

Fool Me Once... The Need for Federal Legislation to Remedy Fraud and Misrepresentation in Ballot Initiatives that Negatively Affect Minority Communities

Jessica George

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

Recommended Citation

Jessica George (2018) "Fool Me Once... The Need for Federal Legislation to Remedy Fraud and Misrepresentation in Ballot Initiatives that Negatively Affect Minority Communities," *Journal of Civil Rights and Economic Development*: Vol. 32 : Iss. 2 , Article 5.
Available at: <https://scholarship.law.stjohns.edu/jcred/vol32/iss2/5>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

FOOL ME ONCE...

THE NEED FOR FEDERAL LEGISLATION TO REMEDY FRAUD AND MISREPRESENTATION IN BALLOT INITIATIVES THAT NEGATIVELY AFFECT MINORITY COMMUNITIES

BY: JESSICA GEORGE

I. INTRODUCTION

Imagine you are taking your weekly Sunday trip down to your local Stop N' Shop to quickly grab some milk. After saying hello to some of the familiar faces along the way, you notice a ballot petitioner approaching you. She stops you to ask if you have some time to learn about an important petition that is making its way to the ballot for the upcoming election. Being a citizen who wants to stay informed about the issues, you oblige. She tells you that this particular proposal is one that is beneficial to you and your community because it will offer equal opportunities in education, employment, and public contracting. In fact, she is one of the people who can really benefit from this proposal, so you are persuaded by her earnest enthusiasm.

You know the initiative that she is telling you about is one that can make a positive impact on many people in your life. Wanting to get behind something that can benefit your community, you agree to sign her petition. She hurriedly hands you the pen and petition without showing you the actual proposal, thanks you for your time, and rushes off to a nearby group of local community members. Feeling good about your choice, you continue to run your errands.

To your dismay, you later learn that the petitioner blatantly lied to you. The petition was to actually abolish the equal opportunity programs that she explained to you. She, and hundreds of other petitioners, targeted your community knowing that you and your neighbors are supportive of these types of initiatives, and

misrepresented the entire issue. Now this proposal, which negatively impacts the opportunities of those you know and love, is on the ballot for the upcoming election. You would have never put this issue on a ballot for popular vote if you had known this. Although you voted against it and spread the word about the fraud and misrepresentation you experienced, the proposal passed. A majority, whose interests the proposal actually benefitted, outvoted you at the polls.

Thus, because it believed the vote was representative of the people's choice, the government amended your state constitution to include the proposal. Now, the programs and initiatives that benefitted you and your community are gone because you were misled into signing a proposal that you were told would help. To get rid of this amendment, you would need to take on the inordinately difficult task of amending your state constitution. Unfortunately, there is no solution to remedy the fraudulent process that got the proposal on the ballot to begin with.

This scenario is based on the accounts of hundreds of Michigan voters, who were duped into supporting a proposal to ban all equal opportunity programs in public education, public employment, and public contracting in 2005.¹ This proposal was part of a larger national campaign by California businessman, Ward Connerly, to end affirmative action.² In Michigan, an organization called the Michigan Civil Rights Initiative (MCRI) attempted to amend the state constitution by garnering signatures to put the proposal on the general election ballot.³ Despite finding that these signatures were obtained through "a deceptive political process"⁴ filled with fraud and misrepresentation, Michigan state courts still allowed

¹ See MICH. C.R. COMM'N, REPORT OF THE MICHIGAN CIVIL RIGHTS COMMISSION REGARDING THE USE OF FRAUD AND DECEPTION IN THE COLLECTION OF SIGNATURES FOR THE MICHIGAN CIVIL RIGHTS INITIATIVE BALLOT PETITION (2006). This report summarizes testimony from Michigan citizens who signed the Michigan Civil Rights Initiative's petition because they were told it supported affirmative action (hereinafter, this will be referred to as the "MCRC Fraud Report").

² MICH. C.R. COMM'N, *"One Michigan" at the Crossroads: An Assessment of the Impact of Proposal 06-02 By the Michigan Civil Rights Commission*, MICHIGAN.GOV, 5-6 (Mar. 7, 2007), https://www.michigan.gov/documents/mdcr/FinalCommissionReport3-07_1_189266_7.pdf (hereinafter, this will be referred to as the "MCRC Impact Report").

³ *Id.* at 2.

⁴ *Operation King's Dream v. Connerly*, No. 06-12773, 2006 WL 2514115 at *17 (E.D. Mich. Aug. 29, 2006).

the proposal to be put on the ballot.⁵ With the confusion surrounding the fraudulent and misrepresentative petitioning process still looming, Michigan citizens voted the proposal into their state constitution.⁶ Though there was subsequent litigation about a remedy for Michigan's deceived voters,⁷ they were ultimately left without any recourse.

Organizations and individuals sought justice for the voters by pursuing different causes of action in different courts.⁸ In *Schuette v. Coalition to Defend Affirmative Action By Any Means Necessary*,⁹ the Supreme Court considered the issue of whether to uphold this amendment to the Michigan constitution. In the plurality opinion, the Justices upheld the amendment to ban affirmative action for their own various reasons.¹⁰ Chief Justice Roberts, Justice Kennedy, and Justice Alito reasoned that voters should be allowed to determine whether or not race should be considered in public education, housing, and employment.¹¹ Justices Scalia and Thomas believed that the amendment did not violate the Equal Protection Clause of the Fourteenth Amendment¹² because there was no racially discriminatory purpose behind it.¹³ Finally, Justice Breyer reasoned that the amendment was consistent with the Equal Protection Clause, that the people should be able to decide whether or not to use race-

⁵ *Id.* at *1.

⁶ MCRC Impact Report, *supra* note 2, at 6–7.

⁷ See *Operation King's Dream v. Connerly*, 501 F.3d 584, 591–92 (6th Cir. 2007). After Michigan's federal district court held that there was no violation of the Voting Rights Act, an appeal to the 6th Circuit was dismissed because the action was rendered moot by the November 2006 election and the passage of the amendment. The court would not consider for the first time on appeal plaintiffs' request for the Court to invalidate portions of Michigan's constitution amended by initiative.

⁸ See *Operation King's Dream*, 2006 WL 2514115 at *1; see also *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1629 (2014). The first case concerned the ballot initiative's fraudulent practices and the second case examined the constitutionality of the state amendment. This amendment implicated public education, public housing, and public employment, so several different organizations and individuals brought claims about whether this type of issue should have been placed on a ballot at all.

⁹ *Schuette*, 134 S. Ct. at 1629. Organizations and individuals with ties to state universities supporting affirmative action initiated this suit against Michigan state officials and universities.

¹⁰ *Id.* at 1638.

¹¹ *Id.* at 1630–38.

¹² U.S. CONST. amend. XIV, § 1 (guaranteeing that no State shall deny to any person within its jurisdiction the equal protection of the laws).

¹³ *Schuette*, 134 S. Ct. 1623, 1639–48.

conscious programs, and that the amendment did not create diminution of the minority's ability to participate in the political process.¹⁴ Thus, with two dissenting, six out of the nine Justices¹⁵ upheld the Michigan amendment as constitutional because it seemed consistent with the voters' choice and because it did not violate any other part of the Constitution.

The problem is that the amendment should never have been voted on in the first place. The proponents of the amendment gathered signatures to place the proposal on the ballot by blatantly lying to voters about the substance of the initiative.¹⁶ Had those voters known what the proposal was actually about, they would not have supported it at all and it would not have even had the chance to become a state amendment.¹⁷ The Court in *Schuette* did not address this issue.¹⁸ However, a Michigan state court decided that the only piece of federal legislation that was designed to protect minority voters, the Voting Rights Act of 1965¹⁹, did not provide a remedy.²⁰ These voters were fraudulently deceived into supporting a proposal that ultimately became an amendment.²¹ Because the Voting Rights Act does not provide a cause of action for this type of injustice, a new remedy is imperative.

This Note proposes new federal legislation to provide relief for voters who might be negatively affected by fraud and deception at any phase of a ballot initiative, including the signature-gathering process. Ballot initiatives are a significant part of the democratic process. They must be protected from fraud, especially when those practices result in initiatives that harm specific minority group

¹⁴ *Id.* at 1648–51.

¹⁵ *Id.* at 1638. Justice Kagan did not take part in the decision.

