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# BAMN! THE SIXTH CIRCUIT STRIKES DOWN MICHIGAN'S PROPOSAL <sup>2</sup>

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## I. INTRODUCTION

For at least the last two decades, the University of Michigan has had a formal policy of promoting racial and ethnic diversity among its student body.<sup>1</sup> To achieve this diversity, various units of the university give some degree of preference in the admissions process to persons from selected racial and ethnic groups. Members of non-preferred groups, along with some members of the preferred groups, have objected to the policies, and legal and political battles have ensued. These battles continue to this day, and the United States Supreme Court has granted certiorari to a case on this issue for the October 2013 term.<sup>2</sup>

Some issues related to consideration of race in admissions at the University of Michigan have already been ruled on substantively by the Supreme Court in *Gratz v. Bollinger*<sup>3</sup> and

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<sup>1</sup> The University may well have had such policies prior to the early nineties, *Coal to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary (BAMN) v. Regents of the Univ. of Mich.*, 701 F.3d 466, 470 (6th Cir. 2012), but the current formal policy of Michigan's law school was adopted in 1992 and that of the University's undergraduate school at least as early as 1995, *Grutter v. Bollinger*, 539 U.S. 306, 314-315 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

<sup>2</sup> *BAMN*, 701 F.3d 466, *cert. granted sub nom. Schuette v. Coal to Defend Affirmative Action*, 133 S. Ct. 1633 (2013). In October 2012, the Court heard oral arguments on closely related issues in *University of Texas at Austin v. Fisher* on appeal from the Fifth Circuit. 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012). The *Fisher* case presented the Court with arguments that may or may not affect the status of the *BAMN* appeal. If the Court holds all consideration of race unconstitutional, then the *BAMN* appeal arguably becomes moot. But if the Court approves of some consideration of race in the Texas case, then the related questions presented by the *BAMN* case will likely become the next-most-pressing issue in the broad area of consideration of race in admissions for the Court to reconcile.

<sup>3</sup> 539 U.S. 244 (2003).

*Grutter v. Bollinger*<sup>4</sup> in 2003. In *Gratz*, the Court ruled that the University of Michigan undergraduate college's admissions program amounted to a quota,<sup>5</sup> and thus was unconstitutional.<sup>6</sup> But on the same day, the Court upheld the constitutionality of the policy implemented by the University of Michigan Law School in the *Grutter* case,<sup>7</sup> the first case in which a majority of the Court approved the use of non-remedial consideration of race in the context of admissions decisions. Following the *Grutter* decision, the people of Michigan amended their Constitution through a ballot initiative (Proposal 2) that prohibited the use of racial preferences by government agencies, explicitly including public universities of the state. In response to Proposal 2, a group known as the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN) filed suit in federal court against the state, asserting that Proposal 2 violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

Proposal 2 was upheld in federal district court in March 2008,<sup>8</sup> and the case was appealed to the Sixth Circuit Court of Appeals. On November 15, 2012, the *en banc* appeals court held in *BAMN v. Regents of the University of Michigan*<sup>9</sup> that Proposal 2 violated the Fourteenth Amendment's Equal Protection Clause, restoring the university's authority to consider race as part of the admissions process. This Article will give a brief history of the development of the *BAMN*<sup>10</sup> case, a description of the opinions by the District Court and the Sixth Circuit, a discussion analyzing the strengths and weaknesses of

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<sup>4</sup> 539 U.S. 306 (2003).

<sup>5</sup> *Gratz*, 539 U.S. at 245.

<sup>6</sup> *Id.*, at 275.

<sup>7</sup> *Grutter*, 539 U.S. at 343.

<sup>8</sup> *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924 (E.D. Mich. 2008).

<sup>9</sup> 701 F.3d 466 (6th Cir. 2012).

<sup>10</sup> In the Sixth Circuit opinion in this case, the court used the term "coalition" to describe the group of plaintiffs. In this Article, the authors use the term "BAMN" to refer both to the group of plaintiffs and the case itself. They do this to avoid confusion with a Ninth Circuit case titled *Coalition for Economic Equity v. Wilson*, which will also be mentioned in this Article.

the court's opinion, and a conclusion exploring the implications of the case.

## II. HISTORICAL DEVELOPMENT OF THE *BAMN* CASE

In the early 1900s, the ability to pursue a college education was still a privilege enjoyed by few. Student bodies largely consisted of white males whose fathers were well-educated and held high-profile jobs in medicine, law, or business.<sup>11</sup> Many distinct classes of people, including women and African-Americans, were underrepresented in the major institutions of higher education.<sup>12</sup> In some cases, unmarried women were allowed to attend in order to pursue a career in teaching. However, if these women chose to marry, they were expected to drop out of school.<sup>13</sup> The few African-Americans who were admitted into prestigious universities were often subjected to racism from their peers, as well as from university faculty and administrators. For example, in the 1920s at Harvard University, African-Americans were not allowed to share dorm rooms with their white peers. They had to choose between footing the cost of rooming alone or finding another black student with whom to room.<sup>14</sup> Until World War II, Princeton University did not admit black students into their undergraduate programs, allowing them only to attend Princeton's Theological Seminary.<sup>15</sup>

A number of movements and initiatives challenged classic universities to become more inclusive and accessible. Only a few decades after the abolition of slavery, African-Americans who desired to pursue a college education began opening their own institutions, as they were not allowed to attend most of the predominantly white colleges in the country.<sup>16</sup> These

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<sup>11</sup> See generally Howard B. London, *Transformations: Cultural Challenges Faced by First-Generation*

*Students*, 1992 NEW DIRECTIONS FOR COMTY. COLL. 5 (2006); see also GEORGE MARSDEN, *THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF* (1994).

<sup>12</sup> MARSDEN, *supra* note 11.

<sup>13</sup> London, *supra* note 11.

<sup>14</sup> MARSDEN, *supra* note 11, at 359-60.

<sup>15</sup> *Id.*

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

institutions, known as Historically Black Colleges and Universities (HBCUs), were established to educate African-Americans in an era and a society that offered them few other higher education opportunities.<sup>17</sup>

After the long history of racial exclusion and isolation in institutions of higher education described above, the cultural and legal tide began to turn in the mid-twentieth century. As a result of *Brown v. Board of Education*,<sup>18</sup> *University of California Regents v. Bakke*,<sup>19</sup> and other similar cases, as well as general societal shifts, the need for equal access to and participation in higher education for formerly excluded groups became an increasing priority in America. But while the ideal of increased participation is laudable by modern ethical standards, the mechanics of a system that might lead to such an increase at highly competitive institutions, while at the same time surviving legal challenges, have been difficult to develop. In order to increase participation of historically excluded groups, individual members of those groups must be both willing and qualified to participate. Colleges and universities have been faced with a chronic scarcity of qualified minority applicants for admission, particularly at institutions to which admission is highly competitive.<sup>20</sup>

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<sup>17</sup> Thomas F. Nelson Laird et al., *African American and Hispanic Student Engagement at Minority Serving and Predominantly White Institutions*, 40 J.C. STUDENT DEV. 39 (2007). Today, HBCUs are highly successful in retaining and graduating African-Americans who go on to pursue graduate and doctoral degrees. In fact, African-Americans who attend these institutions tend to have greater academic success than African-Americans who attend predominantly white institutions. Women also began to establish all-female colleges across the country, providing educational opportunities to this underrepresented group. As a result of the establishment and growth of these institutions after World War I, the number of African-Americans and women who took advantage of the opportunity to pursue a college education increased sharply. See London, *supra* note II; MARSDEN, *supra* note II.

