment" has not been clearly defined. In fact, polls leading up to the vote on Proposition 2 indicated that Michigan citizens could be swayed depending on the amendment's wording.[49] Polls showed that the amendment had 7 percent less support when it was phrased as banning affirmative action than when it was phrased as prohibiting discrimination.[50] This discrepancy illustrates the im-

> school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.
> (4) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.
> (5) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.
> (6) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Michigan anti-discrimination law.
> (7) This section shall be self-executing. If any part or parts of this section are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section.
> (8) This section applies only to action taken after the effective date of this section.
> (9) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.
>
> MICH. CONST. art. 1, § 26.

45. Jaschik, *supra* note 9.
46. *America Votes 2006: Michigan Proposition 2: Exit Poll*, CNN, http://www.cnn.com/ELECTION/2006/pages/results/states/MI/I/01/epolls.0.html (last visited Mar. 21, 2015) (showing that 85 percent of voters identified as white and 64 percent of those voters chose "Yes" while 12 percent of the voters identified as African American and 86 percent of them voted "No").
47. *Supreme Court Case May Affect Prop. 209, Bring Back Affirmative Action*, CBS S.F. (Mar. 25, 2013, 9:25 PM), http://sanfrancisco.cbslocal.com/2013/03/25/supreme-court-case-may-affect-prop-209-affirmative-action. *See also* William C. Kidder, *Restructuring Higher Education Opportunity?* 1–2 (Civil Rights Project, Draft, Aug. 2013).
48. *See Percent Change in California Resident Freshman Admit Counts by Campus and Race/Ethnicity*, U. CAL. OFF. PRESIDENT, http://www.ucop.edu/news/factsheets/2013/fall_2013_admissions_table 3.pdf (last visited Mar. 21, 2015).
49. *Ahead in Two Recent Polls, Behind in Two Others. Never as Far Ahead in the Pre-Ballot Polling, as in the Actual Vote*, DEBATING RACIAL PREFERENCE, http://www.debatingracialpreference.org/MCRI-Polls.htm (last visited Mar. 21, 2015) [hereinafter *Ahead in Two Recent Polls*].
50. *Id.*

portance of a clear definition of preferential treatment. The Supreme Court failed to seize the opportunity to articulate such a definition when it decided *Schuette*.[51]

II. *SCHUETTE*

The Supreme Court's task in *Schuette* was to decide whether a state referendum forbidding preferential treatment on the basis of race was constitutional.[52] The Sixth Circuit had struck down Proposal 2 in 2012 mainly arguing that the amendment had reordered the political system in a way that placed an unfair burden on minorities.[53] Michigan Attorney General Bill Schuette argued that the Sixth Circuit's decision to strike down Proposal 2 was wrong[54] while the respondent, the Coalition to Defend Affirmative Action (CDAA), hoped that the decision would stand.[55] The petitioners and respondents disagreed on two central issues: the discriminatory impact of the amendment and the amendment's effect on the political process.

A. Discrimination and Disparate Impact

The petitioner, Schuette, argued that Proposal 2 was not facially discriminatory and did not have a disparate impact on minorities.[56] The respondents countered that the law had a discriminatory motive and would disparately impact specific minority groups.[57] This Subpart provides general background on the disparate impact issue as well as more details on each side's argument.

1. The Issue

The Supreme Court uses strict scrutiny to examine all racial classifications, which means that such classifications can only be constitutional if they are narrowly tailored to achieve a compelling governmental purpose.[58] In some cases,

51. *See* discussion *infra* Part **Error! Reference source not found.**.
52. Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1624 (2014).
53. Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466, 485 (6th Cir. 2012).
54. Brief for Petitioner, *supra* note 13, at 4.
55. *See* Respondents' Brief, *supra* note 12, at 19.
56. *See* Brief for Petitioner, *supra* note 13, at 14.
57. *See* Respondents' Brief, *supra* note 12, at 3.
58. Adarand Constructors Inc. v. Pena, 515 U.S. 200, 227 (1995). ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

the Court faces situations where a proposed law does not discriminate on its face but has a disparate impact on certain racial groups.[59] Facially neutral laws may only be struck down if they were enacted with discriminatory intent and disparately impact certain racial groups.[60] In *Schuette*, the law at issue prohibited preferential treatment on the basis of any race or sex.[61] Thus, on its face, the law was not discriminatory.[62] Even so, the law could still have violated the U.S. Constitution's Equal Protection Clause if the respondent CDAA could have proven both a discriminatory motive and a disparate impact. The next Subpart describes what arguments each side made about the disparate impact issue.

2. The Arguments

The petitioner passionately argued that there was no discriminatory intent behind Proposal 2 and that the law did not disparately impact protected groups.[63] Schuette stated that the voters in favor of the amendment sought to advocate colorblind policies that would bring races together rather than keep them apart.[64] Moreover, Schuette argued that the law is designed to put everyone on equal footing as far as admissions policies go.[65] In fact, some of the petitioner's amici argue that the affirmative action policies before Proposal 2 had a significantly disparate impact on white and Asian-American students.[66] Their point is that since

59. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 232–33 (1976) (involving a new promotion policy that required all police officers to pass a qualifying test that ended up excluding a large number of African American applicants).

60. *Id.* at 241 ("A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race."); *see also* Brief for Petitioner, *supra* note 13, at 14.

61. *See* MICH. CONST. art. 1, § 26.

62. *See* Brief for Petitioner, *supra* note 13, at 14.

63. *See id.*

64. *Id.* at 15–16 (stating that the district court found that racial animus did not fuel the law's enactment). For further support, the petitioner cited to certain periodical articles that defend Proposal 2 for nondiscriminatory reasons. *See, e.g.*, *Time to Scrap Affirmative Action*, ECONOMIST (Apr. 27, 2013), http://www.economist.com/news/leaders/21576662-governments-should-be-colour-blind-time-scrap-affirmative-action (arguing that affirmative action divides society rather than unites it and that all students should be judged on their academic prowess rather that the color of their skin); Bill Keller, *Affirmative Reaction*, N.Y. TIMES (June 9, 2013), http://www.nytimes.com/2013/06/10/ opinion/keller-affirmative-reaction.html (arguing in favor of affirmative action based on socioeconomic status rather than race).

65. *See* Brief for Petitioner, *supra* note 13, at 15.

66. *E.g.*, Brief Amicus Curiae for Richard Sander in Support of Petitioner at 5, Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014) (No. 12-682) [hereinafter Brief for Richard Sander as Amicus Curiae] ("[A]t private institutions, the admissions advantage for blacks was equivalent to 310 SAT points relative to whites; 130 points for Hispanics relative to whites; and a 140 point disadvantage for Asians relative to whites. The same pattern was closely paralleled in public institutions.").

the disparate impact argument can equally apply to those groups, the best way to assure that no race faces discrimination is through Proposal 2.[67] That way, according to the petitioner's arguments, the only people who are negatively impacted by Proposal 2 are students who would not gain admission to a particular university without race-conscious admissions policies.

Although respondents did not spend as much time addressing whether Proposal 2 violates the Equal Protection Clause under a traditional analysis, they did mention that the amendment had a significantly disparate impact on African Americans and Hispanics.[68] In response to the petitioner, CDAA argued that a colorblind admissions policy actually gives preferential treatment to white students since such policies are blind to the injustices and inequalities that minorities face.[69] Moreover, as Justice Sotomayor pointed out in her dissent, it is likely that at least some voters were motivated by racial animus.[70] Such animus could be significant since it contributes to a theory that the law did have a discriminatory motive.[71] Thus, because Proposal 2 would only impact minorities since affirmative action policies are not known to favor white applicants, the respondents argued that the law would result in a disparate impact and was therefore unconstitutional.

Petitioners and respondents cited statistics from Michigan and California to support their disparate impact analyses.[72] These statistics clearly indicated that the amendments in California and Michigan have led to certain changes, but both sides disagreed as to whether these changes are for the better or the worse.[73] For example, the respondents cited the low number of certain minority groups

67. *Id.* at 6 ("Establishing a constitutional prohibition of racial preferences, which protects Asian-Americans from discrimination, is entirely consistent with other protections of rights in both the federal and state constitutions.").

68. *See, e.g.*, Brief for the President and Chancellors of the University of California as Amici Curiae in Support of Respondents at 28, *Schuette*, 134 S. Ct. 1623 (No. 12-682) (arguing that the similar proposal in California has had a significantly detrimental impact on the number of underrepresented minorities at California institutions).

69. *See* Respondents' Brief, *supra* note 12, at 6.

70. As Justice Sotomayor states, "One of the main sponsors of this bill said it was intended to segregate again." Transcript of Oral Argument at 4, *Schuette*, 134 S. Ct. 1623 (No. 12-682).

71. *See* Washington v. Davis, 426 U.S. 229, 241 (1976).

72. *See* Reply Brief of Petitioner at 21, *Schuette*, 134 S. Ct. 1623 (No. 12-682); Respondents' Brief, *supra* note 12, at 50.