¹⁶ See generally MCRC Fraud Report, *supra* note 1, at 6–11 (detailing citizens' testimony about specific experiences with petitioners who lied to them about the substance of the petition).

¹⁷ *Id.*

¹⁸ As discussed above, the Supreme Court only considered whether the Constitution would allow the Judiciary to set aside an amendment that bans affirmative action to a state constitution. The *Schuette* case came to the Court from a suit initiated by students, faculty, and prospective students of Michigan public universities who questioned whether a state amendment could abolish affirmative action. See *Schuette*, 134 S. Ct. at 1630.

¹⁹ 52 U.S.C.A. § 10301 (2018).

²⁰ See *Operation King's Dream*, 2006 WL 2514115 at *35.

²¹ This result is even more troubling today, since the Supreme Court weakened the Voting Rights Act in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). In this case, the Supreme Court struck down provisions of the Voting Rights Act that actually enforced the Act. This case will be discussed in detail later in this Note.

interests. This legislation will give deceived voters a cause of action to stop the effect of a ballot initiative before it negatively impacts them. Voters can bring a civil action in federal court for preventive relief, including a permanent or temporary injunction, restraining order, or other order.

This Note will discuss the need for this type of legislation by analyzing (1) the importance of protecting ballot initiatives, (2) the fraudulent practices that took place in Michigan, (3) the effects of letting this type of political process decide controversial issues, and (4) the continuing inadequacy of the Voting Rights Act to remedy this problem. Part II will discuss why ballot initiatives are part of the political process and why they should be protected. Part III will analyze what happens when ballot initiatives are not protected by examining the specific instances of fraud in the campaign in Michigan. Part IV analyzes why the Voting Rights Act is not an adequate remedy for this type of harm in ballot initiatives. Part V discusses the effects of a fraudulent ballot initiative on minority communities through an analysis of Justice Ginsberg and Justice Sotomayor's dissent in *Schuette* to further explain the need for a remedy. Part VI proposes a new federal cause of action to remedy these deceptive and fraudulent political processes that particularly impact minority communities.

II. BALLOT INITIATIVES AND THE IMPORTANCE OF PROTECTING THEM

The fraud in Michigan took place during the signature-gathering process of a ballot initiative. Ballot initiatives are a process in which citizens can bypass their own state legislature and submit a proposed statute or constitutional amendment to a popular vote for enactment as an expression of desire for political change.²² They are a part of the political process and must be protected. The following sections will analyze the process of

²² See *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (noting that circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change). See also Anna Skiba-Crafts, *Conditions on Taking the Initiative: The First Amendment Implications of Subject Matter Restrictions on Ballot Initiatives*, 107 MICH. L. REV. 1305, 1308 (2009) (explaining that ballot initiatives were promoted by Populists because they allow citizens to bypass the legislature through popular vote).

getting initiatives on the ballot, why this process is a part of the political process, and why this process needs to be protected.

The process of getting initiatives on the ballot and what that process represents.

To place an initiative on the ballot, citizens need to satisfy a number of procedural requirements that vary across states.²³ Generally, proponents of an initiative must get the text of their proposal certified by a state official and collect a state-specified number of signatures in support of the proposal by circulating petitions.²⁴ Then, if enough signatures are verified, the secretary of state will approve the initiative to appear on the ballot in the next election.²⁵ If a majority of voters vote for an initiative at the ballot, it will pass into law.²⁶

This process of getting an initiative on the ballot is significant because it allows state citizens to circumvent their state legislatures, who are supposed to be representative of the people, and ultimately create law in a different way. When ballot initiatives first arose in the early 1900s, they were promoted by Populists who were disappointed with representative democracy.²⁷ The Populists believed direct democracy would increase citizen involvement in politics, make government more democratic, and circumvent the influence of special interests and money.²⁸ Thus, ballot initiatives were promoted because citizens believed they would accurately represent the will of the people. They allow citizens to intervene in the democratic process when their representative officials are not carrying out their wishes.

Ballot initiatives are also a fair representation of the people's choice because they are mechanisms of direct democracy.²⁹ All eligible voters are allowed to cast their ballot directly on a matter

²³ Skiba-Crafts, *supra* note 22, at 1309 (describing the general process for getting a proposal on the ballot).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 1308.

²⁸ *Id.* Direct democracy is the process by which citizens vote on a proposal directly.

²⁹ Note, *Making Ballot Initiatives Work: Some Assembly Required*, 123 HARV. L. REV. 959, 959 (2010) (noting that all eligible voters can participate in decision-making instead of only elected representatives).

without having to rely on a perhaps-unaccountable representative.³⁰ Thus, all eligible voters can participate in decision-making instead of only a select few.³¹ The process of petitioning and circulating a proposal, being informed about an issue, and then signing a signature in support allows citizens themselves to ensure their own choice is represented. Furthermore, the initiative is a check on potential tyranny, since each person's vote is counted equally, so no one has more influence because of status or other factors.³²

Why the ballot initiative is part of the political process and why it must be protected.

This ballot initiative process is part of the political process. As discussed above, it is an important avenue for citizens to create change in law without relying on state legislatures. Every aspect of the ballot initiative process should be considered part of the political process and should be protected to ensure fairness, including the process of gathering signatures in support of proposed legislation. By requiring proponents to gather enough signatures to place a proposal on the ballot, the state requires proponents of the proposal to demonstrate that this is an issue that the citizens want to consider.

In fact, in *Meyers v. Grant*³³, the Supreme Court acknowledged the significance of the signature-gathering phase of ballot initiatives. The case primarily concerned the issue of a statutory prohibition against the use of paid circulators, but Justice Stevens explained that the signature-gathering process is an expression of a desire for political change and a discussion of the merits of the proposed change.³⁴ He noted that petition circulators aim to persuade citizens that a matter is one deserving public scrutiny and debate that would be considered by the whole electorate.³⁵

³⁰ *Id.*

³¹ *Id.*

³² *Id.* (explaining that is counterproductive to attempt to fix the problems inherent in a majority-rule voting system, like tyranny, by stressing voting systems and elections even more. Addressing these problems likely requires that we stress elections less and supplement them with other forms of citizen interaction).

³³ 486 U.S. 414 (1988).

³⁴ *Id.* at 421.

³⁵ *Id.*

Justice Stevens concluded that the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as “core political speech.”³⁶ Thus, the signature-gathering phase of ballot initiatives is supposed to be indicative of the people’s political speech and their desire for political change. Therefore, each part of the ballot initiative, including the signature-gathering process, constitutes a significant part of the political process that citizens rely on to change the law.

Since the ballot initiative is an important part of the political process, it must be protected from any fraudulent or deceptive practices that could improperly influence it and create a misrepresentation of citizens’ will. That is why states that allow ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally.³⁷ States should use this power to protect ballot initiatives from fraudulent acts and deception. Ballot initiatives are vulnerable to three weaknesses that can further perpetuate practices that may taint the signature-gathering process.³⁸

First, ballot initiatives are easily influenced by money and power, which creates the risk of initiative processes and outcomes being misaligned with principles of democracy.³⁹ The Michigan case illustrates this weakness because the entire campaign was part of a larger national initiative led by wealthy California businessman, Ward Connerly.⁴⁰ He made it his mission to end affirmative action and already achieved his goal in California and

³⁶ *Id.* at 422 (explaining that this type of speech is very important, which is why it is protected by the First Amendment of the federal Constitution).

³⁷ See *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999) (noting the importance of states protecting ballot initiatives in this case when it analyzed whether a state regulation requiring ballot circulators to wear an identification band violated the First Amendment free speech guarantee).

³⁸ See Michele S. Moses, and Amy N. Farley, *Are Ballot Initiatives A Good Way To Make Education Policy? The Case Of Affirmative Action*, EDUC. STUD. 47.3 260, 270–274 (2011) (explaining that there are several arguments against the use of ballot initiatives in formulating education policy about affirmative action. They are: abuse of power, the use of deception, potential for misinformation, and negative impact on minorities). This Note uses these arguments to explain additional reasons why ballot initiatives need protection.

³⁹ *Id.* at 271.

⁴⁰ See MCRC Impact Report *supra* note 2, at 5.