<sup>18</sup> 347 U.S. 483 (1954).

<sup>19</sup> 438 U.S. 265 (1978).

<sup>20</sup> See generally RICHARD SANDER & STUART TAYLOR, MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (2012); see also, e.g., Gratz v. Bollinger, 539 U.S. 244, 233-54 (2003) ("During all periods relevant to this litigation, the University has considered African-Americans, Hispanics, and Native Americans to be 'underrepresented minorities,' and it is undisputed that the University admits 'virtually every qualified . . . applicant' from these groups.").

The literature on this subject offers various explanations for the phenomenon. Due to economic, social, and racial disparities—disparities that are largely attributed to segregated neighborhoods that offer inferior educational resources<sup>21</sup>—students of color (particularly African-Americans, Latinos, and American Indians) struggle to access the opportunities of higher education that exist in the United States. These groups are more likely to attend public schools with high concentrations of students of color from low socioeconomic backgrounds and do not receive the academic preparation or critical information needed to advance to college.<sup>22</sup>

Even when students of color from lower socioeconomic backgrounds are college-qualified and have strong academic credentials, they are still reported to enroll in college at relatively low rates.<sup>23</sup> This disparity has been attributed to the lack of support first-generation students receive from their families and influential adults in their lives.<sup>24</sup> In fact, many are discouraged from aspiring to a college education by family, peers, and even teachers and administrators in their schools.<sup>25</sup>

The full explanation for the ongoing scarcity of qualified persons from historically excluded groups is complex, with contributing factors varying with the individual, and will be the subject of ongoing debate among social scientists for the foreseeable future. Meanwhile, the fact remains that competitive institutions of higher education have found it difficult to find what they consider to be a sufficient number of such persons.<sup>26</sup> Consequently, institutions have at times

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<sup>21</sup> Nelson Laird et al., *supra* note 17, at 39–56.

<sup>22</sup> *Id.* at 41.

<sup>23</sup> LAURA HORN ET AL., U.S. DEP'T OF EDUC., OFFICE OF EDUC. RESEARCH & IMPROVEMENT, MAPPING THE ROAD TO COLLEGE: FIRST-GENERATION STUDENTS' MATH TRACK, PLANNING STRATEGIES, AND CONTEXT OF SUPPORT (2000), available at <http://nces.ed.gov/pubs2000/2000i53.pdf>. Of the highly qualified first-generation students in Horn's study, approximately 25% were not enrolled at a four-year institution and another 13% had not enrolled at any postsecondary institution.

<sup>24</sup> Jennifer Engle et al., *Straight From the Source: What Works for First-Generation College Students*, 23 THE PELL INST. 1 (2006).

<sup>25</sup> *Id.* See also R.G. Fryer, "Acting White": *The Social Price Paid by the Best & Brightest Minority Students*, 6 EDUC. NEXT 53 (2006), available at [http://www.economics.harvard.edu/faculty/fryer/files/aw\\_ednext.pdf](http://www.economics.harvard.edu/faculty/fryer/files/aw_ednext.pdf).

<sup>26</sup> *Grutter v. Bollinger*, 539 U.S. 306, 318 (2003). Justice O'Connor, writing for the

resorted to granting preferential treatment to minorities in the admissions process by effectively lowering objective admissions standards as they apply to preferred applicants.<sup>27</sup> Individuals from groups treated as over-represented have objected to preferential systems due to the fact that a preference to members of one race necessarily penalizes members of non-preferred races, given the limited number of seats in a class.

Among the first lawsuits related to consideration of race in admissions from the field of higher education was *University of California Regents v. Bakke*.<sup>28</sup> Allan Bakke, a white applicant to medical school at the University of California-Davis, had been denied admission in favor of objectively less-qualified applicants pursuant to the medical school's quota system, which was designed to ensure a certain percentage of minority students.<sup>29</sup> Finding meaning from the *Bakke* decision has been difficult from the start, even to members of the Court who issued the opinion.<sup>30</sup> At least three firm principles may be taken from *Bakke*, however: 1) race-based quotas are unconstitutional,<sup>31</sup> 2) the Fourteenth Amendment does not always prohibit governmental consideration of race,<sup>32</sup> and 3) all

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majority, noted that the Director of Admissions at the University of Michigan Law School testified at trial that "she must consider the race of applicants because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores." *Id.*

<sup>27</sup> *Id.* at n.20.

<sup>28</sup> 438 U.S. 265 (1978). *Cf.* *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (ruling that the plaintiff's case was moot due to his provisional admission during pendency of the trial).

<sup>29</sup> *Bakke*, 438 U.S. at 265.

<sup>30</sup> *Id.* at 324-25 (Brennan, J., concurring in part and dissenting in part) ("the mature consideration which each of our Brethren has brought to [this case has] resulted in many opinions, no single one speaking for the Court").

<sup>31</sup> *Id.* at 289 ("To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status."). Arguably, even drawing this principle from *Bakke* was debatable because the Justices who agreed with Justice Powell that Allan Bakke must be admitted to the medical school thought that his statutory right to admission was sufficient and the constitutional question should not have been reached.

<sup>32</sup> *Id.* at 325 ("Mr. Justice Powell agrees that some uses of race in university

governmental decision-making processes that consider race must pass strict judicial scrutiny.<sup>33</sup> The inherent tension in these principles was apparent in the several concurring and dissenting opinions in *Bakke*, and in the state of confusion in equal protection law that prevailed after *Bakke*.<sup>34</sup> In fact, even these three principles were the subject of ongoing judicial and political battles, and the narrow and shifting majorities supporting each of them in the *Bakke* decision made them somewhat shaky legal ground for a time.<sup>35</sup> In the three decades after *Bakke*, though, the law has developed to a point where all three of these principles have been solidified to reliability.<sup>36</sup>

While these principles from *Bakke* were settled relatively quickly, a part of Justice Powell's opinion that was arguably *dicta* had what might be considered a greater impact on both the law and politics. Specifically, his statement that race could,

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admissions are permissible and, therefore, he joins with us [Justices Brennan, White, Marshall, and Blackmun] to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future.”)

<sup>33</sup> *Id.* at 291. “[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.” *Id.* “Unquestionably we have held that a government practice or statute which restricts ‘fundamental rights’ or which contains ‘suspect classifications’ is to be subjected to ‘strict scrutiny’ and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.” *Id.* at 357.

