

INTERSECTIONALITY SQUARED: INTRASTATE MINIMUM WAGE PREEMPTION & *SCHUETTE'S* SECOND-CLASS CITIZENS

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INTRODUCTION

Between 2012 and 2017, more than twenty municipalities passed ordinances providing for extended labor protections for their residents like paid sick leave and higher minimum wages.¹ Often these municipalities and their governing bodies have been more liberal and racially diverse than their respective legislatures.² In some of the states where municipalities have succeeded in passing this legislation, the state legislature has very quickly preempted those measures with a state law dictating that no city can set a minimum wage higher than the federal standard of \$7.25 an hour.³ These state laws banning cities from raising the working wage constitute intrastate minimum wage preemption. The lawmakers preempting these local reform efforts proffer to justifications for the bills rooted in economics and federalism.⁴ However, these preemptive measures raise consequential questions related to

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* J.D., Columbia Law School 2018; B.A., Yale University 2012. My deepest gratitude to Professor Olatunde Johnson for her insight and guidance on the project that precipitated this Note and for her support of my commitment to highlighting intersectional issues. My sincere thanks to the entire staff of the Columbia Journal of Gender and Law for their hard work and editorial contributions to this publication.

1 See NAT'L P'SHIP FOR WOMEN AND FAMILIES, PAID SICK DAYS—STATE AND DISTRICT STATUTES (last updated Feb. 2018), <http://www.nationalpartnership.org/research-library/work-family/psd/paid-sick-days-statutes.pdf> [perma.cc/QZK4-6ZN8].

2 See *infra* Part I.B. (discussing recent events in Birmingham, Alabama as a paradigmatic example). In Birmingham, Alabama, Black Americans account for seventy-five percent of the city population, yet the population of the whole State of Alabama is seventy-five percent white. Max Rivlin-Nadler, *Preemption Bills: A New Conservative Tool to Block Minimum Wage Increases*, NEW REPUBLIC (Feb. 29, 2017), <https://newrepublic.com/article/130783/preemption-bills-new-conservative-tool-block-minimum-wage-increases> [perma.cc/V8HM-CDD7].

3 See *infra* Part I.A. for discussion of a contemporary example in Birmingham, Alabama.

4 See Press Release, Econ. Pol'y Inst., Progressive Cities Are Raising Their Labor Standards, but

the due process of lawmaking and equal protection jurisprudence more generally.⁵

This Note applies an intersectional analysis to the ongoing conservative strategy of intrastate minimum wage preemption⁶ to reveal one example of how such preemptive measures limit progressive change, and especially burden Black women and women of color. Ultimately, this Note identifies two significant phenomena—or “intersections”—that, together, amount to what this Note will call Intersectionality Squared. The first intersection arises directly out of conventional intersectional theory: the intersection of multi-faceted identities of the women of color themselves and the social factors causing disproportionately high employment of women of color in minimum-wage jobs.⁷ The second phenomenon contributing to Intersectionality Squared is an intersection in the less theoretical sense of the word: a temporal intersection of the current political strategy of minimum wage preemption and the Supreme Court’s recent decision narrowing the political process rationale in equal protection law as an avenue to curb intersectional discrimination.⁸

This Note examines both of these consequential intersections and reveals how they converge into Intersectionality Squared. The ultimate objective herein is the illumination of how the intrastate minimum wage preemption strategy goes beyond an issue of identity politics and, instead, results in a pattern of legal erasure which further renders legally uncognizable the ways in which Black women and women of color experience discrimination.⁹ This Note does not intend to argue that all instances of intrastate preemption raise constitutional concerns, nor does this Note intend to imply that all instances of intrastate minimum wage preemption necessarily pose a threat of a political process constitutional

Conservative State Legislatures Are Preempting Them (Aug. 28, 2017), <http://www.epi.org/press/progressive-cities-are-raising-their-labor-standards-but-conservative-state-legislatures-are-preempting-them/> [https://perma.cc/NN3M-QAMR].

5 See *infra* Part II.A. (discussing various equal protection claims raised by plaintiffs to challenge a recent Alabama law preempting a Birmingham ordinance raising minimum wage).

6 See Rivlin-Nadler, *supra* note 2 (referring to such preemption as a “conservative tool”).

7 See *infra* Section II.A. (providing an overview of intersectional theory and applying an intersectional analysis to Alabama’s preemption of Birmingham’s efforts to raise the local minimum wage).

8 See *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1637–38 (2014) (upholding voter-approved amendment to Michigan constitution prohibiting state universities’ use of race-based preferences in admissions and finding such amendment did not violate precedent of previous political process cases).

9 See *infra* Part II (identifying the intersectional harm caused by intrastate minimum wage preemption and the daunting legal obstacles for recovering for intersectional disparate impact).

violation. Rather, this Note argues that where localities enact ordinances or regulations that work to the benefit of women of color and the state legislature responds with a political restructuring that invalidates or preempts those local ordinances, courts should consider the disparate impact on women of color as circumstantial evidence which weighs against the constitutional validity of a political restructuring.¹⁰

Part I of this Note discusses recent examples of intrastate minimum wage preemption and the case *Schuetz v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN)*, which concerns the future of the political process doctrine challenging such measures.¹¹ Part II applies an intersectional analysis to an open appeal challenging intrastate minimum wage preemption in Birmingham, Alabama to demonstrate how a single-axis equal protection analysis of intrastate minimum wage preemption obscures the way in which such preemption more severely burdens women of color. Part III identifies the potential doctrinal openings that remain to assert intersectional political process doctrine claims and makes recommendations for how the Court might more adequately acknowledge intersectional harms moving forward.

I. The Battle over Local Power and the Constitutional Limits of Political Restructuring

Cities and localities have played an integral role in recent efforts to raise the minimum wage and expand benefits for workers beyond those mandated by federal law.¹² The power cities have to regulate the health and safety standards of their community, determine monetary compensation and benefits for city employees, and set the terms of contracts, leases, and agreements with firms and large developers, position city governments to effectuate higher working wages and greater labor protections for their constituents.¹³

10 See *infra* Part III (exploring potential post-*Schuetz* doctrinal openings for successful political process challenges to intrastate minimum preemption that disparately harm women of color).

11 See also *infra* Section I.B.2. (discussing the *Schuetz* decision in further detail); see generally *infra* Part III.

12 See Richard Briffault et al., *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, AM. CONST. SOC'Y FOR L. AND POL'Y (Sept. 2017), https://www.acslaw.org/sites/default/files/ACS_Issue_Brief_-_Preemption_0.pdf [<https://perma.cc/U9VU-PNLZ>] [hereinafter *The Troubling Turn in State Preemption*].