Washington State.⁴¹ The second weakness is that ballot initiatives are prone to misleading practices, such as those in the Michigan case. Campaigns and the wording of the initiatives themselves can be intentionally or unintentionally misleading and can confuse petition signers into thinking they are supporting one cause when they are actually supporting the opposite.⁴²

The third weakness of ballot initiatives that can lead to fraudulent practices is misinformation. Misinformation is common in democracy generally, and it is also common in ballot initiatives. Citizens may not be adequately informed, may be misinformed, or may be influenced by personal bias or fear.⁴³ The last weakness is the ability of a majority to trump a minority on controversial issues in which significant minority interests are at stake.⁴⁴ Though this weakness is inherent in democracy generally, it is especially threatening in ballot initiatives, where governments give direct deference to the people's will.

When these weaknesses are exploited to perpetuate fraudulent and deceptive practices, voters need a remedy. As the Supreme Court noted in *Meyer*, the signature-gathering process is supposed to be indicative of the initial need for political change. When this indication of a need for change is obtained through fraud and misrepresentative practices, the process is no longer democratic. If citizens do not actually want a contentious issue on the ballot, then the state should not allow citizens to vote on it and make it a state amendment.

III. WHAT HAPPENS WHEN BALLOT INITIATIVES ARE NOT PROTECTED: BLATANT FRAUD AND DECEPTION IN THE PROPOSAL 2 CAMPAIGN

The vulnerabilities of the ballot initiative process necessitate protection and remedies for when the process is tainted by fraudulent and deceptive practices. When those protections are

⁴¹ *See id.*

⁴² Moses and Farley, *supra* note 38, at 271.

⁴³ *Id.* at 272.

⁴⁴ Moses and Farley, *supra* note 38, at 273 (citing THE FEDERALIST NO. 63 (James Madison) (“[T]here are particular moments in public affairs, when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn.”)).

not in place, a ballot initiative can produce results that injure the interests of certain groups of citizens. This is exactly what happened to Michigan minority voters during a ballot initiative to end equal opportunity. This section analyzes the ballot initiative process in Michigan, the fraud that took place, and the deception that ultimately injured the interests of Michigan's minority voters, illustrating what occurs when the signature-gathering process is not adequately protected.

The process to get the proposal to end equal opportunity on the ballot.

Understanding the injustice these minority voters faced requires an examination of how they were deceived into supporting a proposal that so severely and negatively impacted their lives and eventually became an amendment to their state constitution.

The initiative to end equal opportunity in Michigan stemmed from a national strategy that had already found success in both California and Washington State.⁴⁵ Equal opportunity programs have had a long, tumultuous history in this country, and are rooted in the civil rights movement.⁴⁶ Equal opportunity initiatives, like affirmative action, were originally seen as a method of addressing the discrimination that persisted in the United States despite civil rights laws and Constitutional guarantees.⁴⁷ However, people like California businessman Ward Connerly believe that affirmative action overshadows and subordinates excellence and competence,

⁴⁵ See Melvin Butch Hollowell, *In the Wake of Proposal 2: The Challenge to Equality of Opportunity in Michigan*, 34 T. MARSHALL L. REV. 203, 205 (2008). In California, the initiative was originally called Proposition 209 and in Washington it was named Initiative 200.

⁴⁶ Moses and Farley, *supra* note 38, at 262 (noting that equal opportunity initiatives began with President Kennedy creating the Committee of Equal Employment Opportunity in 1961. Since then, however, affirmative action policies have been challenged in many high-profile court cases). This Note will not address the merits or policy considerations of affirmative action, but raises this point to highlight that the ballot proposal was based on a contentious issue.

⁴⁷ Pamela Barta Moreno, *The History Of Affirmative Action Law And Its Relation To College Admission*, 179 J. OF C. ADMISSION 14, 15 (2003) (explaining that affirmative action originally focused on jobs and education, so that minorities could have the same opportunities for school admissions, financial aid, salary increases, and career advancement).

and often makes society content with mediocrity.⁴⁸ Thus, Connerly sought to end these types of programs, and came to Ann Arbor, Michigan to announce that he would mount a petition to put an anti-affirmative action measure on the ballot, just like he successfully did in California and Washington.⁴⁹

The timing of the initiative was not coincidental. The campaign came to Michigan shortly after the Supreme Court decided *Grutter v. Bollinger*.⁵⁰ In that case, the Court decided that the consideration of race in the holistic review of a law school application is constitutional.⁵¹ The campaign was labeled Proposal 2 by the Michigan Civil Rights Initiative (“MCRI”), and aimed to stop those diversity measures by putting anti-diversity measures on the ballot, namely in public education, public employment, and public contracting.⁵² The campaign’s ultimate goal was to amend the state constitution through this ballot initiative and abolish affirmative action programs in Michigan completely.⁵³

The blatant fraud, deception, and misrepresentation that took place during the signature-gathering phase of the campaign illustrates that this proposal is not what the people wanted on the ballot.

To amend the Constitution in Michigan, a proposal must be placed on the ballot for voters to support it by a majority vote.⁵⁴ To get the proposal on the ballot, registered electors must create a petition, sign and circulate the petition, and obtain a sufficient amount of signatures in support of the petition.⁵⁵ To gain the necessary 317,757 signatures, MCRI gathered approximately

⁴⁸ See generally Ward Connerly, *What Happened to Post-Racial America? Affirmative Action is Flourishing and Undermining the Color-blind Vision of Kennedy and King*, WALL ST. J. ONLINE, (Oct. 4, 2011).

⁴⁹ See MCRC Impact Report *supra* note 2, at 5.

⁵⁰ 539 U.S. 306 (2003).

⁵¹ *Id.* at 337, 343. The Court reasoned that the Equal Protection Clause of the Fourteenth Amendment did not prohibit the narrowly tailored use of race in law school admissions in order to further the school’s compelling interest in educational benefits derived from diversity in classrooms.

⁵² See Hollowell, *supra* note 45 at 206 (noting that Connerly announced his campaign at the University of Michigan in Ann Arbor campus at a press conference and outlined how the campaign aimed to ban affirmative action in the public sector).

⁵³ *Id.* at 211.

⁵⁴ M.C.L.A. §§ 168.471–168.473b (2015).

⁵⁵ M.C.L.A. CONST. ART. 12, § 2 (West 2015).

1,000 petition circulators, 600 of whom were paid independent contractors, and an unknown number of volunteers.⁵⁶

After they were trained, the petition circulators went out into the community to campaign and gather signatures. Hundreds of people throughout various communities in Michigan testified about their experiences with MCRI petitioners and the open deception they encountered.⁵⁷ The MCRI petitioners targeted “black neighborhoods” in Michigan, like Detroit and Flint.⁵⁸ They were told to go there since support for affirmative action was overwhelming in those areas, and they could gather signatures by claiming that the proposal supported equal opportunity.⁵⁹ The petitioners targeted areas such as cultural festivals and minority church congregations to gain as many signatures as possible.⁶⁰

Several citizens testified that they were explicitly told that the proposal advocated to “end discrimination” and that it was “for affirmative action.”⁶¹ One citizen, Fred Anthony, testified that a petitioner approached him in Flint, asking if he had any children in college, and told him that he needed to sign the petition to keep affirmative action in place.⁶² In the Grand Rapids, citizens were told that they needed to sign the proposal in order to “protect affirmative action.”⁶³ Some were lied to and told that the petition was to support raising minimum wage.⁶⁴ In addition to being misinformed, several citizens testified that their names were fraudulently added to the signature list without them ever signing the petition.⁶⁵

⁵⁶ Defendants-Appellees-Cross Appellants’ Final Brief at 9-10, *Operation King’s DREAM, et al., Plaintiff-Appellants-Cross-Appellees, v. Ward CONNERLY, et al, Defendants-Appellees-Cross-Appellants, Terry Lynn Land, et al., Defendants-Appellees.*, (Nos. 06-2144, 06-2258), 2007 WL 2413956 (C.A.6).

⁵⁷ See generally MCRC Fraud Report, *supra* note 1.

⁵⁸ First Final Brief of the Plaintiffs-Appellants/Cross-Appellees at 5, *OPERATION KING’S DREAM; Plaintiffs-Appellants/Cross-Appellees, v. Terri Lynn LAND; Kathryn DeGrow; Lynn Bankes; Doyle O’Connor; Christopher Thomas, Defendants-Appellees, Ward Connerly; Jennifer Gratz; Michigan Civil Rights*, (Nos. 06-2144, 06-2258), 2007 WL 2425356 (C.A.6).