<sup>34</sup> John Dayton, *An Analysis of Judicial Opinions Concerning the Legal Status of Racial Diversity Programs in Educational Institutions*, 133 ED. LAW REP. 297, 314 (1999) (“The Court’s fragmented decisions in affirmative action cases have produced more heat than light, resulting in significant confusion concerning the legal status of race-conscious programs.”).

<sup>35</sup> See, e.g., *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990) (applying intermediate scrutiny to the affirmative action program at issue due to its purportedly benign intentions), *overturned by Adarand v. Peña*, 515 U.S. 200 (1995) (holding that strict scrutiny applies to all governmental classifications based on race).

<sup>36</sup> *Parents Involved in Cmty. Sch. v. Seattle*, 551 U.S. 701, 726 (2007) (“[T]he plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.”). “It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.” *Id.* at 720. “This Court has recently reiterated, however, that ‘all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.’” *Id.* at 741 (internal quotation marks omitted). See also *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“[G]overnmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry” (internal quotation marks and emphasis omitted)).

consistent with strict scrutiny, be considered a plus factor spawned a movement toward the acceptance of race as a compelling governmental interest in admissions decisions.<sup>37</sup> In spite of the fact that none of Justice Powell's colleagues joined him in the part of the *Bakke* opinion upholding diversity as a compelling governmental interest, colleges and universities across the country tailored admissions plans to satisfy his plus-factor statement.<sup>38</sup>

Given the at-that-time tenuous nature of Justice Powell's diversity rationale, members of non-preferred racial groups who had been denied admission under diversity plans sued. Cases from universities in Georgia, Texas, Washington, and Michigan all made it to federal appellate courts with varying results.<sup>39</sup> Culminating the process by which the diversity rationale made its way through the appellate circuits were the Supreme Court cases *Gratz v. Bollinger*<sup>40</sup> and *Grutter v. Bollinger*.<sup>41</sup> In these cases, the undergraduate program and the law school at the University of Michigan, respectively, were sued for considering race in the admissions process. However, while the law school had developed a plan that ultimately survived the Court's strict scrutiny,<sup>42</sup> the plan implemented by the undergraduate school did not.

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<sup>37</sup> See generally PETER WOOD, DIVERSITY: THE INVENTION OF A CONCEPT (2003).

<sup>38</sup> *Grutter*, 539 U.S. at 323 ("Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies.").

<sup>39</sup> Compare *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that student body diversity is not a compelling governmental interest that justifies racial preferences in admissions) and *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001) (striking down a diversity program as not narrowly tailored, but opining that diversity is not a compelling interest) with *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000) and *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (holding in both cases that student body diversity does constitute a compelling governmental interest that justifies racial preferences in university admissions).

<sup>40</sup> 539 U.S. 244 (2003).

<sup>41</sup> 539 U.S. 306 (2003).

<sup>42</sup> In upholding the law school's admissions plan, the *Grutter* Court held for the first time that student body diversity could serve as a compelling governmental interest. While recognizing the difficulty courts had had in determining the weight to accord Justice Powell's notion of diversity, the *Grutter* majority essentially adopted it, effectively settling the issue to a large degree in the context of higher education admissions decisions for the time being.

The Court's decisions in *Grutter* and *Gratz* had both legal and political ramifications. Concerning the law of racial preferences in admissions, institutions of higher education can use the *Grutter* and *Gratz* decisions as guidance for their admissions policies as they pertain to the promotion of diversity. Based on *Grutter*, absent any state law provisions to the contrary, for a limited time colleges may legally consider race as one of many plus factors in the admissions process, so long as they do not isolate preferred minorities from competition in the process. Based on *Gratz*, however, they must do so in a narrowly tailored manner.<sup>43</sup> What constitutes narrow tailoring is still difficult to define, and is dependent on the totality of the admissions process. But in *Gratz* the Court found that granting twenty of 100 points total based solely on race was not narrow tailoring, and, in fact, approached being a quota.<sup>44</sup>

From a political perspective, while the *Grutter* decision outlined to some degree the permissible boundaries of consideration of race in the admissions process, it did not mandate its consideration. Instead, universities that chose to grant a plus factor could do so consistent with *Grutter* and applicable state law. After *Grutter*, advocates for racial neutrality in the admissions process sought to change Michigan law to prohibit the consideration of race at the public colleges and universities of the state through a ballot initiative commonly referred to as Proposal 2. They succeeded in doing so, ultimately leading to an amendment to the Michigan Constitution that states in relevant part:

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<sup>43</sup> See William Thro, *The Constitutionality of Racial Preferences in K-12 Education After Grutter & Gratz*, 211 ED. LAW REP. 537, 551 (2006) ("With respect to this narrow tailoring process in the context of educational admissions, *Grutter* and *Gratz* decreed that such programs must provide for individualized consideration; be undertaken only after a serious good faith consideration of the viability of non-racial alternatives; not unduly burden non-minorities; and be periodically reviewed and of limited duration.").

<sup>44</sup> *Gratz*, 539 U.S. at 272 ("[U]nlike Justice Powell's example, where the race of a 'particular black applicant' could be considered without being decisive . . . the LSA's automatic distribution of 20 points has the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant.").

(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, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.<sup>45</sup>

As a result of this amendment, Michigan’s public universities were legally forestalled from granting racial preferences to candidates for admission. But the legal battle was not over as advocates of racial preferences, while fighting the political battle, had simultaneously prepared to file a complaint alleging that Proposal 2 violated the Federal Constitution.

### III. THE DISTRICT COURT OPINION IN *BAMN*

Proposal 2 went into effect December 3, 2006, but by that time, two separate groups of plaintiffs had already filed suit asserting that it violated the U.S. Constitution and federal law.<sup>46</sup> Collectively,<sup>47</sup> the plaintiffs sought to overturn Proposal 2 as it applied to university admissions, arguing that it violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, Title VI of the Civil Rights Act of 1964, and Title IX of the Education

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<sup>45</sup> MICH. CONST. art. I, § 26.

<sup>46</sup> *BAMN v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924, 932 (E.D. Mich. 2008).

<sup>47</sup> As noted above, there were two different groups of plaintiffs, each advancing theories that overlapped in some areas and differed in others. Since the details of which plaintiffs asserted which arguments are not important to the substance of this article, the authors will treat the claims as if they were from one group of plaintiffs.