13 See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990) [hereinafter Briffault, *Our Localism: Part I*] (“State legislatures . . . have frequently conferred significant political, economic and regulatory authority on many local cities Localism is deeply embedded in the American legal and political culture.”). The National League of Cities breaks down the discretionary

Indeed, in recent years cities across the United States have leveraged their regulatory power and influence to pass progressive legislation regulating issues from bans on employer inquiries into an employee's previous wage history, to campaign finance reform, and even single-use plastic bags.¹⁴

Within the last five years, however, approximately half of the states in the country have passed laws expressly preempting localities from adopting laws that, among other things, raise minimum wages, provide leave benefits, or expand workplace anti-discrimination protections past requirements set by federal or state law.¹⁵

This Part examines contemporary use of political restructuring in the ongoing partisan conflict over local power. Section I.A. provides an overview of the political process rationale for invalidating political restructuring that especially burdens minorities and examines the seminal cases in the Supreme Court's political process doctrine. Section I.B. examines the Supreme Court plurality opinion in *Schuette v. BAMN*, which calls into question the future of the political process doctrine. Section I.C. then turns to a recent example of intrastate minimum wage preemption in Birmingham, Alabama which raises issues that implicate the political process doctrine.

A. The Political Process Doctrine & *Schuette v. BAMN*

While the contest continues between states and various localities over the question of which governmental body should wield final regulatory authority in a number of areas, the remaining legal avenues to challenge intrastate preemption measures that disproportionately

political power a municipal government might exercise to advocate for more extensive labor protections into four discrete categories: structural, functional, fiscal, and personnel. *Cities 101—Delegation of Power*, NAT'L LEAGUE OF CITIES, <http://www.nlc.org/resource/cities-101-delegation-of-power> [<https://perma.cc/5LEE-39S4>].

14 See Kristen De Groot, *Philadelphia Bars Employers from Requesting Salary History*, PITTSBURGH POST-GAZETTE (Jan. 24, 2017), <http://www.post-gazette.com/business/career-workplace/2017/01/24/Philadelphia-s-mayor-signs-nation-s-first-city-pay-equity-bill/stories/201701240111> [<https://perma.cc/3M97-MHHW>]; Paul Blumenthal, *The Future of Campaign Finance Reform Is at the State and Local Level*, HUFFINGTON POST (Dec. 20, 2016), https://www.huffingtonpost.com/entry/campaign-finance-reform_us_5858569ae4b03904470a4d1b [<https://perma.cc/8DBH-8XMC>] (discussing the city of Portland's passage of campaign finance legislation in Oregon); Editorial Board, *It's Been a Year Since California Banned Single-Use Plastic Bags. The World Didn't End*, L.A. TIMES (Nov. 18, 2017), <http://beta.latimes.com/opinion/editorials/la-ed-plastic-bag-ban-anniversary-20171118-story.html> [<https://perma.cc/P8YZ-YVN4>].

15 Jay-Anne B. Casuga & Michael Rose, *Are State Workplace Preemption Laws on the Rise?*, BLOOMBERG LAW (Jul. 19, 2016), <https://www.bna.com/state-workplace-preemption-n73014444995/> [<https://perma.cc/3SAL-5LZP>].

affect minorities and other marginalized groups hang in the balance. The facts around the preemptive measures in states like Alabama, Missouri, and Wisconsin implicate issues that may have previously triggered strict scrutiny under the political process doctrine; however, the recent plurality decision in *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN)* rendered the future of the doctrine unclear.¹⁶ The next two sub-sections provide an overview of the theory underlying the political process doctrine and trace the development of the doctrine through the new test for detecting impermissible political restructuring announced by the Court in *Schuette*.

1. The Political Process Doctrine

In addition to the conventional equal protection doctrine, which mandates that courts evaluate legislation that makes racial and gendered classifications under strict scrutiny,¹⁷ the Supreme Court has also articulated a second strand of equal protection jurisprudence known as the political process rationale or the political process doctrine.¹⁸ The “simple but central principle” embodied by the political process doctrine is that the state may not make it more difficult for certain minorities to achieve legislation that is in their interest by placing special burdens on minorities within the governmental process.¹⁹ Though each

16 See generally *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

17 The Fourteenth Amendment of the United States Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV. Classifications or invidious discrimination based on race and gender or that impinge a fundamental right receive some form of heightened scrutiny. See, e.g., *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273–74 (1979); *Wash. v. Davis*, 426 U.S. 229, 239 (1976). Government actions that burden a fundamental right (like voting, or certain rights to liberty in matters such as marriage and procreation) may also trigger heightened review. See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

18 One might locate the origin of the rationale underlying the political process doctrine as far back as the oft-cited “Footnote Four” from Justice Stone’s opinion in *United States v. Carolene Products Company* and can trace its development through a number of less well-known cases. See *Wash. v. Seattle School District No. 1*, 458 U.S. 457, 486 (1982) (“[W]hen the State’s allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the ‘special condition’ of prejudice, the governmental action seriously ‘curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities’” (quoting *Carolene Products*, 304 U.S. 144, 153 n.4 (1938))); *Schuette*, 134 S. Ct. 1623, 1668 (2014) (Sotomayor, J., dissenting) (framing *Carolene Products* as the origin of the values “at the heart of” the political process doctrine). Scholars have also connected the doctrine to John Hart Ely and political process theory more generally. See Steve Sanders, *Race, Restructurings, and Equal Protection Doctrine through the Lens of Schuette v. BAMN*, 81 BROOK. L. REV. 1393, 139 (2016).

19 See Daniel P. Tokaji & Mark D. Rosenbaum, *Promoting Equality by Protecting Local Power: A Neo-*

of the Supreme Court cases that explicitly invoke the political process doctrine involved questions of whether a political restructuring amounted to an instance of race-based discrimination, the political process rationale has also been invoked by lower courts in the interest of discrete minority groups not recognized as protected classes under the Fourteenth Amendment.²⁰ Perhaps the most notable difference between the conventional equal protection doctrine and the political process doctrine is the absence of an explicit intent requirement from the latter.²¹

The political process doctrine instructs courts to identify and scrutinize state actions, decision making structures, and schemes that place “special burdens” on minorities seeking to advocate for their interests through the political process.²² Under the political process rationale, political restructurings are inherently atypical; at a minimum, they signal the intention of the political majority to alter or circumscribe the usual legislative process.²³ As Courts have examined facially neutral political restructurings under more careful scrutiny to protect against entrenched or concealed discrimination against minorities.²⁴ The Court has previously applied the doctrine to invalidate political restructuring that singles

Federalist Challenge to State Affirmative Action Bans, 10 STAN. L. & POL’Y REV. 129, 136 (1999).