73. *Compare* Respondents' Brief, *supra* note 12, at 50 (demonstrating that the percentage of African Americans among California Resident Admissions is nearly half of what it was prior to the passage of proposition 209), *with* Kate L. Antonovics & Richard H. Sander, *Affirmative Action Bans and the "Chilling Effect"*, 15 AM. L. & ECON. REV. 252, 295 (2013) (suggesting that Proposition 209 had a "warming effect" making underrepresented minorities more likely to accept offers of admission after the ban on racial preferences). *See generally* RecordtoCapture, *33*, YOUTUBE (Feb. 10, 2014), http://www.youtube.com/watch?v=5y3C5KBcCPI (lamenting the current significant underrepresentation of African American students at UCLA Law School).

enrolled in Michigan's higher education institutions after Proposal 2,[74] while those who supported the petitioner argued that graduation rates and the enrollment yield rate among minorities (number of students who choose to enroll after being admitted) improved.[75]

3. The *Schuette* Court's Disparate Impact Analysis

Justice Kennedy, who wrote the majority opinion in *Schuette*,[76] did not spend much time addressing the potential disparate impact on minority students. For the majority, the case was more about minority access to the political system.[77] The main reason for the Court's brevity when addressing the disparate impact arguments is the difficulty of proving discrimination through this theory.[78] Justice Scalia did address the issue briefly, noting that few equal protection theories have been as soundly rejected as the disparate impact theory, which requires state action motivated by discriminatory intent.[79] Nonetheless in her dissent, Justice Sotomayor addressed the impact that laws like Proposal 2 have on minority students.[80] She presented several statistics to show that universities in California have failed to meet their diversity goals following Proposition 209 and used those statistics to argue that without race-sensitive admissions policies, a multiracial environment that fosters frequent and meaningful interactions between students might be impossible.[81] Thus, while the Justices in the majority do not make it explicit, the opinion implies that disparate impact on minorities would not make Proposal 2 unconstitutional.[82]

74. *E.g.*, Respondents' Brief, *supra* note 12, at 50; Brief Amicus Curiae of the Society of American Law Teachers in Support of Respondents at 16–17, *Schuette*, 134 S. Ct. 1623 (No. 12-682) (describing the severe declines in the enrollment of black students at the University of Michigan's undergraduate and graduate schools).

75. *See* Richard Sander & Stuart Taylor, Jr., *The Painful Truth About Affirmative Action*, ATLANTIC (Oct. 2, 2012, 10:30 AM), http://www.theatlantic.com/national/archive/2012/10/the-painful-truth-about-affirmative-action/263122 (stating that four-year graduation rates for black students at UCLA doubled following Proposition 209 and that students were eager to attend a school where the stigma of preference could not be attached to them).

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

77. *See infra* Part II.B.

78. *Disparate Impact Discrimination*, FINDLAW, http://files.findlaw.com/pdf/employment/employment.findlaw.com_employment-discrimination_disparate-impact-discrimination.pdf (last visited Mar. 21, 2015).

79. 134 S. Ct. at 1647 (Scalia, J., concurring).

80. *Id.* at 1679–80 (Sotomayor, J., dissenting).

81. *Id.* at 1682–83.

82. *See generally id.* (plurality opinion).

B. The Political Process

This Subpart provides background on the political process issue and the Sixth Circuit's emphasis on it. The Subpart also examines both the petitioner and respondent's arguments on whether Proposal 2 reorders the political system in a way that places an unfair burden on minorities.

1. The Issue

Most of the arguments in *Schuette* focused on the political process and the doctrine holding that it is unconstitutional to reorder the political system in a way that places special burdens on racial minorities.[83] The Sixth Circuit's decision to strike down Proposal 2 similarly focused on the political process argument.[84] The circuit court's analysis focused on two cases in particular: *Hunter v. Erickson* and *Washington v. Seattle School District*.[85]

In *Hunter*, the Supreme Court invalidated a charter amendment forbidding the city council from enacting laws dealing with racial discrimination without first obtaining approval from a majority of the city's voters.[86] The Court observed that the amendment placed special burdens on racial minorities within the governmental process.[87] Such burdens are impermissible under the Fourteenth Amendment, which prevents significant and unjustified official distinctions based on race and thereby requires that such classifications be subjected to the most rigid scrutiny.[88] The Court held that the amendment was unconstitutional because it disadvantaged minority groups by making it more difficult for minority groups to enact legislation.[89]

Similarly, in *Seattle School District*, the Supreme Court invalidated a statewide initiative on mandatory student busing.[90] The initiative said that no school board could require a student to attend a school other than the one geographical-

83. *Id.* at 1624; Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466, 480–85 (6th Cir. 2012); Audio Analysis of *Schuette v. Coalition to Defend Affirmative Action* by Abby Bar-Lev, ALLIANCE FOR JUST. (Oct. 15, 2013), http://www.afj.org/multimedia/audio-analysis/audio/schuette-v-coalition-to-defend-affirmative-action.

84. 701 F.3d at 475.

85. Hunter v. Erickson, 393 U.S. 385 (1969); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).

86. 393 U.S. at 393.

87. *See id.* at 391.

88. *Id.* at 391–92.

89. *Id.* at 393.

90. 458 U.S. at 487; Coal. to Defend Affirmation Action v. Regents of the Univ. of Mich., 701 F.3d 466, 475 (6th Cir. 2012).

ly nearest to the student's residence.[91] Although the initiative was not facially discriminatory, it became apparent that the initiative was solely aimed at desegregative busing.[92] The Court reasoned that the reallocation of decisionmaking authority imposed substantial and unique burdens on racial minorities.[93] By definition, minorities would lose votes to the majority, so schools would never be desegregated as long as the decision was in the hands of voters rather than school boards.[94] Therefore, the Court found the initiative unconstitutional.[95]

The Sixth Circuit relied strongly on these precedents and articulated a two-prong test when applying them to Proposal 2.[96] According to the Sixth Circuit:

> [A]n enactment deprives minority groups of the equal protection of the laws when it: (1) has a racial focus, targeting a policy or program that "inures primarily to the benefit of the minority"; and (2) reallocates political power or reorders the decisionmaking process in a way that places special burdens on a minority group's ability to achieve its goals through that process.[97]

The Sixth Circuit found that the first prong was met since race-conscious admissions policies at Michigan's public universities were designed to benefit minorities.[98] The court found that the second prong was also met since Proposal 2 reordered the political process in a way that placed special burdens on minority interests.[99] For this prong, the court observed that a Michigan citizen could use a number of means to advocate for changes in admissions policies, such as lobbying admission committees directly, petitioning the dean or University President, or campaigning for certain university board members.[100] Following Proposal 2, however, a citizen who would like to advocate for affirmative action policies would have to start with a statewide referendum to overturn the state's constitutional amendment.[101] Thus, according to the Sixth Circuit, under Proposal 2, Michigan would effectively force people who want to advocate for the

91. 458 U.S. at 462.
92. *Id.* at 471.
93. *Id.* at 474.
94. *See id.* at 483.
95. *Id.* at 484 ("[O]ne group cannot be subjected to a debilitating and often insurmountable disadvantage.").
96. Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466, 477 (6th Cir. 2012).
97. *Id.*
98. *Id.* at 479.
99. *Id.* at 485.
100. *Id.* at 484.
101. *Id.*

consideration of racial factors in admissions decisions into an uphill battle compared with people who want to make changes to admission policies involving nonracial factors.[102] This inconsistency is what the circuit court found to violate the Fourteenth Amendment.[103] Accordingly, each side directly responded to the circuit court's reasoning in their arguments to the Supreme Court.[104]

2. The Arguments

Schuette claimed that the amendment would not significantly alter the political process and distinguished the case at hand from the Court's decisions in *Seattle* and *Hunter*.[105] He argued that those cases were racially focused since they dealt with discriminatory laws; meanwhile, Proposal 2 bans racial preference, so the Sixth Circuit incorrectly concluded that those cases controlled the amendment's fate.[106] In fact, Schuette stated the circuit court did not put enough emphasis on the discriminatory intent factor.[107] He also challenged the notion that admissions policies are part of the political process.[108] He explained that because unaccountable and unelected faculty members make many admissions decisions, the situation in Michigan was different from that in *Hunter*, where the amendment in question took power away from the elected city council.[109] Finally, Schuette requested that the Court overrule *Seattle* and *Hunter* if it does not find the case distinguishable.[110] Even *Seattle*, the more recent case, was heard over thirty years ago. According to the petitioner, the world had changed significantly, especially regarding race categorization, and both precedents should not be responsible for striking down a law that guarantees race neutrality.[111]

On the other side, respondents argued that both *Hunter* and *Seattle* applied to Proposal 2.[112] Before Proposal 2, the Regents of the University of Michigan would decide admissions policies, including whether or not to use affirmative action.[113] If the Regents decided to remove the policy, minorities could petition

102. *Id.* at 485.
103. *Id.*
104. Brief for Petitioner, *supra* note 13, at 17; Respondents' Brief, *supra* note 12, at 30.
105. Brief for Petitioner, *supra* note 13, at 17.
106. *Id.* at 29 (stating that under a political-restructuring analysis, reallocation of political decision making only violates equal protection when there is a racial classification).
107. *Id.* at 38 (arguing that the Sixth Circuit's two-part inquiry is not reconcilable with other precedents and that it is impossible to establish an equal protection violation without discriminatory intent).
108. *Id.* at 24.
109. *Id.*
110. *Id.* at 37.
111. *Id.* at 37–38.
112. Respondents' Brief, *supra* note 12, at 30.
113. *Id.* at 44.

and argue why the policy should be reinstated.[114] However, after Proposal 2, the only way minorities could reinstate the policy is through a statewide referendum.[115] In further response to the petitioner, the respondents argued that Proposal 2 openly classifies on the basis of race since it is aimed specifically at racially conscious admissions plans.[116]