Amendments of 1972.<sup>48</sup>

The district court began its analysis of the substantive issues by addressing the Equal Protection claims of the plaintiffs. It did so through two different lenses: conventional Equal Protection analysis and analysis under the *Hunter/Seattle*<sup>49</sup> line of Supreme Court cases. Additionally, the court ruled on arguments that Proposal 2 was preempted by federal law. Regarding the conventional equal protection analysis, the court observed that “college admission at elite universities is a zero-sum enterprise, and programs that prefer some students on the basis of race must do so necessarily at the expense of other applicants not of the preferred race.”<sup>50</sup> In light of this “stark reality,” the district court detailed Supreme Court holdings that establish strict scrutiny as the standard for all racial classifications by all levels of government in the United States.<sup>51</sup>

Applying conventional equal protection analysis, the court noted that the first step in the process “is to determine whether the challenged legislation draws any classification.”<sup>52</sup> Further, “the determining factor is not whether the enactment has race as its subject matter, but whether it facially purports to accord unequal treatment across racial lines.”<sup>53</sup> Holding that Proposal 2 is facially neutral, the court then sought to determine whether it “was motivated by a racial purpose or object, or is unexplainable on grounds other than race.”<sup>54</sup> The court found no evidence of intent to discriminate via the facially neutral Proposal 2 and noted the problematic nature of assigning

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<sup>48</sup> *BAMN*, 539 F. Supp. 2d at 933.

<sup>49</sup> *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle Sch. Dist. No.1*, 458 U.S. 457 (1982).

<sup>50</sup> *BAMN*, 539 F. Supp. 2d at 948.

<sup>51</sup> *Id.* at 948–49 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–90 (1978); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1993)) (noting two Supreme Court opinions, one in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and another in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), both applying intermediate scrutiny to racial classifications, but citing the portion of the *Adarand* decision specifically overturning *Metro Broadcasting*).

<sup>52</sup> *BAMN*, 539 F. Supp. 2d at 949.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 949–50 (citing *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 368 (6th Cir. 2002)).

intent to an entire electorate in any case.<sup>55</sup> Concluding its traditional equal protection analysis, the court noted that while sufficient evidence of a disparate impact on minorities would result from Proposal 2 to warrant a trial,<sup>56</sup> there was insufficient evidence of a discriminatory purpose.<sup>57</sup> Thus, summary judgment for the defendant was warranted under the traditional equal protection analysis.

Turning to the *Hunter/Seattle*<sup>58</sup> equal protection analysis, the court described the plaintiff's argument as follows:

They reason that before Proposal 2, minority groups could petition university officials to implement affirmative action programs, or at least consider race among a host of non-academic factors in making admissions decisions. However, after Proposal 2, the only way racial minorities can secure programs that account for race in the assembly of a student body is to seek and obtain passage of another constitutional amendment. That daunting process, they contend, imposes a unique and heavy burden upon them as a class and unconstitutionally distances them from the political process when they seek what the law allows, even if what they seek can be characterized as an advantage.<sup>59</sup>

The court accepted the plaintiff's contention that Proposal 2 made it more difficult for minorities to pass legislation in their interests.<sup>60</sup> Nonetheless, the court recognized the difference between laws prohibiting unequal treatment based on race and those that provide for racial preferences.<sup>61</sup> Based on

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<sup>55</sup> *Id.* at 950 (“Examining intent in the context of a ballot initiative presents a unique problem due to the sheer number of individuals whose intent is relevant.”).

<sup>56</sup> *Id.* at 951.

<sup>57</sup> *Id.* “It is the demonstration of a discriminatory purpose that vexes the Coalition plaintiffs and dooms their conventional equal protection argument, since the plaintiffs must show that Proposal 2 was enacted ‘because of, not merely in spite of, its adverse effects upon an identifiable group.’” *Id.* The court further noted the testimony of both Ward Connerly and Jennifer Gratz, two of the chief proponents of Proposal 2, in which both articulated non-discriminatory reasons for espousing the measure.

<sup>58</sup> As the *Hunter/Seattle* test is the basis upon which the Sixth Circuit overturned Proposal 2, the authors will explain it in further detail in the context of that opinion below.

<sup>59</sup> *BAMN*, 539 F. Supp. 2d at 953.

<sup>60</sup> *Id.* at 956 (“There is no question, therefore, that Proposal 2 makes it more difficult for minorities to obtain official action that is in their interest.”).

<sup>61</sup> *Id.* at 956-57 (citing *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 708 (9th Cir. 1997)) (“While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms.”).

this distinction, the court held, “Michigan may limit the ability of discrete groups to secure an advantage based upon a racial classification without offending the Fourteenth Amendment.”<sup>62</sup> Therefore, the *Hunter/Seattle* equal protection argument of the plaintiffs failed.

Having held that Proposal 2 did not violate the Equal Protection Clause under either a traditional equal protection analysis or the *Hunter/Seattle* test, the district court turned its attention to the preemption argument. The plaintiffs claimed that both Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 preempt Proposal 2. In order to preempt a state statute or a state constitutional provision, Congress must intend to do so, and this intent must be either expressed or implied in the federal statute or regulation in question.<sup>63</sup> In some cases, congressional intent to preempt is implied when a conflict exists which makes it physically impossible to comply with federal and state law simultaneously.<sup>64</sup> It is this type of conflict preemption that is recognized by the terms of Title VI.<sup>65</sup> The court noted that while Title IX is a gender-based analogue to Title VI, it also contains an express provision that it does not mandate preferential treatment. Finding that Proposal 2 contains language that resolves any conflict between federal and state law in favor of federal law if compliance with state law would result in a loss of federal funds such as those provided by Titles VI and IX,<sup>66</sup> the court held that Proposal 2 is not preempted by either federal statute.

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<sup>62</sup> *Id.* at 957.

<sup>63</sup> The power of Congress to preempt state law derives from the Supremacy Clause of the U.S. Constitution (“the Laws of the United States, which shall be made in Pursuance [of the Constitution] . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”). U.S. CONST. art VI, cl. 2.

<sup>64</sup> For a clear and concise explanation of the general law of federal preemption of state law, see Richard J. Scislawski, *Jenkins v. James B. Day & Co.: A New Defense of State Tort Law Against Federal Preemption—Is It Legitimate?*, 28 AKRON L. REV. 373, 374-376 (1995).

<sup>65</sup> *BAMN*, 539 F. Supp. 2d at 958 (“By its terms, Title VI recognizes conflict preemption only.”).

<sup>66</sup> *Id.* at 958.

IV. THE SIXTH CIRCUIT OPINION IN *BAMN*

In contrast to the district court, the Sixth Circuit ruled in favor of the plaintiffs, holding that Proposal 2 did violate the Equal Protection Clause.<sup>67</sup> As they had at the district court level, the plaintiffs in *BAMN* advanced two theories for why Proposal 2 violated the Equal Protection Clause: first, under a “political process” equal protection analysis and second, under a more conventional equal protection analysis regarding the impermissible classification of individuals based on race.<sup>68</sup>

Regarding the political process argument, the *BAMN* court relied on the Supreme Court cases *Hunter v. Erickson*<sup>69</sup> and *Washington v. Seattle School District No.1*.<sup>70</sup> Citing *Seattle*, the *BAMN* court stated that “[i]t is beyond dispute . . . that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner.”<sup>71</sup> Citing *Hunter*, the court declared that “the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.”<sup>72</sup>

According to the Sixth Circuit, the application of these principles to Proposal 2 is as follows: Prior to the passage of Proposal 2, anyone seeking to change admission policy for any reason could do so by lobbying either the admissions committees that made such decisions by lobbying the administrative structure up to and including the governing boards of the respective universities or, as actually happened, the people of Michigan directly.<sup>73</sup> After the passage of Proposal

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<sup>67</sup> *BAMN v. Regents of the Univ. of Mich.*, Nos. 08-1387/1534 at \*36 (6th Cir. 2012), available at <http://www.ca6.uscourts.gov/opinions.pdf/12a0386p-06.pdf> [hereinafter *BAMN II*] (“Finding those provisions of Proposal 2 affecting Michigan’s public colleges and universities unconstitutional, we REVERSE the district court’s judgment granting the Defendants-Appellees’ motion for summary judgment.”).