20 The Colorado Supreme Court based its decision in *Evans v. Romer* on a political process rationale. See *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993); EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS 122* (1999). The Supreme Court did not address the issue in affirming the Colorado Supreme Court’s decision and ruled instead on substantive due process grounds. See Tokaji & Rosenbaum, *supra* note 19, at 131 (“The pertinence of the *Hunter-Seattle* principle to *Romer* is clarified by Justice Scalia’s dissent. Just as the *Romer* majority silently relies on the *Hunter-Seattle* principle, the *Romer* dissent silently refutes it. In a key passage, Justice Scalia’s blistering dissent asserts: The central thesis of the Court’s reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decision making than others. The world has never heard of such a principle . . .”).

21 See Tokaji & Rosenbaum, *supra* note 19, at 136 (“It might be tempting to view *Hunter* and *Seattle* as anomalies, of dubious relevance in light of the Supreme Court’s general insistence that only facially or intentionally discriminatory laws violate the Equal Protection Clause. The reality, however, is that the principle for which these cases stand has its foundation in the very bedrock of American constitutional law. The requirement of equal access to the political process is even *more* fundamental than equality in the outcomes of that process.”).

22 See *Seattle*, 458 U.S. at 486.

23 See *Sanders*, *supra* note 18, at 1398.

24 *Id.* (“Experience teaches that when a question of public policy is taken outside the usual lawmaking process and is committed to a higher, more remote level of decision making, it is not unreasonable to suspect that the restructuring might be intended to work constitutionally improper discrimination against some group.”).

out a disadvantaged or minority group as the only group that must undertake atypical or additional steps—like obtaining a city charter amendment, state constitution amendment, or ballot initiative—as a precursor to enact legislation in favor of group interests.²⁵

An application of the political process doctrine may invalidate a political restructuring that shifts decision-making power regarding a particular issue from one kind of process to another.²⁶ A court may also find that a shift of decision-making power from one level or branch of government to another level, like a state charter amendment prohibiting localities from passing legislation to curb racial discrimination in real estate, is similarly impermissible.²⁷

2. The Pre-*Schuette* Political Process Doctrine

Many scholars and courts read the two cases *Hunter v. Erickson*²⁸ and *Washington v. Seattle School District*²⁹ together to establish the “*Hunter/Seattle*” political process doctrine.³⁰ Yet, Justice Kennedy began his analysis of the doctrine in the plurality opinion for *Schuette v. Coalition to Defend Affirmative Action* by turning back to a case decided two

25 See Girardeau A. Spann, *Proposition 209*, 47 DUKE L. J. 187, 250 (1998) (summarizing the “fatal defects” identified by the Supreme Court in the major political process cases); *Fourteenth Amendment—Equal Protection Clause—Political-Process Doctrine—Schuette v. Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*, 128 HARV. L. REV. 281, 281 (2014) [hereinafter *Equal Protection Clause—Political-Process Doctrine*].

26 *Recent Legislation, Equal Protection—Political Restructuring—Arkansas Passes Statute Prohibiting Local Governments from Creating New Protected Classifications—Intrastate Commerce Improvement Act (Act 137)*, Ark. Code Ann. §§ 14-1-401 to -4, 129 HARV. L. REV. 600, 600 (2015) [hereinafter *Recent Legislation*]; Alex Reed, *Pro-business or Anti-gay?: Disguising LGBT Animus as Economic Legislation*, 9 STAN. J. C.R. & C.L. 153, 169 (2013) [hereinafter Reed, *Pro-business or Anti-gay?*].

27 See Reed, *Pro-business or Anti-gay?*, *supra* note 26, at 168.

28 *Hunter v. Erickson*, 393 U.S. 385, 389 (1969).

29 *Wash. v. Seattle School District No. 1*, 458 U.S. 457 (1982).

30 In fact, though the plurality opinion in *Schuette* does not explicitly refer to the “*Hunter/Seattle*” doctrine, most of the Justices did reference the doctrine in writing their separate concurrences and dissents. See e.g., *Schuette*, 134 S. Ct. at 1649 (Breyer, J., concurring in the judgment) (“[T]he parties do not here suggest that the amendment violates the Equal Protection Clause if not under the Hunter-Seattle doctrine.”); *id.* at 1646 (Scalia, J., concurring) (“Taken to the limits of its logic, Hunter-Seattle is the gaping exception that nearly swallows the rule of structural state sovereignty, which would seem to permit a State to give certain powers to cities, later assign the same powers to counties, and even reclaim them for itself.”).

years before *Hunter—Reitman v. Mulkey*.³¹ Though the challenged political restructuring at issue in *Mulkey* did not make a facial classification as did the challenged enactments in *Hunter* and *Seattle*, when examined in sequence, the three cases make clear the doctrine's concern with obstacles in the political process stemming from invidious discrimination.

In *Reitman v. Mulkey*, the governor of California signed the Rumford Fair Housing Act ("AB 1240"), which banned racial discrimination among mortgage holders, real estate brokers, property owners, and landlords who refuse to rent or sell to tenants or potential buyers on the basis of color.³² Opponents of the Act immediately sought a voter-initiative and referendum ("California Proposition 14") which provided that state could not "deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."³³ The plaintiffs were a Black couple who were denied as renters on account of their race and brought suit challenging the constitutional amendment repealing the AB 1240 on the basis that it was unconstitutional.³⁴ In deciding *Mulkey*, the Court did not discuss any unique burdens the minority litigants faced in participating in the political process.³⁵ Rather, the question answered by the Court in *Mulkey* was whether the state had become so involved with private discrimination as to violate equal protection when it repealed the antidiscrimination measure.³⁶ Ultimately, the Court found AB 1240 unconstitutional after concluding that it would "significantly encourage and involve the state in private discriminations."³⁷

In *Hunter v. Erickson*, the Court invalidated a voter-enacted charter amendment in Akron, Ohio, which required the electorate approve any fair housing ordinance to be approved by the electorate, on the basis that it "place[d] special burdens on racial minorities within the governmental process."³⁸ The City of Akron argued that the challenged voter-enacted charter amendment, which required any fair housing ordinance to be approved by

31 *Schuetz*, 134 S. Ct. at 1629 (plurality opinion) (citing to *Reitman v. Mulkey*, 387 U.S. 369 (1967)).

32 *Mulkey*, 387 U.S. at 374.

33 *Id.*

34 *Id.* at 372.

35 See *Equal Protection Clause—Political-Process Doctrine*, *supra* note 25, at 287 n.64.

36 *Mulkey*, 387 U.S. at 378–89.

37 *Id.* at 381.