⁵⁹ *Id.* at 6.

⁶⁰ *Id.* at 6, 17.

⁶¹ MCRC Fraud Report, *supra* note 1, at 7–11.

⁶² See Petitioner’s Brief, *supra* note 58, at 17.

⁶³ MCRC Fraud Report, *supra* note 1, at 11.

⁶⁴ *Id.*

⁶⁵ MCRC Fraud Report, *supra* note 1, at 12–13.

Virtually every one of the approximately 125,000 black Michigan voters who signed the ballot petition to ban affirmative action was deceived into signing it.⁶⁶ Testimony from several hundreds of citizens that were approached by MCRI petitioners in Detroit, Flint, Lansing, and Grand Rapids all revealed the same story: they were all lied to and told that Proposal 2 was an initiative to support affirmative action.⁶⁷ The proposal they had signed was not what was advertised. Ultimately, they unjustly had to pay the price for this deception.

Some of the MCRI petitioners themselves were deceived into believing they were circulating a petition in support of equal opportunity, further demonstrating the flagrant deception involved in this campaign.

To further illustrate that the purpose of this campaign was to induce people to sign the initiative using misrepresentations, there is evidence that the petitioners themselves were deceived into believing they were actually circulating a petition that supported affirmative action. Reverend Nathaniel Smith, a black MCRI petitioner, testified that the MCRI told him and other black circulators to concentrate on Detroit and to tell black voters that the petition was pro-civil rights and pro-affirmative action.⁶⁸ Another black circulator, Joseph Reed, also testified that he was told to concentrate on Detroit and tell citizens that the petition supported affirmative action.⁶⁹ After he realized that “he had gathered at least 500 signatures that would place this type of amendment on the ballot,” Reverend Nathaniel Smith asserted he had no idea that he was circulating a petition against affirmative

⁶⁶ Complaint for Injunctive and Other Relief at 1, OPERATION KING’S DREAM, Kwame M. Kilpatrick, Locals 207 and 312 of the American Federation of State County, and Municipal Employees (Afcme), Samantha Canty, Belita H. Cowan, Martha Cuneo, Linda Dee McDonald, Michelle McFarlin, Pearline McRae, and, Sarah Smith, Plaintiffs, v. Ward CONNERLY, Jennifer Gratz, and the Michigan Civil Rights Initiative, and Terrilynn Land, in her Official Capacity as Secretary of State; Kathryn Degrow, Lynn Bankes, and Doyle, (No. 2:06CV12773), 2006 WL 5022926 (E.D.Mich.).

⁶⁷ MCRC Fraud Report, *supra* note 1, at 6–7. The actual language of one portion of the Proposal stated: “The proposed constitutional amendment would: Prohibit public institutions from discriminating against groups or individuals due to their gender, ethnicity, race, color or national origin.”

⁶⁸ See Petitioner’s Brief, *supra* note 58, at 17.

⁶⁹ *Id.*

action and that he was humiliated and embarrassed when he realized.⁷⁰

“On January 6, 2005, MCRI submitted 508,159 petition signatures for the November 2006 ballot.”⁷¹ When citizens learned that they had been duped into signing a proposal that was the exact opposite of what they wanted to support, they were outraged.⁷² Michigan’s voters sought to challenge the legitimacy of these signatures by seeking relief from the Attorney General, the Secretary of State, and the Board of Canvassers.⁷³ However, despite agreeing that the process itself was misleading and racially targeted, none of these state actors intervened to stop the fraudulently obtained signatures from being used as legitimate support for Proposal 2.⁷⁴

All three actors launched investigations that proved the deception and fraud involved in the signature gathering process, but Michigan state courts either deemed that they lacked the authority to intervene, or the courts declined to review their subsequent findings.⁷⁵ Ultimately, the Board of Canvassers approved the signatures without further investigation.⁷⁶ The state’s response was disappointing. Finally, Michigan citizens turned to their final and last resort: the federal courts. They sought a remedy using the only law left in their arsenal – the Voting Rights Act.

⁷⁰ MCRC Fraud Report, *supra* note 1, at 9 (detailing the testimony of several other petitioners with similar stories who state that they were told the proposal was pro-affirmative action).

⁷¹ *Id.* at 1.

⁷² Video:

<https://web.archive.org/web/20100923104925/http://chetlyzarko.com/video/BoC%2012142005%20171-table.avi> (link to a cell phone video). This video takes place after four members of the election board were attempting to vote on whether they would certify the petitions for the November ballot. The crowd began to shout “No voter fraud” and “They say Jim Crow! We say hell no!” until the meeting was adjourned. The students overturned a table and the Lansing police were called.

⁷³ Jocelyn Friedrichs Benson, *Election Fraud and the Initiative Process: A Study of the 2006 Michigan Civil Rights Initiative*, 34 *FORDHAM URB. L.J.* 889, 906 (2007) (explaining that these authorities concluded they lacked jurisdiction and authority to look into these matters so they ultimately did not provide the voters with a remedy).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

IV. THE VOTING RIGHTS ACT IS NOT AN ADEQUATE REMEDY FOR THIS TYPE OF HARM IN BALLOT INITIATIVES

Michigan's deceived minority citizens sought relief by bringing a claim under the Voting Rights Act of 1965.⁷⁷ The Voting Rights Act, or VRA, aims to ensure that everyone's right to vote is protected in reality and not just in theory. Congress enacted the VRA to abolish the prevalent illegal barriers that prevented African Americans from casting their vote.⁷⁸ At the time of the statute's enactment, many states created procedural hurdles that targeted African Americans ability to vote. States used poll taxes, restricted opportunities to register to vote, and instituted voter identification requirements whereby two white registered voters had to vouch for each new applicant.⁷⁹ The VRA eliminated these and other obstacles to voting that existed in 1965, such as literacy tests, and prevented future, yet-to-be devised mechanisms to restrict the vote.⁸⁰

The Act sought to accomplish these objectives through two major provisions. The first is Section 2, which prohibits any unfair voting practice based on race.⁸¹ The second provision is Section 5, which "required certain specially covered jurisdictions with a history of discrimination, determined by a formula in Section 4(b), to obtain federal pre-clearance before implementing any voting changes".⁸²

In *Operation King's Dream v. Connerly*,⁸³ Michigan voters brought a Section 2 claim. They alleged that MCRI used racially targeted voter fraud to obtain signatures in support of the initiative petition to place an anti-affirmative action proposal on

⁷⁷ 52 U.S.C.A. § 10101; *See generally Operation King's Dream*, 2006 WL 2514115.

⁷⁸ *See* 52 U.S.C.A. § 10301 (noting that no state shall apply any voting qualification or prerequisite to voting or standard, practice, or procedure that results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color). *See also* Ryan P. Haygood, *Hurricane SCOTUS: The Hubris of Striking our Democracy's Discrimination Checkpoint in Shelby County & the Resulting Thunderstorm Assault on Voting Rights*, 10 HARV. L. & POL'Y REV. 12, 17.

⁷⁹ *See* Haygood, *supra* note 78, at 17 (detailing these specific tactics and how they were used to prevent black voters from getting to the polls).

⁸⁰ *See* 52 U.S.C.A. § 10301(a); *see also* William Jefferson Clinton, *The Voting Rights Umbrella*, 33 YALE L. & POL'Y REV. 383, 383 (2015).

⁸¹ *See* 52 U.S.C.A. § 10301(a); *see also* Clinton, *supra* note 80, at 383.

⁸² *See* 52 U.S.C.A. § 10304; *see also* Clinton, *supra* note 80, at 383.

⁸³ *Operation King's Dream*, 2006 WL 2514115 (2006).

the November 2006 general election ballot.⁸⁴ To evaluate the Section 2 claim, the court analyzed the findings and reports of both the MCRI and the Michigan Civil Rights Commission (“MCRC”) on the signature-gathering process used to put the proposal on the ballot.

The court found that the VRA is applicable to the harm suffered by Michigan minority citizens in this instance.

One of the main issues in the case was whether the VRA was actually applicable to the signature-gathering process. Though MCRI defendants attempted to argue that the VRA does not cover the petitioning process because it is not sufficiently tied to the voting process,⁸⁵ the court disagreed and reasoned that the signature-gathering process is covered by the VRA for two reasons.