Additionally, the respondents claimed that a racial majority may not adopt constitutional amendments that ban minorities from using available political procedures to advocate for lawful policies.[117] Similarly, they argued that Michigan may not prohibit minority citizens from petitioning for programs that are crucial to achieving a critical mass of minority students, especially when the Supreme Court has found such programs to be constitutional.[118]

3. The *Schuette* Court's Analysis

At the end of the day, the Supreme Court agreed with the petitioner and rejected the Sixth Circuit's broad reading of *Seattle*.[119] The Court distinguished the *Schuette* facts from *Hunter* and *Seattle School District* and found Proposal 2 did not constitute invidious discrimination.[120] Furthermore, much of Kennedy's opinion raised democratic issues regarding the extent to which the judiciary should strike down the will of the voters.[121] Thus, the majority refused to intervene where Michigan citizens had collectively chosen a path to follow.[122] Additionally from a policy perspective, Justice Kennedy was deeply concerned about the precedent that striking Proposal 2 down would set since it could risk "the creation of incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage."[123] In other words, Kennedy was concerned about encouraging people to look for racial issues within a given policy, even if such issues are irrelevant, simply because they disagree with the policy itself and want a court to strike it down.[124]

114. *Id.* at 30.
115. *Id.* at 44 ("The Regents have always had full power over admissions; Proposal 2 has stripped them of that power only in the areas of the admission of racial minorities. Only racial minorities must win a vote to amend the Constitution before they may even present their proposals to the Regents.") (emphasis omitted).
116. *Id.* at 45.
117. *Id.* at 25.
118. *Id.* at 31.
119. Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1634 (2014).
120. *Id.* at 1637–38.
121. *Id.* at 1635.
122. *Id.*
123. *Id.*
124. *Id.*

Justices Scalia and Thomas concurred with the majority but added that *Seattle* and *Hunter* should be overruled.[125] Scalia started his opinion by framing the question as whether "the Equal Protection Clause of the Fourteenth Amendment *forbid[s]* what its text plainly *requires*[.]"[126] Scalia essentially argued that universities can and should capitalize on race-neutral admissions methods since the Equal Protection Clause advocates race neutrality.[127] Scalia was also unconvinced that Proposal 2 burdened minorities at all, arguing that it would actually be harder to change the Regents' mind than it would to change the mind of the average Michigan voter.[128]

Justice Sotomayor's dissent (joined by Justice Ginsburg) agreed mostly with the respondents' view that, although Michigan citizens enjoy the freedom of right to a democratic society, the Constitution leaves it to the courts to intervene when minority groups are oppressed.[129] She disagreed strongly with Justice Scalia's assertion that Proposal 2 made it easier for minorities to access the political system and pointed out that he understated how difficult it is to amend a state Constitution.[130] Sotomayor's approach in *Schuette* is best illustrated through her statement that "[t]he 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."[131]

C. The Failure to Define Preferential Treatment

After all the briefs, oral arguments, and months of deliberation, the Supreme Court had the opportunity to clearly define preferential treatment and to thereby provide universities with a framework for evaluating minority applicants after Proposal 2. They did not take it.[132] The only mention of the issue came in a footnote in Justice Sotomayor's dissent where she explains her terminology:

> Although the term "affirmative action" is commonly used to describe colleges' and universities' use of race in crafting admissions policies, I

125. *Id.* at 1643 (Scalia, J., concurring).
126. *Id.* at 1639.
127. *Id.* at 1639–40.
128. *Id.* at 1645 (explaining that passing a statewide referendum only requires the majority of votes one time while electing university board members requires multiple candidates, who often run during different election cycles, to each earn a majority of votes).
129. *Id.* at 1651 (Sotomayor, S., dissenting).
130. *Id.* at 1662 n.6.
131. *Id.* at 1676. This statement was most likely a response to Justice Roberts's catchphrase in a prior case that states "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).
132. *See generally Schuette*, 134 S. Ct. 1623.

> instead use the term "race-sensitive admissions policies." Some comprehend the term "affirmative action" as connoting intentional preferential treatment based on race alone—for example, the use of a quota system, whereby a certain proportion of seats in an institution's incoming class must be set aside for racial minorities; the use of a "points" system, whereby an institution accords a fixed numerical advantage to an applicant because of her race; or the admission of otherwise unqualified students to an institution solely on account of their race. None of this is an accurate description of the practices that public universities are permitted to adopt after this Court's decision in *Grutter v. Bollinger*. There, we instructed that institutions of higher education could consider race in admissions in only a very limited way in an effort to create a diverse student body. To comport with *Grutter*, colleges and universities must use race flexibly, and must not maintain a quota. And even this limited sensitivity to race must be limited in time, and must be employed only after "serious, good faith consideration of workable race-neutral alternatives". *Grutter*-compliant admissions plans, like the ones in place at Michigan's institutions, are thus a far cry from affirmative action plans that confer preferential treatment intentionally and solely on the basis of race.[133]

Sotomayor's statement illustrates the ambiguity of forbidding preferential treatment based on race. She not only distinguished the policies in *Bakke* and *Gratz* from the policy in *Grutter*, but she also suggested that considering race alone and intentionally is different from using race flexibly.[134]

Even though Sotomayor did expand on her point, her distinctions form the basis for an analysis defining preferential treatment. Part III proposes a definition for preferential treatment that can provide universities with a narrow but efficient way to consider race now that Proposal 2 is here to stay.

III. DEFINING PREFERENTIAL TREATMENT

This Part proposes a definition for preferential treatment. First, I use existing attempts at defining the term as starting points. Next, I analyze the ramifications of defining the term narrowly or broadly. Finally, I advocate for an intrinsic/extrinsic test according to which preferential treatment on the basis of race means treating race as an inherently valuable quality. I then apply the test to existing case law and respond to potential challenges.

133. *Id.* at 1652 n.2 (Sotomayor, J., dissenting) (citations omitted).
134. *Id.*

A. Starting Points

What does preferential treatment mean? The Supreme Court has stated that its prohibition is consistent with the U.S. Constitution, but no Justice has offered a specific explanation as to what kind of admissions policies constitute preferential treatment. The respondents in *Schuette* pointed out this missing piece of the puzzle and sharply criticized a general attempt at defining the term.[135] Thus, a good starting point is with the various briefs filed for this case.

One proposed definition that the respondents challenged as being inadequate defined preferential treatment as the admission of minority applicants with lower grades and test scores than white applicants who were denied admission.[136] But as the respondents pointed out, this definition is exceedingly broad and superficial.[137] This definition ignores the fact that admissions criteria place heavy emphasis on soft factors, including extracurricular activities, recommendations, and personal statements.[138] Universities value test scores and grades highly but also know that any applicant can add to a school even without the best quantitative performance.[139] Admitting students with lower scores could have nothing to do with race, so this definition is not helpful when assessing what preferential treatment on the basis of race means. Though the respondents did not spend much more time going over potential ways to define preferential treatment, one of their amici gave this issue the attention it deserves.

The Michigan Civil Rights Commission called upon the Court to answer exactly what it means to prohibit race and sex-based preferential treatment.[140] According to the Commission, preferential treatment "occurs when a university admissions process affirmatively provides an applicant or group of applicants with a benefit based on race in a way that unlawfully discriminates against others."[141] To elaborate, under the Commission's view, preferential treatment is a form of

135. Respondents' Brief, *supra* note 12, at 55–56.

136. *Id.* at 55; *see also* Grutter v. Bollinger, 539 U.S. 306, 317 (2003) (describing the plaintiff's allegation that the Law School gave applicants who belong to certain minority groups a significantly greater chance of admission compared to applicants with similar credentials but from disfavored racial groups).

137. Respondents' Brief, *supra* note 12, at 56.

138. *See, e.g.*, *How College Application Are Evaluated*, 10 IVYWISE NEWSLETTER, no. 1 (Jan. 2014), http://www.ivywise.com/newsletter_jan14_how_college_applications_are_evaluated.html.

139. *See* Respondents' Brief, *supra* note 12, at 56 (describing the fact that grade-test criteria do not always predict success at an institution and in fact reflect and worsen educational inequality of minority students).

140. Brief of Amicus Curiae Michigan Civil Rights Commission in Support of Respondents at 9, Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014) (No. 12-682) [hereinafter Mich. Civil Rights Comm'n Amicus Brief].