38 *Hunter v. Erickson*, 393 U.S. 385, 389 (1969).

the electorate, differed significantly from the constitutional amendment in *Mulkey* because “the city charter declare[d] no right to discriminate in housing, authorizes and encourages no housing discrimination, and places no ban on the enactment of fair housing ordinances.”³⁹ The Court reasoned that despite the facially neutral language of the charter amendment with regard to “distinctions among racial and religious groups,” it made “an explicitly racial classification treating racial housing matters differently from other racial and housing matters,” that caused the impact of the charter amendment to fall disproportionately on minorities.⁴⁰ In reaching this conclusion, the Court recognized that the amendment was aimed at minority racial groups, and found no need to explicitly rely on *Mulkey*.⁴¹

Thirteen years later, in *Washington v. Seattle School District No. 1*, the Court invalidated a voter-initiated constitutional amendment that effectively prohibited desegregating busing efforts undertaken without a court order “because it [did] ‘not attempt[t] to allocate governmental power on the basis of any general principle.’”⁴² The Court categorized the harm suffered by the plaintiffs as an explicit racial injury on the basis that “desegregation of the public schools, like the Akron open housing ordinance, at bottom, inures primarily to the benefit of the minority, and is designed for that purpose,” and in previous cases the Court had “accepted the proposition that mandatory desegregation strategies present the type of racial issue implicated by the *Hunter* doctrine.”⁴³ The Court held that the initiative removed the “authority to address a racial problem—and only a racial problem—from the existing decision-making body, in such a way as to burden minority interests.”⁴⁴ Ultimately, the Court described the circumstances that triggered *Hunter* and the political process doctrine as the following: “when the State’s allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the ‘special condition’ of prejudice, the governmental action seriously ‘curtail[s] the operation of those

39 *Id.*

40 *Id.* at 389–91.

41 *Id.* at 389 (“[W]e need not rest on *Reitman* to decide this case. Here, unlike *Reitman*, there was an explicitly racial classification treating racial housing matters differently from other racial and housing matters.”).

42 *Wash. v. Seattle School District No. 1*, 458 U.S. 457, 470 (1982) (quoting *Hunter*, 393 U.S. at 395 (Harlan, J., concurring)).

43 *Id.* at 473 (citing to *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970) (three-judge court), *summarily aff’d*, 402 U.S. 935 (1971)).

44 *Id.* at 474; *see also id.* at 470 (“[T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power non-neutrally, by explicitly using the *racial* nature of a decision to determine the decision-making process.”).

political processes ordinarily to be relied upon to protect minorities.”⁴⁵

3. *Schuette v. BAMN* and the New Test for Impermissible Political Restructuring

Writing for a three-justice plurality in *Schuette v. Coalition to Defend Affirmative Action*, the Supreme Court’s most recent reformulation of the political process doctrine, Justice Kennedy revisited the Court’s main political process cases to both distill the essence of the political process doctrine as the Court had previously applied it and to announce a new test for identifying political process violations moving forward.

Schuette arose from challenges to a Michigan state constitutional amendment (“Proposal 2”) alleging a political process equal protection violation.⁴⁶ Proposal 2 prohibited public universities from granting race-based “preferences” in the admissions process and effectively withdrew power from university officials to implement any admission policy that involved those “preferences.”⁴⁷ The District Court rejected the applicability of the political process doctrine, and distinguished the challenge to Proposal 2 from *Hunter* and *Seattle*, on the basis that those cases involved laws that protected against unequal treatment for racial minorities where Proposal 2 involved “*advantageous* treatment on the basis of race.”⁴⁸

The Sixth Circuit heard the appeal en banc.⁴⁹ The Sixth Circuit interpreted *Hunter* and *Seattle* together as creating the following two prong test for identifying when “an enactment deprives minority groups of the equal protection of the laws”

45 *Id.* at 486.

46 *Schuette*, 134 S. Ct. at 1629 (plurality opinion).

47 Proposal 2 passed with fifty-eight percent support and became Article I, § 26 of the Michigan Constitution. *Id.* Section 26 provides in relevant part:

“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.”

Mich. Const. Art. I, § 26.

48 *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 539 F. Supp. 2d 924, 953, 957 (E.D. Mich. 2008) (emphasis in original).

49 *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 701 F.3d 466, 489 (6th Cir. 2012) (en banc).

(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 decision-making process in a way that places special burdens on a minority group’s ability to achieve its goals through that process.⁵⁰

The Sixth Circuit ultimately concluded that Proposal 2 triggered strict scrutiny because it impermissibly modified Michigan’s political process by placing special burdens on the ability of minority groups to achieve legislation to their benefit.⁵¹ The Sixth Circuit then struck down Proposal 2 on the basis of its conclusion that the defendants had not provided a compelling state interest to avoid a violation of the Equal Protection Clause.⁵²

The Supreme Court reversed the en banc decision of the Sixth Circuit in *Schuette*.⁵³ Justice Kennedy wrote the plurality opinion for himself, Chief Justice Roberts, and Justice Alito.⁵⁴ The plurality initially identified that the Sixth Circuit’s principal error was an improper extension of Justice Harlan’s concurrence in *Seattle*.⁵⁵ The plurality opinion’s main thrust, however, was a strong rejection of the doctrine’s purported assumption that minority groups hold convergent views and political interests.⁵⁶ In asserting that the *Seattle* doctrine relies on the same concept, Justice Kennedy cast significant doubt on the accuracy and continuing validity of the political process doctrine.⁵⁷ Indeed, Justice Kennedy noted that “a number of problems raised by *Seattle*, including racial definitions,” were relevant in the case, even though some of the *Seattle* formulation’s “larger consequences” were not at issue.⁵⁸ Justice Kennedy was clear that the Sixth Circuit’s reasoning was invalid for its

50 *Id.* at 477 (quoting *Seattle*, 458 U.S. at 472).

51 *Id.* at 489.

52 *Id.*

53 134 S. Ct.

54 *Id.*

55 *Id.* at 1631. Justice Scalia’s concurrence in the judgment, joined by Justice Thomas, produced a majority in favor of reversing the Sixth Circuit. *Id.* at 1639. Justice Scalia would have overruled *Hunter* and *Seattle* and rejected the political process doctrine entirely. *Id.* at 1643.

56 *Id.* at 1634–35.

57 *See, e.g., id.* at 1635 (“Racial division would be validated, not discouraged, were the *Seattle* formulation, and the reasoning of the Court of Appeals in this case, to remain in force.”).

58 *Id.* at 1635–36.

reliance on the concept of uniformity of interests within given racial groups.⁵⁹

The *Schuette* plurality ultimately rejected what it called a “broad reading of *Seattle*” that called for the application of strict scrutiny to “any state action with a racial focus that makes it more difficult for certain racial minorities than for other groups to achieve legislation that is in their interest.”⁶⁰ Throughout the full length of the opinion, Justice Kennedy did not explicitly name Proposal 2 as a political restructuring or offer comment on political restructurings as a general matter.⁶¹ Justice Kennedy similarly avoided direct reference to a “*Hunter/Seattle*” or “*political process*” doctrine.⁶² Instead the plurality reformulated the principle underlying *Mulkey*, *Hunter*, and *Seattle* to announce what some have called a “new test” for finding political process equal protection violations.⁶³ Under this new test, a political restructuring is impermissible when newly enacted legislation or “state action in question . . . ha[s] the serious risk, if not purpose of causing specific injuries on account of race.”⁶⁴

Though *Schuette* has been largely characterized as an affirmative-action case, the broad language of the plurality’s re-formulation of the political process doctrine carries with it far-sweeping implications across a number of regulatory areas that might implicate racial tensions or divisions. In the current political climate, the labor context is one such area.