First, the court reasoned that signing an initiative petition involved a choice of whether or not to sign the petition, and thus, it implicates voting.⁸⁶ Second, the court reasoned that the plain meaning of the words in Section 2⁸⁷ also indicates its applicability to remedying the fraudulent petitioning process.⁸⁸ It reasoned that the words “the political processes *leading to nomination or election*”⁸⁹ in the VRA should be interpreted in the broadest sense, since the statute “was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.”⁹⁰ Thus, the court concluded that the initiative petition process is a “process leading to nomination or election” within the plain language of Section 2.⁹¹

⁸⁴ *Id.* at *1.

⁸⁵ *Id.* at *12.

⁸⁶ *Id.* at *13.

⁸⁷ The statute says a violation is established if:

... based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C.A. § 10301 (2014).

⁸⁸ *Operation King’s Dream*, 2006 WL 2514115 at *13.

⁸⁹ 52 U.S.C.A. § 10301(b).

⁹⁰ *Operation King’s Dream*, 2006 WL 2514115 at *13 (quoting *Allen v. State Board of Education*, 393 U.S. 544, 565-66 (1969)).

⁹¹ *Id.*

Thus, it seemed as though there was hope for a remedy for the Michigan minority voters who were tricked into supporting Proposal 2.

Though the court held that MCRI engaged in a pattern of fraud and reasoned that Section 2 was applicable, it did not find a violation of Section 2 of the VRA.

The court could not and did not dispute that the Michigan minority voters had established that there was voter fraud in the electoral process.⁹² It found that MCRI and its circulators engaged in a pattern of voter fraud by deceiving voters into believing that the petition supported affirmative action.⁹³ The court explained that the MCRI defendants were aware of and encouraged such deception by disguising their proposal as a ban on “preferences” and “discrimination,” without ever fulfilling their responsibility to forthrightly clarify what these terms were supposed to mean.⁹⁴ It further reasoned that MCRI’s leaders’ confusion about the purpose of their own proposal supported the conclusion that the MCRI deliberately encouraged voter fraud and did nothing to remedy such fraud once it occurred.⁹⁵ However, the court could not find a VRA Section 2 violation.

The court explored both congressional intent⁹⁶ and prior case law⁹⁷ to determine that Section 2 of the VRA was applicable in this case. Then, the Court stated that Michigan’s minority voters needed to establish two things: (1) that there was voter fraud and (2) that minority voters could not participate in the electoral process on the same terms and to the same extent as non-minority voters.⁹⁸

Though the minority voters established voter fraud, the Court concluded that they could not establish the second burden for three

⁹² *Id.* at 15.

⁹³ *Id.* at 1*.

⁹⁴ *Id.* at *15.

⁹⁵ *Operation King’s Dream*, 2006 WL 2514115 at *13.

⁹⁶ *Id.* at *16. The court reasoned that since Congress amended the Act in 1982 to relieve plaintiffs of the burden of proving discrimination it made clear that a violation of Section 2 could be established by proof of discriminatory results alone

⁹⁷ *Id.* at *15 (explaining that plaintiffs must allege that “the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process).

⁹⁸ *Operation King’s Dream*, 2006 WL 2514115 at *16.

reasons. First, the State Director of Elections testified that even if all of the disputed minority votes were stricken from the petition, there would still be an adequate number of votes to require certification of the petition under state law.⁹⁹ Second, there was no evidence to support the minority voters' theory that, but for their support, a large number of white voters would not have signed the petition.¹⁰⁰ Third, the evidence in the record showed that the MCRI sought to deceive and in fact deceived both minority and non-minority voters in order to obtain their signatures.¹⁰¹ Thus, despite the existence of fraud, the court could not find a VRA Section 2 violation because the minority voters participated in the electoral process on the same terms as non-minority voters. In other words, both minority and non-minority voters were equally defrauded in the electoral process, so the minority voters were not treated any differently.

The Court found it "distressing" that its finding of a lack of discrimination was based on the fact that minority and non-minority voters had equal access to a deceptive political process.¹⁰² However, it reasoned that the Voting Rights Act is not a general anti-fraud statute and required a finding of unequal access.¹⁰³ Thus, Michigan citizens had to prove that minority voters could not participate in the electoral process on the same terms and to the same extent as non-minority voters. Since the evidence presented showed that minority and non-minority voters participated in the initiative petition process on the same terms,¹⁰⁴ the court concluded that the fact that the actual political process was fraudulent did not establish a Section II violation.¹⁰⁵ Thus, according to the reasoning in this case, the VRA only addresses procedural injustices and does not account for the substantive injustices that minorities might face as a result of a fraudulent ballot initiative.¹⁰⁶

⁹⁹ *Id.* at *17.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Operation King's Dream*, 2006 WL 2514115 at *17.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (explaining that the VRA is not a general anti-fraud statute, and that there must be a finding of unequal access).

Though the court's analysis of the VRA is sound, the result is still troubling.

The minority communities of Michigan could not remedy their situation in either state or federal courts. The result is unsettling. As discussed previously in this Note, the primary purpose for requiring a specific number of signatures before a proposal is placed on the ballot is because there needs to be proof of substantial support for the change in policy.¹⁰⁷ The Court reasoned that the Michigan proposal would have had enough support without the minority voters' signatures; however, there were other non-minority signatures that were also gathered by deception and fraud.¹⁰⁸ Therefore, that evidence of support is substantially misleading.¹⁰⁹

The issue is not about the voters who supported the proposal at the polls, which led to the amendment to the state constitution. The issue is that the proposal lacked the support to be placed on the ballot to be voted on in the first place. In subsequent litigation, there was evidence that, though Michigan's citizens approved Proposal 2 by a 58 to 42 percent margin, nine out of ten black citizens voted against it, two out of three white citizens voted for it, and it passed solely because white voters outnumbered minority voters six to one.¹¹⁰ This evidence, coupled with the evidence of fraudulently obtained signatures, illustrates that this might not have been an issue that Michigan minority citizens wanted to place on the ballot to begin with. Though there seemed to be sufficient support for the proposal at the polls, there actually was not sufficient support for the proposal to actually be put on the ballot in the first place. This defeats the purpose of utilizing a ballot initiative.

The problem with allowing Proposal 2 to stand as a state amendment because a majority of Michigan voters voted for it on election day is that the signature-gathering phase of the ballot

¹⁰⁷ Benson, *supra* note 73, at 915 (noting that the unique role and power of the ballot initiative as a direct voice of the voters amplifies the effects of the presence of fraud or deception at any part of the process).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (explaining that if voters are deceived about what policy they are supporting, rejecting, or petitioning to place on the ballot, the result is that a law may be enacted or the state constitution amended based upon an illegitimate reflection of the will of the people).

¹¹⁰ *Schuette*, 134 S.Ct. at 1630.

initiative is a part of the political process and as the court in *Operation King's Dream* noted, it is a part of the voting process as well.¹¹¹ The signature-gathering process is an expression of a desire for political change and a discussion of the merits of the proposed change.¹¹² When fraudulent and deceptive practices are allowed to invade the political process, it inaccurately reflects the people's choice to put an issue on the ballot instead of letting it be decided by a state legislature.

The result is that a law may be enacted, or the state constitution amended based upon votes that should not have been cast in the first place, since the issue should not have been up for a vote at all.¹¹³ That is exactly what happened in this instance – a fraudulent and deceptive signature-gathering process led to a contentious issue being wrongfully placed on the ballot, and then voted into law. Then, that law negatively affected the same minority voters that were deceived into supporting its placement on the ballot.

Despite this blatant injustice, Michigan's minority voters could not find a remedy in the Voting Rights Act because both minority and non-minority voters had equal access to a deceptive political process.¹¹⁴ They were denied relief because the VRA does not consider the substantive injuries minorities face as a result of the fraudulent ballot initiative, and only considers procedural fairness. What is even more troubling is that the Voting Rights Act has been further weakened since this injustice in 2006, which diminishes any hope that it could be amended to remedy this type of harm in the future.

The VRA is still an inadequate remedy for this issue today.

When the federal district court of Michigan decided that MCRI's campaign was not a violation of the Voting Rights Act in *Operation King's Dream*, the VRA was much more powerful than it is today. The Act still has the same purpose of eliminating the obstacles to voting that existed in 1965 and preventing future mechanisms to

¹¹¹ See *Operation King's Dream*, 2006 WL 2514115 at *13.