141. *Id.* at 11.

reverse discrimination that was already found unconstitutional in *Bakke* and *Gratz*.[142] The Commission argued that constitutional affirmative action programs, like in *Grutter*, focus on universities' compelling interest of having a diverse student body that benefits the entire campus.[143] Therefore, such policies do not grant preferential treatment to minorities because diversity efforts are not designed to solely benefit minority students but rather all students. Thus, under this definition, Proposal 2 neither outlaws *Grutter*-like admissions policies[144] nor violates the Equal Protection Clause.[145]

The Commission's suggested definition is helpful and narrow, but perhaps slightly too narrow. While it would have allowed Proposal 2 to survive while also keeping affirmative action policies intact, a definition of preferential treatment should further unpack the term's ambiguity. Before examining other possible interpretations, it would be helpful to see how the term has appeared in other states and in other contexts. Because California's Proposition 209 and Washington's Initiative 200 have nearly identical language as Proposal 2, those states and how they have handled the term are another good place to start.[146]

In *Hi-Voltage Wire Works, Inc. v. City of San Jose*,[147] the California Supreme Court attempted to flesh out the meaning of preferential treatment.[148] The court argued that a constitutional amendment should be interpreted with the natural and ordinary meaning of its words.[149] Preferential "means giving 'preference,' which is 'a giving of priority or advantage to one person . . . over others.'"[150] While that case dealt with outreach in the workplace,[151] it remains applicable in the context of university admissions since it exemplifies a court's effort to define preferential treatment with its natural and ordinary meaning. Yet this interpretation still does not go far enough to define what admissions policies would be legal under Proposal 2 and Proposition 209 because it fails to consider situations like

142. *Id.* at 13.
143. *Id.* at 15–16.
144. *Id.* at 40.
145. *Id.* at 18.
146. *Supreme Court Case May Affect Prop. 209, Bring Back Affirmative Action*, *supra* note 47; *see also Other States*, AM. C.R. INST., http://acri.org/other-states (last visited Mar. 21, 2015).
147. 12 P.3d 1068, 1082 (Cal. 2000).
148. *Id.*; *see also* Eryn Hadley, Comment, *Did the Sky Really Fall? Ten Years After California's Proposition 209*, 20 BYU J. PUB. L. 103, 114 (2005) (describing how the court did its best to use the natural and ordinary meaning of the words).
149. *Hi-Voltage*, 12 P.3d at 1082.
150. *Id.* (citing to WEBSTER'S NEW WORLD DICTIONARY 1062 (3d college ed. 1988)).
151. *Id.* at 1070.

Grutter where an applicant's race is merely a plus factor within a holistic analysis of the applicant.[152]

California courts have at least taken a stab at coming up with a clear, albeit too broad, definition. The most helpful starting point for defining preferential treatment, however, comes from the executive branch of Washington State. In 1998, the Attorney General of Washington issued a paper addressing the ambiguity of Initiative 200's language.[153] Specifically, the paper explains that preferential treatment does not have a well-accepted, ordinary meaning and that courts will therefore have to interpret what would and would not constitute preferential treatment.[154] In the context of public education and the university admissions process, the Attorney General identifies two approaches to defining preferential treatment:

> There appear to be two possible approaches to defining "preferential treatment" in the context of public education admissions. The first, more limited definition, would be that "preferential treatment" is the reservation of seats in a college or university for which only students of a particular race or gender can compete, or a similar system where race or gender are used as admissions criteria without any individualized consideration of the applicant's background or qualifications. The second possible definition is that "preferential treatment" is accorded when there is any consideration of the race or gender of an applicant, even in the context of comparing the individual with all other candidates for the available seats to determine what student body make-up best achieves educational diversity.[155]

152. Chief Justice George observed:

> The terminology employed by the majority opinion ignores the circumstance that, in many instances, race or gender has been utilized as a "plus" factor in the affirmative action setting—not because of any belief in group entitlement or proportional representation, but rather to obtain the benefits that are anticipated to flow from the inclusion of one or more persons from groups that are not currently represented in a given entity or organization. . . . Similarly, when a college or university whose student body has been and continues to be almost all-White voluntarily decides to institute an affirmative action policy under which qualified minority applicants are given special consideration, the justification for the policy may not be based upon any notion of 'entitlement based on group representation' or 'proportional group representation,' but instead may well stem from a genuine belief on the part of the institution that an integrated student body will provide a better education for all students attending the school.

Id. at 1094 (George, C.J., concurring and dissenting).

153. Issue Paper on Initiative 200, Att'y Gen. of Wash. (Oct. 16, 1998), *available at* http://mrsc.org/getmedia/C6B69589-7520-4D7E-AD74-CF346A0DB2B0/W3AGInit200.aspx.

154. *Id.*

155. *Id.* at 13.

Examining these two approaches in more detail is an excellent way to begin drafting a workable definition of preferential treatment since these approaches can generally be categorized as either narrow interpretations or broad interpretations.

B. A Narrow Interpretation

On the one hand, the Supreme Court in *Schuette* could have gone with a narrow or limited definition of preferential treatment consistent with the Washington Attorney General's first approach.[156] Such a definition would treat the term as plainly as possible: A university explicitly prefers to accept one race over another. For example, part of the application process at many schools leaves an option of ticking one or more boxes to indicate racial identity.[157] If a school's admissions policy seeks to accept students only because they ticked certain boxes, then that school is giving preferential treatment on the basis of race even under the narrowest of definitions.[158]

The Supreme Court has already examined these sorts of admissions policies and declared them unconstitutional. In *Bakke*, the University of California at Davis medical school's policy reserved sixteen spaces in a class of one hundred for minority students and excluded white students from consideration for those spots, drawing a racial line.[159] By doing so, the University was giving preferential treatment on the basis of race.[160] However, since the Court found that policy to be unconstitutional,[161] a narrow view of preferential treatment would mean that Proposal 2 effectively codifies the *Bakke* decision and only outlaws policies that seek a specific number of students from a particular race.

Most would argue, however, that Proposal 2 does more than prohibit quotas.[162] Thus, even a narrow interpretation of preferential treatment would have to include other kinds of race-conscious programs. Even after *Bakke*, universities could ask for information about race and use that information to decide which

156. *Id.*
157. *See, e.g.*, E. MICH. UNIV., GRADUATE ADMISSION APPLICATION INFORMATION 3 (Aug. 2012), https://www.emich.edu/english/graduate/documents/grad_app.pdf.
158. Issue Paper on Initiative 200, *supra* note 153, at 13.
159. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978); *see also* Amar & Katyal, *supra* note 24, at 1772 (emphasizing the fact that the plaintiff, Allan Bakke, was not even allowed to compete for sixteen of the seats at U.C. Davis and arguing that quotas are stigmatizing since they imply that something is altogether different about certain minority students).
160. Issue Paper on Initiative 200, *supra* note 153, at 13.
161. *Bakke*, 438 U.S. at 320.
162. *See generally* Mich. Civil Rights Comm'n Amicus Brief, *supra* note 140 (explaining that Proposal 2 was intended to prohibit any consideration of race even as one factor among many others).

students to accept.[163] In *Gratz*, the University of Michigan awarded the same points to all students from a particular minority group and by doing so, the school was making an assumption about an applicant based solely on his or her race.[164] This practice would still constitute preferential treatment in the narrow sense.[165] However, as mentioned in Part I, the Supreme Court already struck down this sort of policy.[166] The decision in *Gratz* takes *Bakke* one step further and disapproves of these kinds of assumptions.[167]

Of the three landmark cases concerning the constitutionality of affirmative action, the only admissions policy that survived was in *Grutter*.[168] Since the University of Michigan Law School claimed that it used race as a consideration among many, it is difficult to prove that the school explicitly preferred certain minority students.[169] Thus a narrow interpretation of preferential treatment would mean that Proposal 2 does not do anything more than what the Supreme Court already did and prohibits policies that were already declared unconstitutional.[170] The proposal's drafters and many of its voters, however, likely had a broader definition in mind that would make a substantial change to what type of admissions policies are still legal.[171]

C. A Broad Interpretation

Given that Proposal 2 arose from the *Grutter* holding, its drafters likely did not intend a narrow definition of preferential treatment.[172] Just after the *Grutter*

163. *See* Amar & Katyal, *supra* note 24, at 1772–73 (arguing that following *Bakke*, universities could still take race into account as one consideration among many).

164. Gratz v. Bollinger, 539 U.S. 244, 255 (2003); *see also* Ayres & Foster, *supra* note 28, at 546–48 (expressing how the *Gratz* and *Grutter* opinions make it clear that the Court was suspicious of simple point systems).

165. Because all minority students were treated the same and given the same advantage over nonminority students, the University of Michigan was explicitly making a preference based on race, so even a narrow interpretation of preferential treatment would include such a practice. *See Gratz*, 539 U.S. at 255.

166. *Id.* at 275.

167. *See id.* at 271–72 (explaining that the automatic distribution of points has the effect of making the race factor decisive for any underrepresented minority).

168. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

169. *See id.* at 334 (arguing that a permissible admissions program must be flexible enough to consider all elements of diversity putting all candidates on the same footing but not necessarily according them the same weight).

170. *See* Mich. Civil Rights Comm'n Amicus Brief, *supra* note 140, at 9–11 (stating that Proposal 2 does not present anything that was not already decided in *Grutter*).

171. *See generally* LOWE, *supra* note 43 (describing how the Proposal would make many policies existing as of 2006 illegal).

172. Mich. Civil Rights Comm'n Amicus Brief, *supra* note 140, at 11 ("[Proposal 2's] purpose . . . was Grutter's annulment."); *see also* LOWE, *supra* note 43; Adam Liptak, *Justices Weigh Michigan Law*

holding, Ward Connerly (a political activist against affirmative action) stood by Barbara Grutter when announcing his plan to campaign for Proposal 2 and stated, "[t]he Court may have allowed racial preferences with their decision, but they did not mandate them."[173] Still, Proposal 2 does not define preferential treatment,[174] and it is practically impossible to know—regardless of framer intentions—whether *voters* wanted to merely prohibit judgments based on race or entirely eliminate any mention of race from the discussion.[175] A broader definition of preferential treatment would be problematic since it would lead to impractical and potentially unfair admissions policies.[176]

Yet many Michigan voters likely did want to take the bold step of one hundred percent colorblind admissions, interpreting preferential treatment to include any and all consideration or even awareness of race.[177] Under such a broad interpretation, the admissions policy in *Grutter* would be against the law since the Law School considered race as a plus factor as part of its assessment of candidates.[178] An advantage of this interpretation is that it makes Proposal 2 do more than simply codify the Supreme Court's decisions in *Bakke*, *Gratz* and *Grutter*. Under

and Race in College Admissions, N.Y. TIMES (Oct. 15, 2013), http://www.nytimes.com/2013/10/16/us/justices-weigh-michigan-law-and-race-in-college-admissions.html (stating that Proposal 2 was a response to *Grutter*).