A. Alabama’s Preemption of Birmingham’s Higher Minimum Wage

Of the many polarized instances of intrastate minimum wage preemption, political restructurings that have occurred in states with histories of racial discrimination and ongoing racial division have drawn considerable public criticism in the media.⁶⁵ Birmingham,

59 *Schuette*, 134 S. Ct. at 1634–35.

60 *Id.*; *Equal Protection Clause–Political-Process Doctrine*, *supra* note 25, at 283–84.

61 *See Sanders*, *supra* note 18, at 1429.

62 *Id.* at 1432.

63 *Schuette*, 134 S. Ct. at 1634–35.

64 *Id.* at 1633; *Recent Legislation*, *supra* note 26, at 281.

65 Some reporting on Alabama’s preemptive bill has gone as far as to explicitly connect the measure to Alabama’s long history of overt race-based discrimination. *See, e.g.*, Bryce Covert, *White Lawmakers are Using Alabama’s Racist State Constitution to Keep Black Wages Down*, IN THESE TIMES (Oct. 23, 2017), http://inthesetimes.com/features/alabama_fight_for_15_dillons_rule_preemption_racism.html [https://perma.cc/8B7V-7V4T].

Alabama,⁶⁶ St. Louis, Missouri,⁶⁷ and Detroit, Michigan⁶⁸ are three examples of cities that worked to increase the minimum wage for their locality and were preempted by a majority non-minority state legislature. In each of the three cities, the minority population in the cities is disproportionate compared the minority population of the states as a whole.⁶⁹ The unemployment rate of Black residents as compared to white residents is significantly higher.⁷⁰ Recent events in Birmingham, Alabama exemplify how the current political strategy of intrastate preemption of progressive measures raises a number of equality concerns.⁷¹

Minimum wage workers in Alabama currently receive pay of \$7.25 per hour, the national floor set by federal law.⁷² In August 2015, the Mayor of Birmingham and the Birmingham City Council unanimously passed Ordinance 15–124, which provided for an incremental increase in the minimum wage for Birmingham employees, starting with \$8.50

66 See Rivlin-Nadler, *supra* note 2.

67 In 2016, the Missouri state legislature retroactively preempted the St. Louis measure raising the minimum wage. See Marni von Wilpert, *City Governments Are Raising Standards for Working People—and State Legislators Are Lowering Them Back Down*, ECONOMIC POLICY INSTITUTE (Aug. 26, 2017), <http://www.epi.org/publication/city-governments-are-raising-standards-for-working-people-and-state-legislators-are-lowering-them-back-down/> [https://perma.cc/6FL2-X8HB]; Nicole Dupuis et. al, *City Rights in an Era of Preemption: A State-by-State Analysis 2018 Update 7*, NAT'L LEAGUE OF CITIES, <https://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf> [https://perma.cc/75L3-TGG2].

68 See Emily Lawler, *Gov. Rick Snyder Signs 'Death Star' Bill Prohibiting Local Wage, Benefits Ordinances*, MICHIGAN LIVE (Jun. 30, 2015), http://www.mlive.com/lansing-news/index.ssf/2015/06/gov_rick_snyder_signs_death_st.html [https://perma.cc/8TQY-HLB4]. At the time of drafting, labor equality groups in Michigan were in the midst of continued efforts to raise the minimum wage via a petition to include ballot referendum on the topic in November 2018. Kathleen Gray, *Michigan OKs \$12 Minimum Wage Proposal Aimed at 2018 Ballot*, DETROIT FREE PRESS (Sept. 19, 2017), <https://www.freep.com/story/news/politics/2017/09/19/michigan-minimum-wage-12-dollars-per-hour/680950001/> [https://perma.cc/C5TM-Y95M].

69 See Covert, *supra* note 65.

70 *Id.*

71 At the time of drafting, the NAACP challenging to Alabama's preemption of Birmingham's ordinance raising the minimum wage was the only ongoing litigation. It remains to be seen whether interest groups in other cities across the country will bring similar cases. Given the uncertainty around the political process doctrine, it is possible that some groups may wait to bring claims until the outcome of the NAACP challenge is made final.

72 While many states have enacted legislation to raise the state minimum wage above the federal floor, Alabama is one of five states that have declined to do so. See *State Minimum Wages—2017 Minimum Wage by State*, NAT'L CONFERENCE OF STATE LEGISLATURES, (Jan. 5, 2017), <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx> [https://perma.cc/KTT6-8CMP].

per hour in July 2016 and increasing to \$10.10 per hour in July 2017.⁷³

In response to the Birmingham ordinance, the Alabama state legislature enacted the Alabama Uniform Minimum Wage and Right to Work Act (“Act 2016–18”), which effectively nullified Birmingham’s minimum wage ordinance and preempted municipalities in the state from raising the minimum wage above \$7.25 an hour or requiring that employers provide any paid or unpaid leave, or vacation pay that is not required by federal or state law.⁷⁴ Act 2016–18 closely imitates the Living Wage Mandate Preemption Act, model legislation circulated by The American Legislative Exchange Council (“ALEC”), an organization with a membership that includes many of the nation’s largest companies, a quarter of state legislators, one-fifth of the United States Congress, and seven sitting governors.⁷⁵ ALEC justifies their model preemption legislation and advocacy for intrastate preemption of local labor protections on the basis that states require consistent labor laws and state legislatures are best positioned to achieve that consistency.⁷⁶ However, despite the assertion that states should regulate labor, ALEC has simultaneously advocated for cities and counties to enact “right-to-work” ordinances at the local level.⁷⁷

Of particular significance to the pending litigation challenging the constitutionality of Alabama’s Act 2016–18 are the racial demographics of the municipality the legislation

73 See Amended Complaint at 29, *Lewis v. Bentley*, No. 2:16-CV-690-RDP, 2017 BL 29541 (N.D. Ala. Jun. 30, 2016).

74 *Id.* Section 6(a) of Act 2016–18 explicitly states that the purpose of the Act is to provide the Legislature complete control over regulation and policy pertaining to wages, leave, or other employment benefits provided by an employer to an employee, class of employees, or independent contractor.