¹¹² See *Meyers v. Grant*, 486 U.S. 414, 421 (1988) (stating that the signature-gathering process constitutes political speech and is indicative of citizens' desire for political change).

¹¹³ Benson, *supra* note 73, at 914.

¹¹⁴ *Operation King's Dream*, 2006 WL 2514115 at *16,

restrict the vote.¹¹⁵ However, recent developments have left the VRA with seemingly weaker capabilities to remedy injustice than it did in 2006. There is no way the VRA can remedy the Michigan minority voters' dilemma today because the Supreme Court invalidated one of its key provisions, which further necessitates the need for a solution.

Recently, in *Shelby County v. Holder*,¹¹⁶ the Supreme Court held that Section 4(b) of the VRA was invalid, which thereby made ineffective another essential section, Section 5. Section 5 forbids voting changes with any discriminatory purpose, as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, to elect their preferred candidates of choice.¹¹⁷ Section 4 of the Act banned all such voting changes, tests, and devices that might cause such a result.¹¹⁸ Subsection (b) of Section 4 provided a formula that determined which states needed to obtain preclearance to make any changes forbidden by Section 5.¹¹⁹ Preclearance is the process by which a state would need to gain approval from the Department of Justice or a three-judge panel of the District Court for the District of Columbia before enacting voting changes.¹²⁰ These changes weaken the VRA in a substantial way. Without Section 4(b)'s preclearance formula, the VRA cannot apply Section 5 to any of the states that previously needed preclearance. This defeats the entire purpose of the statute, which was to prevent those states from creating voting changes with a discriminatory purpose.

The Supreme Court invalidated Section 4 because it determined that the formula no longer reflects the positive changes in the covered jurisdictions, such as increased voter turnout and registration rates and less blatantly discriminatory evasions of federal decrees.¹²¹ In other words, the Act had been so effective in blocking discriminatory voting practices in the covered

¹¹⁵ See Clinton, *supra* note 80, at 383.

¹¹⁶ 133 S.Ct. 2612, 2616 (2013).

¹¹⁷ See 52 U.S.C.A. § 10304.

¹¹⁸ See 52 U.S.C.A. § 10303.

¹¹⁹ *Id.*

¹²⁰ Haygood, *supra* note 78, at 17.

¹²¹ *Shelby County v. Holder*, 133 S.Ct. 2612, 2618 (2013) (noting that the conditions that originally justified Section 4 no longer characterize voting in the covered jurisdictions).

jurisdictions identified by Section 4(b), that it was no longer fair to hold those places to a different standard.¹²²

However, by invalidating Section 4, the coverage formula, the Court essentially left Section 5, the requirement of preclearance, without effect as well. Without a formula to determine which states are required to obtain preclearance under Section 5, Section 5 itself is not useful. Thus, this decision creates uncertainty about what the Voting Rights Act can actually do.

The VRA was historically used to protect minority rights in voting. However, the Court's decision that the nation has advanced beyond the original conditions that necessitated the VRA makes it seem as though the statute is not as imperative as it was when it was first enacted and may not be necessary at all. The Court does recognize that racial discrimination in voting still exists.¹²³ Nonetheless, by invalidating Section 4, the Court has allowed states to implement voting changes that had previously been blocked by Section 5.¹²⁴ Ultimately, it is sending the message that the VRA now exists in a state of limbo, struggling to reconcile its original fortitude and its current weakness.

Thus, the holding in *Shelby County* diminishes any hope of the Voting Rights Act remedying the type of injustice that minority voters in a similar situation to the Michigan minority voters might face today. Since Section 5 is ineffective without Section 4(b), voters cannot seek a remedy under that section.¹²⁵ Michigan voters could not establish a Section 2 violation.¹²⁶ Today, the VRA only barely protects equal access to voting and does not protect against discriminatory impacts that can result from a law passing that was fraudulently placed on the ballot. A new piece of legislation is imperative.

¹²² Clinton, *supra* note 80, at 384 (explaining the Court's reluctance to keep the preclearance formula in tact).

¹²³ *Shelby County*, 133 S.Ct. at 2619.

¹²⁴ See Clinton, *supra* note 80, at 385.

¹²⁵ Keesha M. Middlemass, *The Need to Resurrect Section 5 of the Voting Rights Act of 1965*, 28 J. OF C.R. & ECON. DEV. 61, 61 (2015).

¹²⁶ *Operation King's Dream*, 2006 WL 2514115 at *43.

V. THE CONSEQUENCES AND DANGERS OF LEAVING BALLOT INITIATIVES UNPROTECTED: DISCRIMINATORY IMPACT ON MINORITY CITIZENS

The need for a solution to this problem is further illustrated in the negative effects that minority citizens faced as a result of allowing the fraudulent signature-gathering process to place Proposal 2 on the ballot and become a state amendment.¹²⁷ Despite the district court's finding of a lack of discrimination in *Operation King's Dream v. Connerly*, the actual effects of that decision proved otherwise.¹²⁸

These effects are analyzed in *Schuette v. Coalition to Defend Affirmative Action*.¹²⁹ *Schuette* is a subsequent Supreme Court case that reached the Court in 2014 from a different set of litigation flowing from the fraudulent ballot initiative in Michigan.¹³⁰ *Schuette* did not address the issues of voter fraud, but instead addressed whether a state could constitutionally amend its constitution to end equal opportunity initiatives by a ballot vote.¹³¹ Though that case primarily concerned issues unrelated to voting rights¹³², the dissent in particular highlights the haunting consequences of letting a proposal passed by fraudulent means slip through the cracks.¹³³ Thus, although minority voting rights was not the main focus, the case illustrates the need for a remedy for these Michigan minority citizens.

The primary issue in the *Schuette* case was the political process doctrine, which examines whether a law restricts, either on its face or in effect, a minority group's access to an egalitarian political

¹²⁷ Kristen Barnes, *Breaking the Cycle: Countering Voter Initiatives and the Underrepresentation of Racial Minorities in the Political Process*, 12:2 DUKE J. OF CONST. L. & PUB. POL'Y 123, 163 (2017).

¹²⁸ *Id.* at 135–37.

¹²⁹ 134 S. Ct. 1623, 1629 (2014).

¹³⁰ *Id.* at 1630. This case came to the Court after organizations and others filed suits against Michigan state officials, universities, and others, bringing equal protection challenge to state constitutional amendment prohibiting affirmative action.

¹³¹ *Id.* at 1623 (phrasing the issue of the case).

¹³² *Id.* The case primarily concerned constitutional challenges under the Equal Protection Clause and whether, and in what manner, voters in the States may choose to prohibit the consideration of such racial preferences.

¹³³ *Id.* at 1675 (explaining the negative impact that the amendment had on minority enrollment and success in public higher education).

system.¹³⁴ Three Justices, Kennedy, Roberts, and Alito, all decided that by approving Proposal 2 and thereby adding § 26 to their State Constitution, Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power, bypassing public officials they deemed not responsive to their concerns about a policy of granting race-based preferences.¹³⁵ These Justices did not address the issue of whether or not the proposal should have even been voted on in the first place due to the fraudulent signature-gathering process. Justice Breyer adopted a similar reasoning.¹³⁶ Though Justices Thomas and Scalia did not examine the political process issue, they reasoned that since the amendment did not violate the Equal Protection Clause, it was constitutional.¹³⁷

In their vehement dissent, Justices Sotomayor and Ginsberg not only asserted that the amendment violated the political process doctrine,¹³⁸ but they also made important points about how minority communities must be protected from a political process that often does not work in their favor.¹³⁹ This dissent illustrates the problem that needs to be solved: the discriminatory impacts that can result from a law passing that was fraudulently placed on the ballot. They discuss how the amendment violates the political process doctrine, why racial impact matters in the political process, and how letting this amendment stand negatively impacts minorities.¹⁴⁰ The following sections outline this discussion and

¹³⁴ *Schuette*, 134 S. Ct. at 1629. See also Tyson Y. Herrold, *Political Process Equal Protection and the Repeal of Affirmative Action in Higher Education: The Sixth Circuit Splits from the Ninth*, 18 TEX. J. C.L. & C.R. 153, 156 (2013).

¹³⁵ *Schuette*, 134 S. Ct. at 1634–1638.