173. *Connerly Announces Campaign to Ban Affirmative Action in Michigan*, LEADERSHIP CONF. (July 8, 2003), http://www.civilrights.org/equal-opportunity/michigan/connerly-announces-campaign-to-ban-affirmative-action-in-michigan.html.

174. *See* MICH. CONST. art. 1, § 26; *see also Proposal 2 Approved Ballot Wording*, LEADERSHIP CONF., http://www.civilrights.org/equal-opportunity/michigan/proposal_text.html (last visited Mar. 21, 2015).

175. *See Ahead in Two Recent Polls*, *supra* note 49 (demonstrating how rephrasing the question could change voters' minds).

176. "[E]xcising race from admissions is far from simple." Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1146 (2008).

177. "Proposal 2 . . . . enacts a substantive constitutional provision that takes the issue out of ordinary politics altogether and results in a color-blind program that presents no political risk and contains no uncertain or hidden bias." Richard A. Epstein, Schuette v. Coalition to Defend Affirmative Action*: The Intellectual Confusion That Surrounds Affirmative Action Today*, SCOTUSblog (Sept. 9, 2013, 2:25 PM), http://www.scotusblog.com/2013/09/schuette-v-coalition-to-defend-affirmative-action-the-intellectual-confusion-that-surrounds-affirmative-action-today; *see also* Denise O'Neil Green, *Justice and Diversity: Michigan's Response to* Gratz, Grutter, *and the Affirmative Action Debate*, 39 URB. EDUC. 374, 377 (2004), *available at* http://uex.sagepub.com/ content/39/4/374 (explaining that the colorblind stance directly opposes the premise of affirmative action and that color-blind advocates do not agree with race-conscious measures); Robert Downes, *The Colorblind Society?*, N. EXPRESS (Oct. 12, 2006), http://www.northernexpress.com/michigan/ article-2499-the-colorblind-society.html (stating that the people behind Proposal 2 have the lofty goal of a colorblind society where everyone is equal); Henry Payne, *Election Silver Lining*, WASH. TIMES (Nov. 21, 2006), http://www.washingtontimes.com/news/2006/nov/21/20061121-083638-4873r/ (arguing that Proposal 2 is a step towards a colorblind society).

178. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (stating that under the *Grutter* decision, universities could consider race as a "plus" factor when considering an applicant).

the constitutional amendment and a broad definition for preferential treatment, the state would be taking more control over university admissions policies by making it clear that race cannot be considered at all. Several arguments, however, establish why such a broad interpretation is extremely impractical.

The fact remains that many individuals—particularly those belonging to underrepresented minority groups—have strong ties to their racial identity.[179] Many of them set themselves apart from other candidates by expressing how that identity made them who they are today; thus, candidates' resumes and personal statements provide a strong indication of race.[180] Active participation and leadership are all attributes that institutions seek, so if a student focuses these activities on their racial identity, eliminating these facts from an application would likely be against the school's interest.[181] Thus, minority students would be limited in the information they can share and the school would be unable to consider any other information even if it tends to show that these students have the qualities the school is seeking.[182]

Eliminating all mentions of race would not only deprive universities of some of the young leaders they are looking for but would also be inefficient. Universities would have to communicate to all their applicants that any mention of race is strictly prohibited.[183] However, most of them are unlikely to do so.[184] Thus,

179. *See, e.g.*, David H. Demo & Michael Hughes, *Socialization and Racial Identity Among Black Americans*, 53 SOC. PSYCHOL. Q. 364, 364 (1990) ("Structurally, being black in American society means occupying a racially defined status; associated with this status are roles in family, community, and society. One psychological consequence of being black is black group identity, the intensity of which should vary with the nature of role experiences.").

180. Carbado & Harris, *supra* note 176, at 1148 ("[T]he life story of many people—particularly with regard to describing disadvantage—simply does not make sense without reference to race.").

181. *Id.* ("[A] formally colorblind admission process exerts significant pressures and incentives that . . . inhibit the very self-expression that the personal statement is intended to encourage.").

182. For further information regarding the difficulty of writing a personal statement without any reference to race for some applicants, see *id.* at 1152–73 (presenting personal statements such as President Obama's that express a strong racial identity and then presenting them without any mention of race to highlight how incomprehensible they become). *See also* Mich. Civil Rights Comm'n Amicus Brief, *supra* note 140, at 21–22 ("Defenders of §26 instead suggest it should remain proper for a university to consider the uniqueness of those who have overcome a personal adversity—unless it has to do with race. That it should be permissible for a graduate school to consider that an applicant from a northern state attended an undergraduate school in the south, but illegal to equally factor that another applicant was one of only a few white students attending an historically black college in his or her own state. Equal protection does not allow for such divergent treatment.").

183. *Contra Diversity Matters: Questions and Answers Regarding the State of Michigan's Proposal 2 of 2006*, U. MICH., http://www.diversity.umich.edu/legal/prop2faq.php (last updated June 11, 2014) [hereinafter *Proposal 2 Q&A*] (explaining the situation following Proposal 2 but not instructing applicants that they are forbidden from mentioning anything to do with race).

184. *See, e.g.*, *id.*; Ted Spencer, Assoc. Vice Provost & Exec. Dir. of the Office of Undergraduate Admissions, Statement: Highlights of the U-M Entering Class of Fall 2013 (Aug. 29, 2013),

those universities would need a system in place for candidates who continue to discuss race in their personal statements yet such a system would also be problematic.[185] Would the university refuse to consider applicants who mention their race? Such a policy is quite extreme. Would some of the admissions staff be tasked with redacting such information? While this policy is not as harsh, it would lead to a major waste of time and resources. The first round of admissions would consist of going through the thousands of applications that universities receive to confirm that race is not mentioned.[186] Such a system is exceedingly impractical.

D. A New Test: Intrinsic Versus Extrinsic

Because of these difficulties, the definition of preferential treatment should err on the narrower side. I therefore propose that the best distinction between permissible and impermissible admissions policies is an intrinsic versus extrinsic test. While the intrinsic/extrinsic discussion is abundant in psychology and philosophy,[187] it has not yet been applied to the context of race in university admissions. Intrinsic denotes an inherent quality that is valuable in and of itself.[188] In the context of admissions decisions, intrinsic qualities are those that schools are searching for since they benefit the campus as a whole. Examples of intrinsic qualities are leadership, collaboration, initiative, and enthusiasm, which are in-

available at http://www.vpcomm.umich.edu/admissions/statements/spencer13.html (describing the enrolled students who wrote about belonging to communities of blended backgrounds and heritages).

185. *See Proposal 2 Q&A*, *supra* note 183 ("Q: How do you know that the undergraduate admissions staff who can still see race, ethnicity, gender, and national origin on the application aren't using those factors in their decision-making? A: We make the rules clear to all our reviewers and fully expect that they follow them. All our application reviewers are experienced professionals, and—given the confidential nature of much of the information students share on their applications—we take the integrity of our reviewers very seriously. Additionally, checks and balances built into the multiple-review process, such as having each application independently reviewed by at least two staff members, also help to ensure compliance by individual reviewers."); *but see* Carbado & Harris, *supra* note 176, at 1146–47 (explaining the psychological difficulty for an admissions officer to ignore race completely).

186. The University of Michigan instead reviews applications by at least two staff members to ensure that race is not being taken into account illegally. *Proposal 2 Q&A*, *supra* note 183.

187. *See generally* Richard M. Ryan & Edward L. Deci, *Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions*, 25 CONTEMP. EDUC. PSYCHOL. 54 (2000); Michael J. Zimmerman, *Intrinsic vs. Extrinsic Value*, STAN. ENCYCLOPEDIA PHIL. (Dec. 17, 2010), http://plato.stanford.edu/archives/win2010/entries/value-intrinsic-extrinsic.

188. "The intrinsic value of something is said to be the value that that thing has 'in itself,' or 'for its own sake,' or 'as such,' or 'in its own right.'" Zimmerman, *supra* note 187. *See also* Ryan & Deci, *supra* note 187, at 55 (describing intrinsic motivation as doing something because it is inherently interesting or enjoyable).

herently valuable to a school.[189] Extrinsic qualities are those that do not possess inherent value but cause something to become, or contribute to something that is, intrinsically valuable.[190] For example, being captain of the soccer team is an extrinsic quality. A school is not seeking captains of soccer teams for any inherent purpose. Being captain of the soccer team, however, might demonstrate that a candidate is well respected among her peers, can lead a group of students, and has committed to something she is passionate about. These are the intrinsic qualities a school is seeking. In other words, being captain of the soccer team does not benefit the school by itself but that experience can contribute and demonstrate that a candidate will be a valuable addition to the school's campus.[191] Thus, if a university considers a candidate's attribute for its inherent value, it is considering that attribute intrinsically. If, however, the university only considers the attribute insofar as it contributes to (or is evidence of) other qualities, then the university is making a judgment about the extrinsic value of the attribute.