75 See *Living Wage Mandate Preemption Act*, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, <https://www.alec.org/model-policy/living-wage-mandate-preemption-act/> [https://perma.cc/XPD7-QUZM]; Henry Grabar, *The Shackling of the American City*, SLATE (Sept. 9, 2016), http://www.slate.com/articles/business/metropolis/2016/09/how_alec_acce_and_pre_emptions_laws_are_gutting_the_powers_of_american_cities.html [https://perma.cc/BHV4-WD54]. ALEC distributed copies of their model legislation and a map of the United States highlighted targets for future preemptive measures at their annual meeting in 2016. *Id.*

76 See Lauren E. Phillips, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2227 (2017) (noting “fundamental contradiction in conservative organizations and individuals pushing for state preemption of local regulations” in light of the fact that those “very groups have emphasized local control in certain areas to overcome progressive policies”).

77 See *Progressive Cities Are Raising Their Labor Standards, but Conservative State Legislatures Are Preempting Them*, *supra* note 4. The right-to-work ordinances would have the effect of weakening collective bargaining power at the local level. *Id.*

targets and the lawmakers responsible for passing the preemptive measure.⁷⁸ In Birmingham, Alabama, Black Americans account for seventy-five percent of the city population, yet the population of the whole State of Alabama is seventy-five percent white.⁷⁹ Act 2016–18 passed with the exclusive support of fifty-three white legislators—no Black legislator voted in favor of the bill.⁸⁰ The Alabama legislature also passed Act 2016–18 with uncharacteristic speed—the bill passed within one week after the first reading and was signed by Governor Robert Bentley within two hours.⁸¹ Yet, notwithstanding the various procedural anomalies in the passing of Act 2016–18, Alabama’s preemption of the Birmingham ordinance unfolded in very similar fashion to several other examples of intrastate preemption of higher local minimum wages in the past few years.⁸² These procedural anomalies and racial disparities, coupled with a shift in decision-making power regarding labor protections from the local level to the state level effectuated by Act 2016–18 implicate the political process doctrine.⁸³ The facts around Alabama’s Act 2016–18 and the NAACP’s legal challenge of Act 2016–18 also highlight a deficiency in the doctrine with regard to intersectional harms.

II. *Schuetz*’s Second Class Citizens

Some recent scholarship has highlighted a turn to the political process and local government to vindicate the interest of minority groups that lack representation at the state level.⁸⁴ Yet, as Part I discussed, some instances of preemptive measures effectively inhibit

78 See Covert, *supra* note 65.

79 Rivlen-Nadler, *supra* note 2.

80 See Covert, *supra* note 65.

81 The Alabama Senate fast-tracked the bill and passed it within 36 hours of receiving on a 23–12 roll call; all in favor were white, only six black senators opposed. See Lauren Walsh, *Birmingham Minimum Wage Ordinance Voided After Gov. Bentley Signs Bill into Law*, ABC 30/40 NEWS (Feb. 25, 2016), <http://abc3340.com/news/local/birmingham-minimum-wage-ordinance-voided-after-gov-bentley-signs-bill-into-law> [https://perma.cc/8T4Z-MD9P].

82 State legislatures passed the same kind of local legislation to preempt labor protections in St. Louis, Missouri and Milwaukee, Wisconsin, two cities with similarly high concentrations of Black and minority minimum wage workers as compared with the rest of the state, and majority white state legislature. See ECON. POL’Y INST., *supra* note 4.

83 See *infra* Section II.A.I. (discussing the NAACP’s political process challenge to Act 2016–18).

84 Olatunde C.A. Johnson, *The Local Turn: Innovation and Diffusion in Civil Rights Law*, 79 L. & CONTEMP. PROBS. 115–44 (2016); see generally DAVID ROLF, *THE FIGHT FOR \$15: THE RIGHT WAGE FOR A WORKING AMERICA* 61 (2016) (describing the contemporary trend of “using local politics to lift worker standards” and the underlying justification that cities “are the arenas where progressive initiatives have the best prospects for

a minority group's ability to engage equally with the political process for their own benefit. Some of the progressive advances achieved at the local level might more directly address systemic deficiencies associated with discrete minority groups than others.⁸⁵ When intrastate preemption disparately harms people of color, the negative impact of such preemption poses a threat more concrete and severe than "impeding innovation and experimentation."⁸⁶ Indeed, the cost of intrastate minimum wage preemption that disparately harms women of color not only poses dire financial consequences for many low-income women and their families, but also further alienates women of color from being represented in a political process from which their interests are already excluded.⁸⁷ Though some interpret *Schuette's* new political restructuring test as a nail in the coffin of the political process doctrine,⁸⁸ the broad and ambiguous nature of the new test arguably creates an opening for the Court to incorporate consideration of intersectional harms into the doctrine.

Having established the jurisprudential history of the local political process doctrine and reviewed contemporary context that calls for resolution around the uncertainty of the doctrine's future, this Part identifies the intersectional harm caused by intrastate minimum wage preemption and the erasure of the unique burdens of women of color in equality law. Section II.A. explores the NAACP's current challenge to Alabama's preemptive bill on the basis that Act 2016–18 discriminates along the single axis of race. II.A. then goes on to discuss how analysis of the effects of the bill along the axis of gender, in addition to

enduring success").

85 For example, North Carolina's HB 2 directly excluded members of the LGBTQ community from the protection of local antidiscrimination law, whereas state preemption of a local plastic bag bans has been more commonly understood as divorced from paradigmatic minority interest. *See* 2016 N.C. Sess. Laws 3 §§ 1–3, *repealed by* 2017 N.C. Sess. Laws 4 § 1. In addition to preempting more inclusive antidiscrimination policies at the local level, the North Carolina law required that "[p]ublic agencies . . . require multiple occupancy bathrooms or changing facilities . . . be designated for and only used by individuals based on their biological sex" and specifically defined "biological sex" as "[t]he physical condition of being male or female, which his stated on the person's birth certificate." 2016 N.C. Sess. Laws 3 §§ 1–3, *repealed by* 2017 N.C. Sess. Laws 4 § 1.

86 *See* Phillips, *supra* note 76, at 2262.

87 *See* Olena Hankivsky & Renee Cormier, *Intersectionality and Public Policy: Some Lessons from Existing Models*, 64 POL. RES. Q. 217, 220 (2011) ("[E]ven when the importance of diversity is noted and recommendations are made to include an intersectionality approach in policy, some decision makers continue to espouse one-dimensional approaches, such as gender mainstreaming or gender-based analysis, which a number of scholars and activists have argued elsewhere cannot be adapted to address multiple inequalities.").

88 *See, e.g.*, Thomas D. Kimball, *Schuette v. BAMN: The Short-Lived Return of the Ghost of Federalism Past*, 61 LOY. L. REV. 365, 377 (2015).

race, reveal women of color as the group most disparately impacted by recent intrastate minimum wage preemption. Section II.B. contextualizes *Schuetz* as one case of many that have narrowed antidiscrimination laws to exclude intersectional harm and then examines how the new test introduced in *Schuetz*, which seems to require an inquiry into the discriminatory harm along the single axis of race, might continue the erasure of the multi-dimensional discrimination experienced by women of color.