¹³⁶ See *id.* at 1629–1632. Justice Breyer reasoned that the amendment was consistent with the Equal Protection Clause, that the people should be able to decide whether or not to use race-conscious programs, and that the amendment does not create diminution of the minority's ability to participate in the political process.

¹³⁷ See *id.* at 1639–40.

¹³⁸ *Id.* at 1653 (explaining that now two very different processes through which a Michigan citizen is permitted to influence the admissions policies of the State's universities: one for persons interested in race-sensitive admissions policies and one for everyone else. After the amendment, if a citizen wanted race-sensitive admissions in public education, she would need to amend the state constitution).

¹³⁹ *Id.* at 1654 (noting that the Court's role includes policing the process of self-government and stepping in when necessary to secure the constitutional guarantee of equal protection because majorities can negatively impact minority interests).

¹⁴⁰ *Id.* at 1668–70.

parallels the dissent's argument with why ballot initiative proponents must consider the initiative's racial impact.

This amendment violates the political process doctrine, thus creating a political process that unfairly burdened minorities' ability to affect that same process.

The crux of the dissent's argument was that allowing citizens to amend their state constitution to abolish affirmative action in public education restructured the political process in a way that severely disadvantaged the way minority voters could impact the political process.¹⁴¹ The amendment, Section 26, created a more burdensome political process for the enactment of admissions plans that consider racial diversity.¹⁴² The dissent pointed out that prior to the enactment of Section 26, Michigan's political structure permitted both supporters and opponents of race-sensitive admissions policies in higher education to vote for university board candidates that would either support or oppose affirmative action in those universities.¹⁴³ After Section 26, it did not matter which board member the citizens elected, because race-sensitive admissions were no longer an option.¹⁴⁴ To change admissions policies on this one issue, a Michigan citizen must instead amend the Michigan Constitution again.¹⁴⁵

The dissent's analysis of the political process doctrine highlights an important parallel between the fraudulent political process used to deceive minority voters and the effect of letting the process stand as a sufficient means of representing the electorate's choice. By allowing MCRI to count its fraudulently gathered signatures as support for Proposal 2, the government ultimately assuaged a political process that unfairly burdened minorities' ability to affect that same process.¹⁴⁶ Justice Sotomayor gave the example of the effect of § 26 that summed up this point nicely: A white graduate of a public Michigan university who wishes to pass his historical privilege on to his children may freely lobby the board of that

¹⁴¹ *Schuetz*, 134 S. Ct. at 1660 (Sotomayor, J., dissenting).

¹⁴² *Id.*

¹⁴³ *Id.* at 1661.

¹⁴⁴ *Id.*

¹⁴⁵ *Schuetz*, 134 S. Ct. at 1661.

¹⁴⁶ *Id.*

university in favor of an expanded legacy admissions policy; however, a black Michigander who was denied the opportunity to attend that very university cannot lobby the board in favor of a policy that might give his children a chance that he never had and that they might never have absent that policy.¹⁴⁷

Thus, allowing this fraudulent process to stand is facilitating an even larger, more injurious political process to stand in the grander scheme.

Race matters in public policy and in ballot initiatives, so the racial impact of a ballot initiative should be evaluated at the campaigning stage.

The dissent then went on to make another essential point: race matters, and thus, lawmakers should consider racial impact in enacting law.¹⁴⁸ The point was made in response to the plurality's contention that the Court should leave the issue of race out of the picture entirely when considering public policy and let the voters sort it out.¹⁴⁹ The dissent's argument is outlined in three points. First, race matters in part because of the long history of racial minorities being denied access to the political process.¹⁵⁰ Second, race matters because of persistent racial inequality in society that cannot be ignored and that has produced stark socioeconomic disparities.¹⁵¹ The dissent's third point is that race matters because of reasons that are skin deep.¹⁵² Race matters to a young boy and impacts his view of society when he notices others tense up at his presence, no matter where he grows up; to a woman's sense of self when people ask her where she is "really from", no matter where she states her hometown is.¹⁵³

The dissent argued that race matters in response to the plurality's view that examining the racial impact of legislation

¹⁴⁷ *Id.* at 1662.

¹⁴⁸ *Id.* at 1676. The dissent raises this point as part of a larger argument. It addresses the plurality's contention that the political process doctrine is unadministrable and contrary to recent equal protection precedents. *Id.*

¹⁴⁹ *Id.* at 1675.

¹⁵⁰ *Schutte*, 134 S. Ct. at 1676.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* The dissent argues that race matters because racial minorities have been persistently discriminated against, denied equal participation in politics, and because racial minorities have a different perspective on life due to their physical racial differences.

only perpetuates racial discrimination.¹⁵⁴ Understanding the importance of factoring in the racial impact of legislation is essential to understanding why Michigan's minority voters deserve a remedy to their injury. Unlike the federal district court's analysis in *Operation King's Dream v. Connerly*, Justice Sotomayor considered how racial impact is an essential aspect of making and evaluating legislation. Thus, if racial impact is important in evaluating the effect of legislation, then governments should also consider racial impact when evaluating the process that leads to that legislation.

Evaluating minority impact at the campaigning stage is just as important as analyzing racial impact in legislation because initiative process works against the advancement of minority rights. In ballot initiatives, the democratic process "allows a majority of voters' fears and prejudices to be expressed in policies that target minorities and restrict minority rights."¹⁵⁵ When issues and initiatives that impact minority rights "reach the ballot, direct democracy campaigns" allow questions about minority rights "to be based on animus, negative group effect, negative stereotypes about the targeted group, and animus toward general counter-majoritarian elements of democracy."¹⁵⁶ These factors make it seemingly "rational for campaigns seeking to constrain minority rights to use irrational appeals to fear and to highlight threats presented by the minority made subject of the ballot question."¹⁵⁷

Evaluating the impact the signature-gathering campaign would subsequently have on minority rights is also important because minority voters even lose in ballot initiatives that are not racially targeted. According to recent studies, black voters are significantly less likely to succeed than whites on four types of ballot propositions, in addition to racially targeted ones. On ballot

¹⁵⁴ *Schuette*, 134 S. Ct. at 1676.

¹⁵⁵ Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730, 1743 (2013). Direct democracy is the process by which citizens decide on policy initiatives directly.

¹⁵⁶ *Id.* This means that campaigns that seek to constrain minority rights have incentives to highlight information that produces or increases animus toward minorities and allows majorities to act on that information by voting against minority rights.

¹⁵⁷ *Id.* The factors encouraging such campaigns include "[t]he muted role of economic self-interest and the prominent role of group affect in decision making on these matters..." *Id.*

propositions concerning housing, taxation, government administration, and elections, “black voters are on average 5.7 percentage points less likely overall than white voters to be on the winning side.”¹⁵⁸ “Even high-income and well-educated voters from minority groups tend to be on the losing side more than their white counterparts, and indeed, tend to lose more than many lower-status whites” because “race more clearly distinguishes winners from losers than does either income or education.”¹⁵⁹

Thus, the initiative process works against the advancement of minority rights and minorities lose in ballot initiatives that do not even affect minority rights. If racial impact is not evaluated during the signature gathering campaigns, these minority voters need some other type of protection to preserve their interests that a ballot initiative might put in jeopardy. Thus, minorities that are negatively affected by such campaign processes deserve a remedy when they are intentionally and fraudulently deceived.

Letting this amendment stand has a direct negative impact on minorities.

The dissent in *Schuette* draws on some of the negative consequences of Section 26 that had already occurred by the time the Court decided *Schuette*. The dissent began its analysis by explaining the need for implementing affirmative action policies after segregation kept minorities out of schools.¹⁶⁰ In 1868, two black students were admitted to the University of Michigan, and by 1966, the number of black students was barely over 1% of the student body.¹⁶¹ These numbers improved after the implementation of equal opportunity programs in higher education; however, after Section 26, the numbers drastically

¹⁵⁸ Ryan T. Moore and Nirmala Ravishankar, *Who Loses In Direct Democracy?*, 41 SOC. SCI. RES. 646, 652 (May 2012) (“[M]inority voters in the 1978-2000 data are more likely to lose on questions involving elections, the environment, health, housing government administration, taxes and transit...issues which minority communities exhibit particular vulnerabilities.”).

¹⁵⁹ *Id.*

¹⁶⁰ *Schuette*, 134 S.Ct. at 1676 (Sotomayor, J., dissenting). Justice Sotomayor argues race matters in an educational setting because of the persistence of racial inequality in politics, society, and everyday life experiences.