<sup>68</sup> *Id.* at \*9.

<sup>69</sup> 393 U.S. 385 (1969).

<sup>70</sup> 458 U.S. 457 (1982).

<sup>71</sup> *BAMN II*, Nos. 08-1387/1534 at \*10.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at \*4. Notably, lobbying the legislature was not an option in this case because the public universities of Michigan have plenary authority, pursuant to the

2, these processes were still available to anyone seeking to change admission policy for any reason other than race, sex, ethnicity, or national origin.<sup>74</sup> In contrast, anyone wishing to reinstate the consideration of race in the admission process would have to succeed in what the *BAMN* court considered the more burdensome process of another constitutional amendment repealing Proposal 2. Relying on *Hunter* and *Seattle*, the court stated:

[E]qual protection of the laws is more than a guarantee of equal treatment under existing law. It is also a guarantee that minority groups may meaningfully participate in the process of creating these laws and the majority may not manipulate the channels of change so as to place unique burdens on issues of importance to them.<sup>75</sup>

Even so, the court recognized that “the Constitution does not protect minorities from political defeat: Politics necessarily produces winners and losers.”<sup>76</sup> The task for the Sixth Circuit, then, was to identify a method of determining whether a political process was legitimate, even though it may produce results that are undesirable to minorities. Drawing upon the *Hunter* and *Seattle* decisions, the court identified the two prongs of what it called the *Hunter/Seattle* test. Under this test, minority groups are denied equal protection when a governmental act:

(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.<sup>77</sup>

Applying the *Hunter/Seattle* test to Proposal 2, the Sixth Circuit found that it had a racial focus because the affirmative action programs prohibited by the amendment primarily

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Michigan Constitution, to control the universities. *Id.* at \*20.

<sup>74</sup> The court discounted Proposal 2’s prohibition of discrimination based on sex, ethnicity, and national origin as being irrelevant to the issue. *Id.* at n.4. See Justice Gibbons’ dissenting opinion for a strong counter-argument. *Id.* at \*44.

<sup>75</sup> *Id.* at \*10.

<sup>76</sup> *Id.* at \*11.

<sup>77</sup> *Id.* at \*15.

benefitted minorities.<sup>78</sup> Comparing the affirmative action programs in question to the integrative busing programs at issue in *Seattle*, the court reasoned that “[j]ust as the desegregative busing programs at issue in *Seattle* were designed to improve racial minorities’ representation at many public schools ... race-conscious admissions policies increase racial minorities’ representation at institutions of higher education.”<sup>79</sup> Further, the *BAMN* court stated that “it is enough that minorities may consider [the repealed policy] to be ‘legislation that is in their interest.’”<sup>80</sup> Applying this standard, the court found that the policies repealed by Proposal 2 “inure primarily to the benefit of racial minorities, and that such groups consider these policies to be in their interest.”<sup>81</sup>

The *BAMN* court also found that Proposal 2 satisfied the second prong of the *Hunter/Seattle* test. The court started by explaining why the admissions process at the public universities of Michigan constitutes part of the political structure.<sup>82</sup> Citing supplemental briefings from the university defendants, the court stressed the plenary role of the policy-making boards of the universities<sup>83</sup> and the fact that the members of the boards are popularly elected. Additionally, these elected boards have “enacted bylaws—which they have complete authority to revise or revoke—detailing admissions procedures.”<sup>84</sup> The court recognized that the boards delegate this responsibility to admissions committees, but found this fact irrelevant because policy boards can and do change admissions bylaws frequently.<sup>85</sup> Thus, the court considered the

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<sup>78</sup> *BAMN II*, Nos. 08-1387/1534 at \*17 (“There is no material difference between the enactment in *Seattle* and Proposal 2, as both targeted policies that benefit minorities by enhancing their educational opportunities and promoting classroom diversity.”).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at \*18.

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

<sup>82</sup> *Id.* at \*19–\*23.

<sup>83</sup> *Id.* at \*20. Indeed, the boards are described as “the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature.” *Id.*

<sup>84</sup> *BAMN II*, Nos. 08-1387/1534 at \*21.

<sup>85</sup> *Id.* (“Since 2008, the University of Michigan’s Board of Regents has revised more than two dozen of its bylaws, two of which fall within Chapter VIII, the section

admissions process to be part of the political process in Michigan.

Having decided the question of the political nature of the admissions process, the *BAMN* court turned to whether Proposal 2 reordered the political process so as to place a special burden on minority interests. Noting that *Hunter* and *Seattle* established that both explicit and implicit restructuring satisfied this prong of the test,<sup>86</sup> the *BAMN* court stated that “any ‘comparative structural burden,’ be it local or statewide or national, satisfies the reordering prong of the *Hunter/Seattle* test.”<sup>87</sup> In *Hunter*, the political process had been altered so that changes related to housing and race had to gain the approval of both the City Council and a majority of the electorate.<sup>88</sup> Even more burdensome, in *Seattle*, changes in school busing based on race had to gain the approval of either the state legislature or the statewide electorate.<sup>89</sup> The Sixth Circuit found the political process to be altered as unfavorably to the interests of minorities by Proposal 2 as by either of the processes at issue in *Hunter* or *Seattle*. The court listed several different levels of government to which an interested party could apply for a change in admissions standards in any area other than race, including the ultimate process of constitutional amendment via ballot initiative. In contrast, parties interested in changing admissions standards in the area of race, after Proposal 2, had only the constitutional amendment process available to them.<sup>90</sup>

At trial, the Michigan Attorney General (AG) tried to distinguish Proposal 2 from the procedural changes in *Hunter* and *Seattle*. Specifically, the AG argued that prohibiting preferential treatment of a group by the government, as Proposal 2 did, is different than prohibiting discrimination,<sup>91</sup> as the procedural changes in *Hunter* and *Seattle* had done. The

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regulating admissions practices.”)

<sup>86</sup> *Id.* at \*24 (discussing the explicit nature of the restructuring in *Hunter* and the implicit restructuring in *Seattle*).

<sup>87</sup> *Id.* at \*25.

<sup>88</sup> *Id.* at \*24.

<sup>89</sup> *Id.*

<sup>90</sup> *BAMN II*, Nos. 08-1387/1534 at \*25-26.

<sup>91</sup> *Id.* at \*27.