A. An Intersectional Analysis of the Effects of Intrastate Minimum Wage Preemption

Intersectional theory asserts a notion of human identity as inherently multi-dimensional.⁸⁹ While a conventional contemporary understanding of identity acknowledges on some level that various identifiers such as race, class, sex, national origin, and sexual orientation can individually affect how a person moves through the world and experiences society,⁹⁰ intersectional theory specifically highlights how those identifiers simultaneously inform and impact an individual's experience.⁹¹ Though the concept of intersectionality now pervades public discourse regarding a number of socio-political topics ranging from feminism to gender theory,⁹² intersectional theory has roots in a specifically legal context. Professor Kimberlé Crenshaw first introduced the concept as an analytical framework to bring to the forefront the particular way the conventional doctrine under Title VII failed to account for and theoretically erased the way Black women uniquely experience

89 RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 10 (2d ed. 2012).

90 The ongoing debate around whether “identity politics” works to unite or divide the American electorate itself evidences a broad awareness of the many available identifiers employed by people in describing themselves and identifying their social and political allegiances. Compare Eric Schinkler, *Debunking the Myth that “Identity Politics” is Bad for the Democratic Party*, *VOX* (Apr. 21, 2018), <https://www.vox.com/the-big-idea/2018/4/16/17242748/identity-politics-racial-justice-democratic-party-lilla-traub-trump> [https://perma.cc/P7DF-XS2B] with Walter Benn Michaels et al., *What is the Left Without Identity Politics?*, *THE NATION* (Dec. 16, 2016) <https://www.thenation.com/article/what-is-the-left-without-identity-politics/> [https://perma.cc/D6EW-DLQ4] (including a debate between four contributors on the question: “Is the left too focused on ‘identity politics’—and what the hell does that term even mean?”).

91 See DELGADO & STEFANCIC, *supra* note 89, at 57.

92 See, e.g., Eleanor Robertson, *Intersectional-what? Feminism’s Problem with Jargon is That Any Idiot Can Pick It Up and Have a Go*, *THE GUARDIAN* (Sept. 30, 2017), <https://www.theguardian.com/world/2017/sep/30/intersectional-feminism-jargon> [https://perma.cc/P6AW-2FFN] (“Like much of the work done by feminists and queer theorists around the same time, there is a certain ambiguity to intersectionality, if only because many of the people interpreting it come from this poststructuralist milieu.”).

workplace discrimination.⁹³ Professor Crenshaw posited that by examining discrimination claims in the context of “otherwise-privileged members of [a] group,” like Black men or white women, the “single-axis framework utilized in the antidiscrimination law context erases Black women in the conceptualization, identification, and remediation of race and sex discrimination.”⁹⁴ Through engaging in a multidimensional analysis of the way gender, class, and race-based discrimination impact and exert force on women of color as individuals at the intersection of those various forms of discrimination, intersectional theory attempts to correct the erasure perpetuated by “single-issue analyses” of harm caused by discrimination as it is experienced by women of color.⁹⁵

In the context of intrastate minimum wage preemption, rather than examining how state action like Alabama’s Act 2016–18 might unfairly burden a class of individuals as they are defined by one axis of their identities, like race *or* gender,⁹⁶ an application of an intersectional analysis encourages identification of groups that may be burdened by that same measure as it impacts multiple axes of their identities (i.e., race and gender). After first acknowledging the interconnected nature of race and gender for those with intersectional identities, it then becomes clear how the harm threatened by some instances of minimum wage preemption that especially burden women of color may be reasonably described as both race-based and gender-based.

1. *Lewis v. Bentley* as a “Single-Axis” Equal Protection Challenge to Act 2016–18

Given the recent proliferation of these kind of preemptive measures, there are relatively few examples of litigation challenging these measures.⁹⁷ *Lewis v. Bentley*, a case currently on appeal in the Eleventh Circuit, however, provides one such example.⁹⁸ In April 2017, the

93 See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 8 *UNI. CHI. L. FORUM* 139, 140 (1989) (identifying that “dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single axis”).

94 *Id.*

95 See *id.* at 139.

96 See *infra* Section II.A.1 (discussing an example of a single-axis political process challenge to Alabama’s Act 2016–18).

97 See *supra* note 68.

98 See *Lewis v. Bentley*, No. 17-11009 (11th Cir. Mar. 3, 2017).

NAACP filed a lawsuit challenging HB 174, the house bill eventually signed into law as Act 2016–18, as a violation under the Voting Rights Act, the conventional Equal Protection Doctrine, and the political process doctrine.⁹⁹ Though the complaint identifies Marnika Lewis, a 23-year-old Black woman, as a named plaintiff,¹⁰⁰ the complaint largely frames the legal claims of the Birmingham citizens harmed by the law preempting Birmingham’s minimum wage ordinance along the single axis of race-based discrimination.¹⁰¹

Among other things, the complaint identified Act 2016–18 as inextricably linked to Alabama’s 1901 Constitution, which concentrated power at the State level for the express purpose of denying predominantly Black communities local control over their communities.¹⁰² The complaint posits that Alabama’s preemption of the Birmingham ordinance “deliberately burdened the ability of Plaintiffs to effectuate meaningful change aimed at eliminating the vestiges of *de jure* race discrimination.”¹⁰³ The complaint identifies significant disparities in unemployment rates among racial groups, significant disparities in levels of income and wealth, home ownership, educational attainment, and in poverty rates as vestiges of *de jure* discrimination.¹⁰⁴ The complaint goes on to argue that due to the dearth of Black state-wide elected officials and racialized political gerrymandering, Black communities have no effective representation at the state level and thus no political recourse to address these vestiges of *de jure* discrimination at the state-wide level.¹⁰⁵ The District Court judge granted the defendant’s motion to dismiss and the NAACP appealed to the Eleventh Circuit.¹⁰⁶

An amicus brief submitted by the Partnership for Working Families and the Southern

99 *Id.*

100 *See* Complaint at 4–5, *Lewis v. Bentley*, (No. 16-00690) 2016 WL 1720457 (Apr. 28, 2016). The second named plaintiff, Antoin Adams, is a 23-year-old Black man. *Id.*

101 *Id.* at 3 (arguing that “[t]he enactment of HB 174 (a sweeping statute nullifying Birmingham’s minimum wage ordinance and pre-empting any local regulation of matters touching upon private sector employment) is the most recent chapter in a long history of the Alabama State Legislature discriminating against predominantly African-American communities”).

102 *Id.* at 3–4, 14.

103 *Id.* at 15–16.

104 *Id.*

105 *Id.* at 16.

106 *Lewis v. Bentley*, 2017 WL 432464 (N.D.Ala. Feb. 1, 2017).