The intrinsic/extrinsic test as it applies to race can be illustrated with two hypothetical African American candidates. The first candidate, A, is the President and Founder of the African American Students Association in her high school. She lives in a predominantly minority neighborhood and takes an active role in her community, advocating for African American interests at her school and to her local government. The second candidate, B, does not identify as strongly with her race. None of her activities illustrate advocacy for racial interests and her profile would not differentiate her from any non-African American students.

Under an extrinsic analysis, a school would find that candidate A's race led to her activities that exhibit leadership and initiative. In this hypothetical, candidate B's race did not contribute to any of her activities. Thus, if preferential treatment means considering race intrinsically and Proposal 2 forbids that, then a

189. *See, e.g.*, *Leadership Development*, W. MICH. U., http://www.wmich.edu/activities/leadership (last visited Mar. 21, 2015) (describing the value of leadership and the university's goal of adding leadership skills through its development program); *Future Students*, CENT. MICH. U. C. MED., https://www.cmich.edu/colleges/cmed/students/Pages/Future.aspx (last visited Mar. 21, 2015) (stating the school seeks students who exhibit the characteristics and interests to become physicians, including depth of past experiences and personal values).

190. "Extrinsic value is value that is not intrinsic." Zimmerman, *supra* note 187; *see also* Ryan & Deci, *supra* note 187, at 55 (stating that an extrinsic motivation refers to doing something because it leads to a separable outcome).

191. *See* Mich. Civil Rights Comm'n Amicus Brief, *supra* note 140, at 22–23 ("[D]iversity is not about any one characteristic. Applicants may stand out based on athletics, legacy, religion, debate team membership, musical ability, attending certain select schools, and hosts of other 'plus' factors. While each factor may be appropriate when looked at in concert with all the others including race, excluding race from the picture actually prevents neutrality.").

school would have to evaluate candidate B without considering race. This distinction is crucial because the school is not seeking minority students simply because they are minorities but rather because they share a unique perspective that would enhance the educational mission of the school. The *Grutter* Court found the holistic method to be sufficiently tailored. Similarly, an extrinsic analysis would be consistent with the Equal Protection Clause since it does not make the same judgment about students with the same race. Instead, the analysis would only treat race as a means to accepting students whose experiences would be mutually complementary.

E. Applying the Intrinsic/Extrinsic Test

1. Applying the Test to *Bakke*, *Gratz*, and *Grutter*

The general theme the U.S. Supreme Court has advocated in its affirmative action decisions is that any judgment based intrinsically on race violates the Equal Protection Clause.[192] If universities interpret Proposal 2 as forbidding such intrinsic judgments, it is important to examine how these prior decisions would have come out under this framework.

UCD's policy from *Bakke* would not distinguish students A and B since it treated race as an intrinsic quality.[193] The policy assured that sixteen students in the class would be underrepresented minorities, so every such applicant would be in the same pool. A person's race in and of itself resulted in separate consideration for admission. However, one goal of the policy was to assure that more minority doctors would be in the workforce.[194] The University might therefore have

192. *Compare* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) ("Preferring member of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."), *with* Gratz v. Bollinger, 539 U.S. 244, 273 (2003) (arguing that the University admissions policy giving the same points to all underrepresented minorities would not consider a particular minority student's individual background, experiences, and characteristics to assess that students contribution to diversity). *But see* Grutter v. Bollinger, 539 U.S. 306, 337 (2003) ("Unlike the program at issue in *Gratz* v *Bollinger,* the Law School awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity . . . . [T]he Law School's admissions policy 'is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'") (citing to *Bakke*, 438 U.S. at 317). *See also* Ayres & Foster, *supra* note 28, at 545–48 (stating that the Court was bothered by quantification).

193. Hypothetical students A and B are discussed in *supra* Part III.D. Justice Powell illustrated the problem with UCD's admissions policy by similarly presenting two hypothetical black students with different characteristics and experiences who would be viewed the same way under the school's policy. *Bakke*, 438 U.S. 265 app. at 324.

194. *See* Ronald Dworkin, *Why* Bakke *Has No Case*, N.Y. REV. BOOKS (Nov. 10, 1977), http://www.nybooks.com/articles/archives/1977/nov/10/why-bakke-has-no-case ("The tiny number of black

argued that it was viewing race extrinsically, as a means to achieve the goal of more minority doctors.[195] Still, the way that the University considered race was intrinsic. Every African American was treated the same way. Race divided applicants into pools and therefore, the University treated race as intrinsically valuable and, according to the Supreme Court, it did so impermissibly.[196]

The intrinsic/extrinsic test can also help reconcile the *Grutter* and *Gratz* decisions. Both decisions found that a diverse student body is a compelling governmental interest.[197] As to the means for achieving that goal, the Court voted down the undergraduate policy that gave certain points to a candidate from a certain race but upheld the Law School's policy that considered race a plus factor in its holistic evaluation of an applicant.[198]

The University of Michigan's undergraduate admissions policy in *Gratz* treated race as an intrinsic quality. A person's race on its own added points to their GPA 2 calculation. Hence, both candidates A and B would get the same amount of points added to their GPA 2 simply because they are both African American.[199] The University did not give those points to white students, indicating preferential treatment on the basis of race. Yet, the University also made other intrinsic judgments. I used the example of a soccer team captain to illustrate an extrinsic quality,[200] but soccer team captains were also all given the same amount of points to their GPA 2.[201] Under this policy and my definitions, the University also treated student-athlete status as an intrinsically valuable quality. In the *Gratz* case, the use of race as an intrinsic factor was impermissible and the difference with athletics is mainly the level of scrutiny on racial subjects.[202] Thus, by automatically giving

doctors and professionals is both a consequence and a continuing cause of American racial consciousness, one link in a long and self-fueling chain reaction. Affirmative action programs use racially explicit criteria because their immediate goal is to increase the number of members of certain races in these professions.").

195. The University did in fact make such a point arguing that one purpose of its program was to improve the delivery of healthcare services to underserved communities. *Bakke*, 438 U.S. 265 at 310.

196. "Petitioner [UCD] simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health-care delivery to deprived citizens. Indeed, petitioner has not shown that its preferential classification is likely to have any significant effect on the problem." *Id.* at 311.

197. *Grutter*, 539 U.S. at 333; *Gratz*, 539 U.S. at 268.

198. *Gratz*, 539 U.S. at 275–76; *Grutter*, 539 U.S. at 343.

199. *See Gratz*, 539 U.S. at 273.

200. *See supra* Part III.D.

201. *See Gratz*, 539 U.S. at 278 (O'Connor, J., concurring) (indicating that athletic recruitment was another factor that led to an applicant's 20 point bonus).

202. *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986) (explaining that heightened scrutiny only applies when considering groups that are minorities, politically powerless, or exhibit immutable characteristics). Soccer team captains do not possess these qualities so even though the university

points to candidates just because of their race, the University viewed race intrinsically and would have violated Proposal 2 under my definition.

An intrinsic/extrinsic analysis under *Grutter* is more nuanced. Under the *Grutter* facts, the University of Michigan Law School used race as a plus factor within a "holistic" analysis of a candidate.[203] Thus, on the one hand, the *Grutter* holding might not have changed at all since the University did not treat all applicants of a particular race the same way. Unlike *Bakke* and *Gratz* where an applicant's race was considered in and of itself, the policy in *Grutter* would not necessarily put candidates like A and B in the same pool. Under the extrinsic test, an evaluation would have to conclude that a candidate's race leads to certain experiences that demonstrate permissible, intrinsic qualities. One cannot make a judgment about an applicant based solely on race, but an applicant's race can contribute to the intrinsic qualities universities are seeking. On the other hand, the plaintiff in *Grutter* could have argued that the University was still treating race intrinsically. Even though race was a plus factor and part of a holistic analysis, the University might still have been giving every applicant from a particular race the same plus factor admissions boost. The University might do a better job of distinguishing candidates A and B and still conclude that because both are African American, they get the same plus. Thus, if the Court had been analyzing the case under the intrinsic/extrinsic framework, they might have concluded that the University's policy viewed race intrinsically.

2. A More Modern Application

The intrinsic/extrinsic analysis can also apply to more recent cases dealing with affirmative action, most notably *Fisher v. University of Texas*.[204] In that case, the Court stood by its precedent decisions in *Bakke*, *Gratz*, and *Grutter*, and remanded the case back to the circuit court to review whether the University of Texas's policies were sufficiently narrowly tailored to benefit the entire student body.[205] But the *Fisher* facts demonstrate the limits of outlawing intrinsic considerations of race.

In *Fisher*, the state of Texas had implemented a "Top Ten Percent" law that granted admission to any candidate in the top ten percent of his or her high

viewed athleticism intrinsically, there was no equal protection violation and Proposal 2 does not discuss athletics.

203. *Grutter*, 539 U.S. at 337.

204. 133 S. Ct. 2411 (2013).

205. *Id.* at 2421.

school class.[206] Thus, top students from high schools in minority-dominated areas were accepted to universities, producing more minority students at these schools than before.[207] Still, minority enrollment remained quite low, so the University of Texas implemented an additional policy in 2004 that explicitly considered a candidate's race.[208] The University's implementation of an additional affirmative action policy demonstrates the possibility that limiting racial consciousness to extrinsic review does not achieve the diverse student body universities seek. Taking our two hypothetical candidates, the University of Texas would argue that both of them offer a unique experience that would enrich their fellow students' education. Candidate A has more to say about her racial identity, but candidate B serves as a good balance since she is also African American with a different outlook on race.