*BAMN* court found this argument unpersuasive. The court also specifically rejected a Ninth Circuit ruling on an analogous issue,<sup>92</sup> holding, in effect, that the outcome of Proposal 2 was not the problem, but rather the change in process that it brought about.<sup>93</sup>

## V. DISCUSSION

Given the politically controversial<sup>94</sup> nature of the Sixth Circuit's opinion, it is unlikely that the *BAMN* decision will settle the matter of a state's authority to prohibit affirmative action programs at the state level through ballot initiatives. This is particularly true in light of the fact that the Ninth Circuit reached a contradictory conclusion in a case dealing with Proposition 209, the California Civil Rights Initiative. In *Coalition for Economic Equity v. Wilson*,<sup>95</sup> the Ninth Circuit held that an amendment to the California Constitution, with substantially similar requirements to those of Proposal 2, did not violate the Equal Protection Clause.<sup>96</sup> As a result of these diametrically opposed decisions, both rendered by federal appellate courts, uncertainty exists in this area of law. Moreover, the lack of clarity touches on two specific areas of national importance: principles of federalism and the individual right to equal protection of the law. Considering the important issues involved, the split among the two federal appellate courts that ruled on the issue, and the reality of continuing efforts to pass similar initiatives in other states, careful analysis of the court's opinion is warranted. In this section, the authors provide this analysis, focusing first on the

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<sup>92</sup> *Id.* at n.8 (citing *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 707 (1997)).

<sup>93</sup> *BAMN v. Regents of the Univ. of Mich.*, 701 F.3d 466, 487 (2012) ("The distinction urged by the Attorney General and the dissenters thus erroneously imposes an *outcome*-based limitation on a *process*-based right. What matters is whether racial minorities are forced to surmount procedural hurdles in reaching their objectives over which other groups do not have to leap. If they are, the disparate procedural treatment violates the Equal Protection Clause, regardless of the objective sought.").

<sup>94</sup> That the opinion is controversial is certain. The reader will remember that the court overturned the will of a majority of voters in Michigan with the *BAMN* decision.

<sup>95</sup> 122 F.3d 692 (9th Cir. 1997).

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

strengths of the decision and second on its vulnerabilities.

### *A. Strengths of the BAMN Opinion*

There are reasons to believe that the Sixth Circuit's opinion in the *BAMN* case constitutes a faithful application of Supreme Court precedent and of the principle of equal protection. Specifically, the Sixth Circuit based its opinion on the Court's opinions in *Hunter v. Erickson*<sup>97</sup> and *Washington v. Seattle School District No.1*,<sup>98</sup> which focus on political process theory. In doing so, the court made arguments that are at least rational and must be addressed. As noted above, the *Hunter/Seattle* test states that a governmental action violates the Equal Protection Clause if 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.<sup>99</sup>

It is clear by the language of the amendment that Proposal 2 has, at least in part, a racial focus. Further, in light of evidence presented to the Court in *Grutter* and *Gratz*, it is equally clear that many individual members of minority groups have benefitted from the affirmative action programs prohibited by Proposal 2. Thus, it is at least a rational argument that the two articulated elements of the first prong of the *Hunter/Seattle* test are met.

Likewise, there is rational support for the contention that the second prong of the *Hunter/Seattle* test is met. If one accepts, *arguendo*, that the first prong of the *Hunter/Seattle* test is met, it is almost beyond debate that Proposal 2 worked a reordering of the decision-making process in Michigan with regard to consideration, *inter alia*, of race in admission decisions. Further, given the nature of mathematics, an argument can be made that minorities are less likely to be able to effect a reimplementation of affirmative action after Proposal 2 than they would be able to if the admission

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<sup>97</sup> 393 U.S. 385 (1969).

<sup>98</sup> 458 U.S. 457 (1982).

<sup>99</sup> *BAMN v. Regents of the Univ. of Mich.*, 701 F.3d 466, 477 (2012).

committees in question changed policies. Thus, it is at least rational that the two articulated elements of the second prong of the *Hunter/Seattle* test are met.

The three above paragraphs describe the essence of the Sixth Circuit majority's reasons for striking down Proposal 2, without missing much in the way of important details. Frankly, to the reader with a healthy level of skepticism, the foundation of the *BAMN* decision as articulated by the court is thin. However, the *Grutter* Court's reliance on academic freedom as the basis for upholding the affirmative action programs in question may provide additional support for the *BAMN* decision. Specifically, the Court stated, "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."<sup>100</sup> Based on this concept, the *Grutter* Court arguably set aside universities as almost an extra state constitutional entity.<sup>101</sup> After all, it used the special niche of universities, grounded in the First Amendment, to support the notion that the usual restrictions of the Equal Protection Clause do not constrain universities when it comes to academic decisions. One might extend this logic to argue that, if an explicit provision of the U.S. Constitution does not constrain a university in its choice of students then, *a fortiori*, neither can a state constitutional provision.<sup>102</sup>

### *B. Weaknesses of the BAMN Opinion*

The arguments described above lend some support to the idea that Proposal 2 does violate the Equal Protection Clause under the political process theory. In spite of these arguments, several weaknesses exist in the *BAMN* opinion. The dissenting

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<sup>100</sup> *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

<sup>101</sup> This extra-constitutional status of public universities may even be stronger in Michigan than other states, considering the extraordinary provisions in the Michigan constitution related to the plenary authority of university governing boards. *See supra* note 73.

<sup>102</sup> This argument, of course, would have no application to the provisions of Proposal 2 relating to areas other than higher education.

opinions argued some of these points forcefully, pointing out, *inter alia*, that “a core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race,”<sup>103</sup> that *Hunter* and *Seattle* are inappropriate as precedents to *BAMN* due to fundamental differences in the underlying programs,<sup>104</sup> that the admissions programs at Michigan’s universities were not really political in nature,<sup>105</sup> and that Proposal 2 does not focus solely on race, but instead prohibits preferences for groups that, added together, make a majority.<sup>106</sup>

The various dissents offered strong arguments against the majority’s application of political process theory in the *BAMN* case. But there is a more fundamental argument that political process theory is flawed *per se*. For example, regarding the first prong of the *Hunter/Seattle* test, the Sixth Circuit held that the affirmative action programs in question were of primary benefit to minority interests.<sup>107</sup> If this is true, it contradicts the primary reasoning employed by the *Grutter* Court to uphold these plans in the first place. Justice O’Connor, writing for the majority in *Grutter*, clearly grounded the Court’s holding in the First Amendment right of universities to decide who gets to study there, based on what contributions a person can make to the intellectual atmosphere of a class.<sup>108</sup> Thus, it was for the good of all persons involved in university life, not just for the sake of minority interests, that diversity was a compelling interest in *Grutter*. Any holding to the contrary, specifically

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<sup>103</sup> *BAMN*, 701 F.3d at 493 (Gibbons, J., dissenting).

<sup>104</sup> *Id.* at 48, 93–98.

<sup>105</sup> *Id.* at 52.

<sup>106</sup> *Id.* at 67 (Sutton, J., dissenting).