¹⁶¹ *Id.* Justice Sotomayor also discusses how there were only 9 black graduates out of a total of 3,041 graduates at the University of Michigan Law School is even more telling of the racial inequities in education.

dropped yet again.¹⁶² “For example, between 2006 and 2011, the proportion of black freshmen among those enrolled at the University of Michigan declined from 7 percent to 5 percent, even though the proportion of black college-aged persons in Michigan increased from 16 to 19 percent.”¹⁶³

Additionally, the percentage of black students among those attaining bachelor’s degrees in 2014 was 4.4 percent, the lowest since 1991; the proportion of black students among those attaining master’s degrees was 5.1 percent, the lowest since 1989; the proportion of black students among those attaining doctoral degrees was 3.9 percent, the lowest since 1993; and the proportion of black students among those attaining professional school degrees was 3.5 percent, the lowest since the mid–1970’s.¹⁶⁴

The MCRC report also indicated that Section 26 ultimately abolished state programs developed to help minority-owned and women-owned businesses and state grants for minority students.¹⁶⁵ Section 26 also negatively impacted companies that used to rely on affirmative action in hiring practices because they could no longer use those practices.¹⁶⁶ These companies used to provide substantial financial support for minorities in higher education to fulfill their own need for a diverse workforce, but after Section 26, those practices were gone.¹⁶⁷

The dissent’s arguments mirror why Michigan’s minority citizens need a remedy: the amendment unfairly burdens minorities’ ability to affect the political process. The amendment was added to the constitution without any analysis of racial impact, and the amendment negatively and specifically impacted minorities.

¹⁶² See *Schuette*, 134 S.Ct. at 1676 (Sotomayor, S., dissenting) (“Race-sensitive admission policies are now a thing of the past in Michigan after § 26, even though...those policies were making a difference in achieving educational diversity.”); see also University of Michigan Registrar’s Office, *Enrollment Reports*, <<http://ro.umich.edu/enrollment/enrollment.php>> (last visited Feb. 11, 2018) (showing that from 2009-2014, African American enrollment in public universities dropped consistently each year).

¹⁶³ *Schuette*, 134 S.Ct. at 1678.

¹⁶⁴ *Id.* at 1677. (“A recent study also confirms that § 26 has decreased minority degree attainment in Michigan.”).

¹⁶⁵ See MCRC Impact Report, *supra* note 2, at 3.

¹⁶⁶ *Id.* at 51–53.

¹⁶⁷ *Id.*

The negative impact of Section 26 on minorities is undeniable. The impact came from an unjust process that did not garner the support it claimed to have from the very minorities it hurt. Michigan's minority voters were duped into supporting an initiative through a process that did not work in their favor, and now they are suffering the consequences of an unjust system. If an adequate legislative remedy does not exist in the Voting Rights Act, one must be created.

VI. A SOLUTION

To provide a remedy for voters like the minority citizens of Michigan, this Note advocates for the adoption of a federal statute that is similar to a current bill that has been introduced in the Senate: The Deceptive Practices and Voter Intimidation Prevention Act of 2011.¹⁶⁸ This bill only applies to federal elections and not ballot initiatives specifically.¹⁶⁹ However, it aims to regulate the deceptive practices¹⁷⁰ that are commonly seen in ballot initiatives, and it covers the specific harm that the Michigan voters faced.

The bill addresses that harm by creating a private right of action for anyone who falls prey to a deceptive practice within 90 days of a federal election.¹⁷¹ It describes a deceptive practice as communicating information known to be "materially false" with the intent to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote in an election.¹⁷² The bill focuses on hindering or preventing a person from voting or registering to vote based on materially false information about the time and place of the election and qualifications to vote.¹⁷³

I propose a federal cause of action similar to the one provided by the Deceptive Practices and Voter Intimidation Prevention Act of

¹⁶⁸ 112th Cong., 1st Session.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* The bill sought to eliminate deceptive practices, which involve the dissemination of false information intended to prevent voters from casting their ballots, prevent voters from voting for the candidate of their choice, intimidate the electorate, and undermine the integrity of the electoral process.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ 112th Cong., 1st Session.

2011, but with greater protection for voters who receive materially false information about the content and implications of proposals on ballot initiatives. This cause of action would be available when state authorities are unresponsive to fraudulent and deceptive practices during ballot initiatives, including during the petition circulation phase and signature-gathering process.¹⁷⁴ When any voter or group of voters is denied relief by their state courts to remedy a fraudulent and deceptive practice that provides materially false information during the electoral process, this federal legislation will provide a remedy.

Voters would need to prove they could not get adequate relief in their state court by submitting a credible report to the Attorney General. The report would need to show: 1) materially false information about the content and substance of the proposal is being promoted and 2) the state courts were ineffective in providing a remedy. This evidentiary report would serve as a basis for voters to apply for a temporary restraining order on the actual election.¹⁷⁵ The Attorney General's review can also be expedited if voters anticipated the actual law would be implemented before the review is complete.¹⁷⁶

The voters would then be able to institute a civil action for preventive relief, including an application in a United States district court for a permanent or temporary injunction, restraining order, or other order. Additionally, if the voters are successful in their civil action, the Department of Justice would provide federal observers¹⁷⁷ to monitor future ballot initiatives within the state.

¹⁷⁴ The cause of action requires a showing of unresponsiveness at the state level in order to respect state power over conducting and regulating elections and voting procedures.

¹⁷⁵ This is similar to a Section 5 violation of the VRA. Section 5 was enacted to freeze changes in election practices or procedures in covered jurisdictions until the new procedures have been determined, either after administrative review by the Attorney General, or after a lawsuit before the United States District Court for the District of Columbia, to have neither discriminatory purpose or effect. See Department of Justice, *Statutes Enforced By the Voting Section*, <http://www.justice.gov/crt/statutes-enforced-voting-section#vra> (last visited Feb. 2, 2018).

¹⁷⁶ This is also similar to the VRA, which allows jurisdictions to request "Expedited Consideration" when a jurisdiction may need to complete the Section 5 review process on an accelerated basis due to anticipated implementation before the end of the 60-day review period. See Department of Justice, *About Section 5 of the Voting Rights Act*, <http://www.justice.gov/crt/about-section-5-voting-rights-act> (last visited Feb. 2, 2018).

¹⁷⁷ See Department of Justice, *About Federal Observers and Election Monitoring*, <http://www.justice.gov/crt/about-federal-observers-and-election-monitoring> (last visited Feb. 2, 2018). Federal observers are also a remedy under the Voting Rights Act when there

This type of legislation would benefit citizens like the minority voters in Michigan because it creates a source of relief when the state allows deceptive practices that eventually create detrimental effects for voters who cannot protect themselves from the interests of the majority. This proposal would provide more relief than the Voting Rights Act could because the fact that the actual signature-gathering process was fraudulent on its own would provide a remedy.¹⁷⁸ Unlike the VRA, this proposal accounts for deceptive and fraudulent practices that affect all groups, but it provides similar remedies. These remedies would provide effective relief for citizens because it would give them the chance to stop the effect of a ballot initiative before it negatively impacts them. The proposal would also be effective because it gives state courts an incentive to give more careful consideration to claims of fraud. States would be aware that the federal government could intervene in their state's proceedings and even utilize invasive federal observers to monitor their state's ballot initiatives.

VII. CONCLUSION

There is an inherent injustice in using a deceptive and fraudulent political process as a basis for allowing a proposal to get on a ballot and then be voted into being a state constitutional amendment. As the dissent in *Schuette* illustrated, allowing that process to eventually dictate the future of the same minority voters that it deceived only creates a greater need for a remedy. Though ballot initiatives are an essential part of the political process, the Voting Rights Act is unable to remedy the potential harm minority voters face when this process is abused. This inadequacy necessitates another form of legislation to help all voters get justice. A federal cause of action similar to the VRA is an effective way to remedy this specific and dangerous harm.

is a Section 2 violation. The federal courts and the Attorney General may certify counties of a State so that federal observers may be assigned to those places. The VRA permits federal observers to monitor procedures in polling places and at sites where ballots are counted in certified political subdivisions.

¹⁷⁸ This is unlike the VRA, which requires a showing of fraud and unequal access as the court required in *Operation King's Dream v. Connerly*, No. 06-12773, 2006 WL 2514115.