If Proposal 2 is read to forbid the intrinsic consideration of race, then the University of Texas would simply not be allowed to consider the fact that candidate B is African American. Still, candidate B can market herself (if she so chooses) as a black student who does not think that race matters. The University would be able to see these views in her personal statement and can argue that she brings a unique perspective about race that would enhance the educational value of the school. If candidate B chose not to market herself that way, then the University could not argue that her race would extrinsically contribute to a common benefit and would thus not be able to consider the fact that she is African American.

In sum, if the Court had applied the intrinsic/extrinsic test to its affirmative action cases, it is likely that they would still come out the same way. The test is thus both narrow and consistent with federal case law.

F. Challenges to the Intrinsic/Extrinsic Test

While this intrinsic/extrinsic distinction clarifies what policies are consistent with the Supreme Court's affirmative action holdings, it still has certain practical and substantive limitations. As Justice Ginsburg's dissenting opinion in *Gratz v. Bollinger* shows, it is difficult to differentiate whether a school is using race, in and of itself, to make a judgment about an applicant or whether it is considering how

206. *Id.* at 2416.
207. *Id.*
208. *Id.* (noting that the University felt it lacked a critical mass of minority students based on a study of minority enrollment in certain classes as well as on anecdotal reports from students regarding their classroom interactions).

the applicant's experiences may be strongly linked to his or her race.[209] Justice Ginsburg was hesitant to distinguish between the University of Michigan's undergraduate policy and its law school policy and was concerned that the disparate holdings in *Gratz* and *Grutter* would incentivize disingenuous admissions practices.[210] Under the *Grutter* holding, universities could still give all members of a certain race the same treatment and pretend that they were doing so as part of a holistic evaluation.[211] The potential issue also presents itself under an intrinsic/extrinsic framework since schools that want to bolster their number of minorities might make intrinsic judgments but pretend that they did not.

This concern can be addressed in two ways. Firstly, the intrinsic/extrinsic framework is distinct from the holistic analysis. A school would have to explain how one student's profile and personal statement demonstrate the qualities the school is looking for, making it clear that the student was not accepted solely because of his or her race. Under a holistic analysis, the university could point to a candidate's positive qualities, including race, and stop there. Under the intrinsic/extrinsic framework, the university would have to demonstrate how some candidates' races specifically contributes to other activities. Moreover, although these policies might encourage minority students to become involved with minority related activities in high school, students without a strong racial identity can still stand out by pursuing activities that they genuinely are passionate about and enjoy. These students could still add to the diverse experiences of a university class even if their activities do not indicate their race.

209. Justice Ginsberg's dissent explains:

> One can reasonably anticipate, therefore, that colleges and universities will seek to maintain their minority enrollment—and the networks and opportunities thereby opened to minority graduates—whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue. Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers' recommendations may emphasize who a student is as much as what he or she has accomplished.

Gratz, 539 U.S. at 304 (Ginsburg, J., dissenting).

210. *Id.*

211. *See, e.g.*, Michael Barone, *Cheating Is Rife in Colleges -- By Admissions Officers*, REAL CLEAR POL. (Aug. 9, 2013), http://www.realclearpolitics.com/articles/2013/08/09/cheating_is_rife_in_ colleges_--_by_admissions_officers__119558.html (stating that in California following Proposition 209 admissions officers would cheat and say they were using a holistic criteria while they were actually only seeking to benefit Hispanics and African Americans).

Secondly, the framework provides clearer criteria for those who argue that universities need more transparency in how they consider race.[212] In case anyone wants to allege that a school is lying when it says it only considered race extrinsically, the issue becomes one of fact rather than an issue of law. Either the school is treating all minority students the same way and is only seeking to increase its diversity numbers, or the school maintains that its minority students share certain experiences that would enhance the educational value of the school. Skeptics who remain unconvinced regarding how a university takes race into account can take the matter to a trial court to decide whether, as a matter of fact, a school is considering race extrinsically.

Challenges from the other side of the debate are also important to note. Strong advocates for affirmative action policies will likely point out a remaining concern: whether it is right to use candidate's racial identity in order to determine whether race was taken into account[213] especially since the *Fisher* case specifically addressed the value of minority students who do not identify strongly with their race. A university should understand that societal hurdles stemming from race affect everyone from that race, and as such it should be able to bear this fact in mind when considering candidates.

The response to this challenge is the fact that despite Proposal 2's ambiguous wording, the new law ultimately has consequences on the university admissions process, and those consequences could potentially forbid any consideration of race. The intrinsic/extrinsic framework at least provides some flexibility for how universities can consider race—minority students can still express their racial identity and explain how their connection to it, strong or otherwise, would benefit a university campus as a whole.

Preferential treatment on the basis of race should mean considering race intrinsically: seeking to accept minority students for the simple fact that they are minority students. As discussed above however, this quite narrow definition would likely make Proposal 2 moot.[214] Since the Supreme Court has already found that the intrinsic analysis in the policies at issue in *Bakke* and *Gratz* is unconstitutional, Proposal 2 essentially codifies these decisions and allow universities to consider a candidate's race insofar as it demonstrates certain qualities. The policy from

212. *E.g.*, Richard Sander, *Why Strict Scrutiny Requires Transparency: The Practical Effects of* Bakke, Gratz, *and* Grutter, *in* NEW DIRECTIONS IN JUDICIAL POLITICS 299 (Kevin T. McGuire ed., 2012) (arguing that the *Grutter* and *Gratz* decisions led to more opaque preference operations and that universities need to be transparent so that the size of their racial preference can be readily monitored).

213. *E.g.*, Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1159 (2013) (highlighting the issues with incentivizing applicants to work their racial identity into their application to fit the type of diversity they feel that the school is seeking).

214. *See supra* Part III.B.

Grutter would potentially remain consistent with Proposal 2 under this narrow definition, so long as the University of Michigan's Law School could show that, as a matter of fact, it only considered race extrinsically.

Being from an underrepresented minority gives certain applicants unique experiences that would diversify class discussions and perspectives, not just its aesthetics. The intrinsic/extrinsic definition of preferential treatment is consistent with admissions policies that the Court accepted in *Grutter*. A broader definition would lead to unfair and impractical results since admissions officers will likely read about many interesting and relevant stories that involve a candidate's race.[215] Therefore, the Supreme Court should have said that the amendment only outlaws the consideration of race intrinsically but still allows the assessment of a candidate's race as an extrinsic quality that would contribute to a diverse student body and enhance education.[216]

IV. APPLYING THE DEFINITION TO *SCHUETTE* AND BEYOND

The U.S. Supreme Court should have defined preferential treatment when it decided *Schuette*. Under my suggested definition, Proposal 2's prohibition on preferential treatment is simply a prohibition on considering race as an intrinsically valuable factor. My definition still remains consistent with the Court's holding in *Schuette* since it is narrow and only a narrow definition of the amendment should survive a constitutional analysis. This Part illustrates how this definition of preferential treatment would have affected the case's various arguments and suggests that Michigan universities should adopt my definition in order to leave room for some consideration of race and hopefully improve the low numbers of minority enrollment.

A. Effect on the Disparate Impact Arguments

The narrow interpretation of preferential treatment under the intrinsic/extrinsic test would not drastically alter current affirmative action policies.[217] In fact, it mainly codifies the Supreme Court's affirmative action decisions while also providing more clarity on the meaning of preferential treatment and keeping some element of race-consciousness alive. Thus, since schools can still consider

215. *See supra* Part III.C.
216. *See generally* Mich. Civil Rights Comm'n Amicus Brief, *supra* note 140, at 16–18 (urging the Court to adopt a definition that allows schools to pursue diversity interests that benefits all students).
217. *See supra* Part III.B.

race, but only as an extrinsic factor, Proposal 2 only assures that the intrinsic qualities school seek remain consistent for all applicants.

My interpretation challenges many of the petitioner's statements but ultimately gives Proposal 2 the best argument for survival. Because schools can still choose to view a candidate's race under my definition, the petitioner would have argued that the disparate impact on white and Asian American students would remain.[218] However, the *Grutter* court emphasized the importance of diversity as a benefit to education and a compelling state interest.[219] While excellent test scores are acceptable intrinsic qualities, so are unique life experiences. It, therefore, would be consistent with a narrow interpretation of preferential treatment if schools decide to admit underrepresented minorities who would add to the diversity of thought and experience.[220] Underrepresented minorities would only be advantaged insofar as they have skills and experiences that differ from other applicants. Because white and Asian American students have the same opportunity to stand out, any disparate impact on them would be far less pronounced.[221] Although the petitioner probably would still have won the disparate impact issue, a broader interpretation of preferential treatment would have severely weakened his argument.

A broad interpretation would strongly and disproportionately impact minority applicants. The respondents focused mainly on the number of students who would be denied admission, further reducing the amount of minority students.[222] A broad interpretation would mean that race could not be seen at all, thereby shifting arguments in the respondents' favor.[223] Not only would the number of minority students diminish, but minorities would also have to redact far more in-

218. In fact, even following the *Grutter* and *Gratz* cases, the University of Michigan's policies tended to disadvantage Asian Americans, which implies that they will continue to do so as long as they can see an applicant's race. *See* Brief for Richard Sander as Amicus Curiae, *supra* note 66, at 5–6.

219. Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

220. Mich. Civil Rights Comm'n Amicus Brief, *supra* note 140, at 15 ("Diversity focuses on the student body as a whole. It recognizes that what each student will get out of the process depends in part on who the other members of the class are. It sees the student body as a team.").

221. *See id.* at 17 ("Simply put, the belief that diversity in university admissions policies will always benefit the same group(s) is racially prejudiced, because it relies upon the false premise that these groups have been provided equal opportunities but are somehow intellectually inferior.").

222. Respondents' Brief, *supra* note 12, at 2 ("Under Proposal 2, black, Latina/o and other minority citizens may no longer ask the universities to consider the ways that Michigan's nationally-recognized pattern of intense segregation and inequality makes it almost impossible for the universities to admit many minority students under its other admissions criteria.") (citation omitted).

223. *See id.*

formation than other students.[224] If the petitioner truly sought a broad colorblind interpretation of preferential treatment, then no student would be able discuss racial identity in an application.[225] Further, since white students do not often discuss their racial identity because they are not minorities, new policies under Proposal 2 would predominately affect minority students.[226] For example, the founder of a Latino culture club would have this accomplishment redacted while white students, who typically do not join clubs about white culture,[227] would have all of their extracurricular activities considered by the university. While a broad interpretation would cause Proposal 2 to impact those white students who would like to describe their experiences of being white—specifically, that their life stories would add to the diverse thought of a campus—it is rare for white applicants in this day and age to emphasize their race.[228] Thus, a broader interpretation than mine would seriously have strengthened the respondents' arguments that minorities would be disparately impacted.[229] Because the Court did not find a disparate impact in *Schuette*, universities and lower courts should stick with the narrow definition.

B. Effect on the Political Process Arguments

A clear and narrow definition of preferential treatment goes a long way towards reconciling the positions of the parties on the political process question in *Schuette*. The petitioner argued that an affirmative action plan, such as the one in *Grutter*, is incompatible with the political restructuring theory.[230] His point was that if those plans are designed solely to benefit minorities rather than the entire

224. *See* Carbado & Harris, *supra* note 176, at 1162–64 (describing the extra time and effort it would take for applicants with a strong racial identity to figure out how much race they are allowed to mention as compared to students who do not have as strong of a connection to their race).
225. *See supra* Part III.C.
226. *See* Carbado & Harris, *supra* note 176, at 1168 ("For the most part, our understanding of racism is shaped by the 'disadvantaging' side of racism and the accounts people of color provide to describe how racism impacts their lives. We have very few accounts of the 'advantaging' side of racism and the accounts white people could provide to describe how racism privileges them.").
227. The few white student clubs that do exist are generally considered dangerous and met with resistance from other students. Krystie Yandoli, *The Danger of White Student Unions*, STUDENTNATION (Sept. 11, 2013, 3:02 PM), http://www.thenation.com/blog/176127/danger-white-student-unions#.
228. *See* Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 970–73 (1993) (posing a series of questions with the point that whites do not commonly feel as though their race is particularly noteworthy).
229. Mich. Civil Rights Comm'n Amicus Brief, *supra* note 140, at 19 ("The prohibition read this broadly unconstitutionally discriminates against minority applicants because it denies them the opportunity to be evaluated in the same holistic way as everyone else.").
230. Brief for Petitioner, *supra* note 13, at 23.

campus, they are unconstitutional under *Bakke* and *Gratz*.[231] But if the plans were designed to promote the diversity of the campus as a whole, as in *Grutter*, the respondents could not have argued that Proposal 2 had a racial focus that harms minority interests. Everyone benefits from diverse interests, so there would be no political restructuring issue. Although this point supported the petitioner's argument, it locks him into a narrow interpretation of preferential treatment.[232] Affirmative action plans that use race as part of a holistic analysis or under an intrinsic/extrinsic analysis, as I've advocated they should, are indeed designed for everyone's benefit. Thus, if preferential treatment is defined narrowly enough to allow these plans to remain permissible, then the petitioner is right and the respondents' political restructuring argument would have been severely weakened. In contrast, if the petitioner had advocated for a broader interpretation that outlaws all race consciousness, then the respondents' political restructuring arguments would likely have been more meritorious.

Under the intrinsic/extrinsic analysis, Proposal 2 is likely consistent with the constitutional policies that the University of Michigan Law School pursued in *Grutter*. In fact, under such an analysis, the only affirmative action policies that the amendment outlaws were already declared unconstitutional. Therefore, underrepresented minorities would not need another state referendum since universities can continue taking race into account extrinsically.

The respondents' arguments would have been stronger if preferential treatment was defined broadly. For example, they argued that racial minorities may not be banned from using the political process to seek lawful proposals to resolve racial inequality.[233] A narrow definition of preferential treatment would mean that the only policies that Proposal 2 forbids were already unconstitutional. Therefore, their argument would also have been defeated under this interpretation. Meanwhile, under a broader definition, CDAA might have won this argument. If the amendment does significantly change the status quo to the point where it drastically takes the political process out of the hands of minorities and imposes an unfair burden on changing university policy, then it is unconstitutional. The impracticality of such a broad definition would impose a

231. *See id.* (arguing that if Proposal 2 targets a policy that primarily benefits minorities, it is unconstitutional, but if it benefits everyone, then a political restructuring analysis cannot be asserted).

232. *See* Mich. Civil Rights Comm'n Amicus Brief, *supra* note 140, at 10 ("Petitioner's central premise, that [Proposal 2] does not violate the Equal Protection Clause, but it does prohibit what *Grutter* permitted, requires placing the importance of semantic structure over that of reason and constitutional principle—first assessing the language while ignoring its intent, and later enforcing its intent without considering what meaning the language was given.").

233. Respondents' Brief, *supra* note 12, at 24–25.

system on universities that is so complicated Justice Sotomayor might have had stronger support when arguing that the burden on minorities is far too severe.

In sum, the Court held that Proposal 2 stands, but an exceedingly broad interpretation of preferential treatment would have seriously called that decision into question. Yet Proposal 2 would still have stood if preferential treatment were interpreted narrowly.[234] My definition is thus narrow enough to remain consistent with Court's holding in *Schuette*.

C. What Comes Next

The Court's holding in *Schuette* means that Proposal 2 will continue to limit how Michigan university admissions officers can consider minority applicants. The universities' only guideline is not to grant preferential treatment to anyone based on race.[235] If those universities interpret preferential treatment the way I do, then Proposal 2 only forbids the consideration of race as an intrinsic factor. Thus, universities can still consider race but only as an extrinsic quality. While evaluating applications, universities will not be able to give any student an advantage solely because of that student's race. But where a student demonstrates leadership, initiative, and other qualities the university seeks through his or her connection to race, the university can conclude that the student's experience (not his or her skin color) would benefit the diversity of the class. Advocates for more explicit but constitutional policies that give all minority students the same plus factor can still try to lobby to change and specify the law. As far as Michigan goes, universities should only stop seeing race as an intrinsic quality because a completely colorblind process would be immensely impractical and potentially unconstitutional.

Some courts might accept my definition while others may reject it. Circuits might even split over what exactly preferential treatment means, so it is possible that a new opportunity for the Supreme Court to articulate a definition will present itself again. The Court did not take its chance in *Schuette*, so Michigan universities have to interpret Proposal 2 as best they can. An intrinsic/extrinsic analysis is consistent with the language of Proposal 2 and the *Schuette* holding but may also improve minority enrollment and benefit universities in Michigan and around the country.

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234. *See* Mich. Civil Rights Comm'n Amicus Brief, *supra* note 140 ("Interpreted as drafted, Michigan Constitution, Article 1, §26's prohibition of preferential treatment does nothing to change the law as the term should not be applied to diversity admissions programs. Interpreted as intended, Michigan Constitution, Article 1, §26 prevents minority applicants from being assessed in the same 'holistic' manner considered as other applicants.").

235. *See* MICH. CONST. art. 1, § 26.

CONCLUSION

Is the Proposal 2 amendment that outlaws preferential treatment in higher education in Michigan consistent with the U.S. Constitution? The Supreme Court said yes, but the answer should really depend on what preferential treatment means. The term should mean that universities in Michigan can no longer ask applicants what race they identify with and use that information to increase that applicant's chances of getting into a university. In other words, Proposal 2 should mean that an applicant's race alone may no longer be considered a plus factor. But as long as universities treat race extrinsically and can point to the intrinsic qualities that an applicant's race enhances, a policy similar to the University of Michigan Law School's in *Grutter* could still be legal under Proposal 2. If the term is interpreted any more broadly, it will face many legal considerations that might have changed the *Schuette* holding. The only way that the amendment can be constitutional is for preferential treatment to be defined narrowly.

Much work still remains before we can one day get to the point that Justice O'Connor mentioned when she said that affirmative action policies would be limited in time. Until then, the Michigan voters' amendment stands, but the state's universities should still be able to see race as an extrinsic factor when assessing an applicant's profile to select a class with diverse experiences and opinions. This interpretation of *Schuette* and Proposal 2 snatches a small victory out of the jaws of defeat for the respondent Coalition and for diversity on university campuses. Moving forward, universities can have a little more clarity on what admissions policies are permissible and can come to appreciate applicants' races insofar as they make these applicants who they are.