<sup>107</sup> *Id.* at 479 (“We find that the holistic race-conscious admissions policies now barred by Proposal 2 inure primarily to the benefit of racial minorities, and that such groups consider these policies to be in their interest.”).

<sup>108</sup> *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (“The Law School’s concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce. These benefits are substantial. As the District Court emphasized, the Law School’s admissions policy promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’ These benefits are ‘important and laudable,’ because ‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’”).

one that supported non-remedial preferences for members of preferred racial groups, would arguably be in opposition to the foundational principle of the rule of law and the related principle of equal protection of the law. Without the justification of benefits to the academic marketplace of ideas as a whole, it is possible that the law school's plan that instigated Proposal 2 would have been held unconstitutional in 2003.

Moreover, the *BAMN* court appears to have adopted a stance that is unjustifiably deferential to the plaintiffs when it comes to their claims to represent minority interests. It is one thing to defer to the expertise of university officials in academic matters, but quite another to defer to advocacy groups seeking preferential treatment under the law. Specifically, the phrase "in the interest of minorities"<sup>109</sup> is so vague as to be subject to manipulation in service of special interests at the expense of equal protection and the rule of law. The court compounded this problem by imposing no limitations on things for which citizens could lobby, using such strong language as "whatever [their objectives] are."<sup>110</sup> The use of such language begs carrying the argument to its logical extreme. The logical extreme of distributing benefits and burdens along racial lines has been carried out in practicality in America, and the results have undermined rather than supported equality before the law, to say nothing of human dignity. If the Sixth Circuit was justified in its deference to "the interests of racial minorities,"<sup>111</sup> how could any principled basis exist for limiting the allocation of benefits to members of minority groups? Where could any lines be drawn that were not arbitrary and unattached to principle? What of the rights of minorities who do not wish to be evaluated based on their skin color? The questions answer themselves and highlight the arbitrary and purely political nature of adopting a legal standard of "whatever [their objectives] are."<sup>112</sup>

Regarding the second prong of the *Hunter/Seattle* test, the

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<sup>109</sup> *BAMN*, 701 F.3d at 486.

<sup>110</sup> *Id.* at 482-83.

<sup>111</sup> *Id.* at 486.

<sup>112</sup> *Id.* at 483.

Sixth Circuit's opinion in *BAMN* purports to protect minority interests from majority manipulation of the political process. For instance, the court stated that *Hunter* and *Seattle* "set the benchmark for when the majority has not only won, but has rigged the game to reproduce its success indefinitely."<sup>113</sup> Undoubtedly, such a rigging would violate fundamental fairness, but the conclusion that Proposal 2 does so is inconsistent with historical fact. The affirmative action programs at issue were voluntarily implemented through a political process in Michigan with a smaller minority population than exists today.<sup>114</sup> Ignoring this fact, however, the Sixth Circuit relied heavily on the implied assumption that majority and minority interests are necessarily permanently set in opposition and on the dubious conclusion that all members of a group think and vote the same way. Supreme Court cases related to racial preferences since *Grutter* contain language skeptical of such thought. In *Parents Involved in Community Schools v. Seattle*, for example, a plurality of the prevailing majority noted that racial classifications "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."<sup>115</sup>

Despite the *BAMN* court's concerns with manipulation of

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<sup>113</sup> *Id.* at 474-75.

<sup>114</sup> Census data reveal that since 1980, whites, as a percentage of the total population of Michigan, have been decreasing steadily from about 84% in 1980 to about 79% in 2010. U.S. Dep't of Commerce, *1980 Census of Population* (1980), available at <http://www2.census.gov/prod2/decennial/documents/1980/>

1980censusofpopu80124uns\_bw.pdf; U.S. Census Bureau, *Profile of General Population and Housing Characteristics* (2010), available at [http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/10\\_DP/DPDP1/040000US26](http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/040000US26) (last visited Feb. 28, 2013).

<sup>115</sup> *Parents Involved in Cmty. Sch. v. Seattle*, 551 U.S. 701, 746 (2007) (internal citations omitted). See also *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 705 ("When we attribute equal protection rights to groups rather than to individuals, 'it reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.'" (citing *Shaw v. Reno*, 509 U.S. 630 (1993))).

the political process, the opinion itself arguably turns the political process on its head. The practical result is that only university officials, specifically the faculty, can determine whether race should be considered when setting admissions standards.<sup>116</sup> Following the logic of the *BAMN* court, even if every voter in the state except those on the admissions committee and at least a few members of a minority group who considered racial preferences to be in their interests wanted to prohibit racial preferences, they would be overruled by a relatively small number of faculty.<sup>117</sup> Alternatively, the Sixth Circuit apparently would approve a state constitutional amendment that provided in detail every aspect of the admissions process, as this would not single out race at the most remote level of government. Obviously, this would be an unwieldy policy, but it is the only other practical way a state could prohibit affirmative action under the *BAMN* decision once a university had decided to implement it. As it stands, the *BAMN* decision arguably places unchecked power in the hands of a few faculty members, many—if not all—of whom are protected from political pressure by tenure.<sup>118</sup>

It is true that the rule of law should allow a very few to overrule the very many in pursuit of fidelity to foundational principles. But in contrast to the Sixth Circuit, the Ninth Circuit's reasoning in *Coalition for Economic Equity v. Wilson*<sup>119</sup> suggests that just the opposite occurred when Proposal 2 was overturned. Ruling on political process theory

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<sup>116</sup> Writing in dissent, Judge Gibbons cites the testimony of the deans of the University of Michigan Law School and Wayne State's law school, both of whom testified that all admission decisions rest with the faculty with essentially no process existing to overturn their decisions. In fact, the Dean of Wayne State testified that any attempt by the university's board of governors to overrule faculty decisions regarding admissions would "precipitate a constitutional crisis." *BAMN v. Regents of the Univ. of Mich.*, 701 F.3d 466, 499–500 (2012).

<sup>117</sup> In fact, while no one seriously believes that any constitutional provision or other form of law represents unanimity of opinion, Proposal 2 does represent the collective political will of the people of Michigan on this issue.

<sup>118</sup> As an aside, anyone who has sat through a faculty meeting could tell you that it is not out of the realm of possibility that changing the minds of the electorate at large would be easier than changing the minds of a group of professors—less expensive, maybe, but not necessarily easier.

<sup>119</sup> *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997).

as it applied to Proposition 209 in California, the court noted that there is no affirmative requirement for the government to consider race in the decision-making process. The court stated:

To hold that a democratically enacted affirmative action program is constitutionally permissible because the people have demonstrated a compelling state interest is hardly to hold that the program is constitutionally required. The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.<sup>120</sup>

Again, in contrast to the Ninth Circuit, the Sixth Circuit arguably gave insufficient weight to the idea that there is a difference between lobbying for protection from discrimination and lobbying for racial preferences. The changes to political process that the Supreme Court held unconstitutional in *Hunter* made it more difficult for individuals to seek protection from discrimination. In contrast, Proposal 2 made it more difficult for anyone to lobby for racial preferences. The Sixth Circuit addressed this difference by finding that the *BAMN* plaintiffs were not asserting a right to an outcome, but a right to lobby using the same process as for non-race related changes to policy.<sup>121</sup> If accepted at face value, there is some force to that argument. But Proposal 2 did not deny anyone of any race the opportunity to lobby for race-based admissions policy changes differently than anyone else. Thus, while the *BAMN* court stated that “the Constitution does not protect minorities from political defeat: Politics necessarily produces winners and losers,”<sup>122</sup> it seems to have belied that principle with its ruling. If individuals in favor of affirmative action are free to compete in the same process as those against it, then the only thing left for the *BAMN* court to find objectionable is the likelihood of political defeat by numerically smaller advocacy groups. This being the case, the different outcomes sought in *Hunter* and *BAMN* are relevant

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<sup>120</sup> *Id.* at 709.

<sup>121</sup> The irony of this assertion seems to have escaped the *BAMN* court. Under the University of Michigan’s admissions plans, Asians and Caucasians must overcome not merely procedural barriers, but substantive ones that other groups do not have to leap. In fact, at times these barriers are insurmountable because no amount of lobbying the body politic will change an individual’s race.

<sup>122</sup> *BAMN v. Regents of the Univ. of Mich.*, 701 F.3d 466, 474–75 (2012).

and substantially erode *Hunter's* applicability to *BAMN*.

The differing context of the *Seattle* case also leads to the conclusion that it is a bad analogy for the *BAMN* case. In *BAMN*, the court emphatically noted the fact that the *Seattle* case did not remediate *de jure* segregation, but instead sought to espouse integration. This was certainly true, but the Sixth Circuit over-extended itself with the following statement: "There is no material difference between the enactment in *Seattle* and Proposal 2, as both targeted policies that benefit minorities by enhancing their educational opportunities and promoting classroom diversity."<sup>123</sup> To the contrary, quite significant differences exist in the contexts of admissions in higher education and that of K-12 schools.<sup>124</sup> In fact, the very race-based busing at issue in *Seattle* has subsequently been held to be unconstitutional by the Supreme Court in *Parents Involved in Community Schools v. Seattle*<sup>125</sup> precisely because of the differences in the *Seattle* busing plan and the *Grutter* admissions plan. The *Parents Involved* Court found that the race-based admission policies of Seattle Public Schools were more akin to Michigan's unconstitutional undergraduate admissions plan because they "rely on racial classifications in a 'nonindividualized, mechanical' way."<sup>126</sup> The Court further stated, "In upholding the admissions plan in *Grutter* . . . this Court relied upon considerations unique to institutions of higher education. . . . The present [*Parents Involved*] cases are not governed by *Grutter*."<sup>127</sup> Thus, *Seattle's* precedential value to the *BAMN* case erodes as much as does that of *Hunter*, if for different reasons.

From a broader perspective, Proposal 2 did set race apart as a category so that making a change to admissions policy in that area is arguably more burdensome than in other areas. But that is correctly viewed as consistent with the Supreme Court's

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<sup>123</sup> *Id.* at 478.

<sup>124</sup> See generally J. Kevin Jenkins, *Grutter, Diversity & Public K-12 Schools*, 182 ED. LAW REP. 353 (2004) (discussing the application of *Grutter* in the K-12 education context).

<sup>125</sup> 551 U.S. 701 (2007).

<sup>126</sup> *Id.* at 723.

<sup>127</sup> *Id.* at 725.

Equal Protection Clause jurisprudence and its underlying principles. It makes sense that anyone seeking to amend policy so that racial preferences may be granted by government would have a harder time than, say, someone seeking to do away with preferences for athletes. No one has a fundamental right to be considered for admission without regard to their lack of athletic ability. But everyone has at least a presumptive right to be considered without regard to race.<sup>128</sup>

Concerning the fundamental right to be treated by the government without regard to one's race, it is important to note that the Supreme Court has repeatedly held that that is an individual right, not a group right.<sup>129</sup> In *Adarand v. Peña*, the Court stated, "The Fifth and Fourteenth Amendments to the Constitution protect persons, not groups."<sup>130</sup> More recently in *Grutter*, the Court affirmed this principle, adding, "We are a 'free people whose institutions are founded upon the doctrine of equality.' It follows from that principle that 'government may treat people differently because of their race only for the most compelling reasons.'<sup>131</sup> More recently still, in *Parents Involved*, the Supreme Court listed a litany of precedents upholding this notion, going back to the *Brown v. Board of Education* cases, in which the Court stated, "At stake is the *personal* interest of the plaintiffs in admission to public schools . . . on a nondiscriminatory basis."<sup>132</sup> In the face of the Court's insistence on the individual right to equal protection, it is difficult to imagine it upholding the notion that groups have a collective right to a specific process to lobby for what is only barely permissible and only for a limited time.<sup>133</sup>

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<sup>128</sup> *Id.* at 793 (Kennedy, J., concurring in part and concurring in the judgment) (noting "the presumptive invalidity of a State's use of racial classifications to differentiate its treatment of individuals.").

<sup>129</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

<sup>130</sup> *Id.*

<sup>131</sup> *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

<sup>132</sup> *Parents Involved*, 551 U.S. at 743 (citing *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) (emphasis in *Parents Involved* opinion)).

<sup>133</sup> *Grutter*, 539 U.S. at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."). See also *Taxman v. Bd. of Educ. of Piscataway*, 91 F.3d 1547 (3d Cir. 1996) (noting the time limitation on affirmative action programs in employment).

## VI. CONCLUSION

The Sixth Circuit in *BAMN* and the Ninth Circuit in *Coalition for Economic Equity* ruled on a very similar issue: whether a state constitutional amendment prohibiting the consideration of race in the context of college admissions violates the Equal Protection Clause under political process theory. But the Sixth and Ninth Circuits reached conclusions that were at opposite ends of the spectrum. Consequently, whether the Equal Protection Clause is violated by such amendments currently depends on whether the state that passed the amendment is in the Sixth or Ninth Circuit. As to states outside those jurisdictions, the law is unknown. Considering the likely continuation of efforts to enact ballot initiatives in states outside the Sixth and Ninth Circuits, conflict around this issue will surely continue.<sup>134</sup> Further, for reasons described above, the *BAMN* court's application of political process theory to Proposal 2 arguably erodes the substantive guarantees of the Equal Protection Clause and the fundamental principle of the rule of law. The opposing opinions from the Sixth and Ninth Circuits lead to both confusion and unpredictability in this area of law and a variation of substantive, even foundational, rights across states. In order to provide for consistency and predictability, the Supreme Court must take the opportunity presented by the Michigan case to reconcile the dichotomy established by the existing appellate court decisions.

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<sup>134</sup> See, e.g., Nat'l Conference of State Legislatures, *Affirmative Action: State Action* (Nov. 2012), available at <http://www.ncsl.org/issues-research/educ/affirmative-action-state-action.aspx>, for a list of recently passed ballot initiatives or referenda outlawing racial preferences in several states.