Poverty Law Center in support of the NAACP's position does acknowledge the even steeper wage discrepancies between Black women and white men in Alabama.¹⁰⁷ However, the main thrust of the amicus argument closely parallels the NAACP's framing of the invalidity of Act as race discrimination, separate from any kind of gender-based discrimination.¹⁰⁸

Demographic data on the racial makeup of Birmingham and the communities therein shows that most of the people relying on low-wage jobs are people of color.¹⁰⁹ This demographic data supports the NAACP's claim that Act 2016–28 effectuates a disparate impact on low-income communities of color and specifically highlights a significant negative impact on Black Americans.¹¹⁰ Empirical data also shows that racial minorities make up a larger portion of the population of the cities that are the recent sites of these preemption measures.¹¹¹ Though the state representative who introduced Act 2016–18 lives in an area of Alabama that is ninety-seven percent white and one of the wealthiest communities in the country, Birmingham is seventy-three percent Black and thirty percent of its residents live in poverty.¹¹²

However, as the next section discusses, a closer look of how intrastate minimum wage preemption impacts sub-groups within larger racial minority groups demonstrates how these kinds of preemptive measures arguably amount to race- *and* gender-based discrimination. Indeed, the empirical data suggests that intrastate minimum wage preemption has the most significantly negative impact on women of color.

2. Intrastate Minimum Wage Preemption Causes Multidimensional Harm

Notwithstanding the substantial racial wage gap identified by petitioners in *Lewis v. Bentley*, when one examines the impact Act 2016–18 has on multiple axes of identity, empirical data suggests that Black women and women of color are especially burdened

107 Brief for The Partnership for Working Families & The Southern Poverty Law Center as Amici Curiae Supporting Appellants at 2–3, *Lewis v. Bentley*, No. 17-11009 (11th Cir. Mar. 3, 2017).

108 *Id.* at 10–11.

109 *Id.* at 9.

110 *See id.* at 9 fig.3 (reflecting higher wages for white employees in the Alabama food and service accommodation sector as compared the hourly wage for Black workers).

111 Complaint at 2, *supra* note 100.

112 *See Wilpert, supra* note 67.

by intrastate preemption of higher minimum wage. Gender alone seems to correlate with employment in the low-wage workforce in a significant way.¹¹³ Due to employment discrimination and the gendered allocation of caregiving responsibilities, among myriad other factors, women are over-represented in low-wage jobs and are at greater risk of poverty than men throughout their lives.¹¹⁴ Women make up two-thirds of minimum wage workers and workers in tipped occupations, and the majority of women in the low-wage workforce contribute the sole source of income to their households.¹¹⁵ A significant number of women working for minimum wage also support children under the age of eighteen.¹¹⁶ To the extent intrastate minimum wage preemption lowers the income of low-wage workers in states like Alabama and Missouri, the statistics outlined above suggest that those measures have a disproportionate impact on women.¹¹⁷ Yet, just as looking at the relationship between race and participation in the low-wage work force cannot accurately depict the reality, neither does a single-axis analysis focusing on gender.

A multidimensional examination of the way race and gender identity correlate with employment in the low-wage workforce distill women of color as the most dependent on minimum wage jobs and the group that stands to lose the most when states preempt localities from enacting a minimum wage above the low floor set by the federal government.¹¹⁸ Among

113 See ROLF, *supra* note 84, at 26, 73, 174–75 (observing gendered disparities in populations employed in part-time work and domestic work in addition to minimum-wage work and a gendered disparity in access “formal job protection” more generally).

114 See *Policy & Economic Security*, NATIONAL WOMEN’S LAW CENTER, <https://nwlc.org/issue/poverty-economic-security/> [<https://perma.cc/WCW8-9SRU>].

115 See Kayla Patrick, *Low-Wage Workers Are Women: Three Truths and a Few Misconceptions*, NATIONAL WOMEN’S LAW CENTER, <https://nwlc.org/blog/low-wage-workers-are-women-three-truths-and-a-few-misconceptions> [<https://perma.cc/48MB-Z7BM>].

116 *Id.*

117 ROLF, *supra* note 84, at 175 (“[T]he decline in the minimum wage’s relative value has contributed to the increased inequality in wages over the past few decades, particularly among low-wage women, whose pay tends to be more closely tied to the minimum wage than low-wage men’s pay.”).

118 See Center for Intersectionality and African American Policy Forum, *Did You Know? The Plight of Black Girls and Women in America*, https://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/5422de0ee4b080d53cf82554/1411571214756/Did-You-Know_Pligh-of-Black-Women.pdf [<https://perma.cc/S894-HTRR>] (“Single black women have the lowest net worth among all racial and gender groups, only \$100 compared to \$7,900 for single Black men, \$41,500 for single white women, and \$43,800 for single white men.”).

female minimum wage workers, women of color are disproportionately overrepresented.¹¹⁹ African-American women accounted for just under 13% and Latina women, just under 14% of all employed women in 2012, but more than 15% of women who made minimum wage were African-American and more than 18% were Latina.¹²⁰ Black women participate in the labor force at higher rates than white women and also raise children as single mothers at higher rates than white women.¹²¹ In the specific context of Alabama, studies published before Alabama's adoption of Act 2016–18, measured the racial wage gap in terms of race alone.¹²² The results evidenced that Black workers in Alabama make 74 cents on the dollar as compared to white workers.¹²³ Yet when two studies looked at the racial wage gap with the added lens of gender, the studies found that Black women make even less, between 57 and 60 cents on the dollar as compared to white men.¹²⁴

Overrepresentation in the minimum wage workforce does seem to correlate with race—Black men and Latinos are slightly overrepresented in the low-wage workforce.¹²⁵ However, that men of color are not over-represented in the lowest-wage workforce and comprise a much smaller portion of low-wage workforces than do Black women and Latinas suggest that the intersection of race and gender uniquely position women of color in the

119 See Katherine Gallagher Robbins & Julie Vogtman, *Higher State Minimum Wages Promote Fair Pay for Women*, NAT'L WOMEN'S LAW CENTER (Sept. 2013), <https://www.nwlc.org/sites/default/files/pdfs/minimumwageandwagegap.pdf> [<https://perma.cc/GT6A-YTS2>].

120 *Id.*

121 See Kayla Patrick, *Black Women Lead Families but Still Lag behind in Jobs and Wealth*, NAT'L WOMEN'S LAW CENTER, <https://nwlc.org/blog/black-women-lead-families-but-still-lag-behind-in-jobs-and-wealth/> [<https://perma.cc/6RG8-7R2T>].

122 See Jeff Rickert & Howard Wial, *The State of Working Alabama*, WORKING FOR AM. INST. (2003), <https://www.doleta.gov/usworkforce/communityaudits/docs/Files%20for%20CA%20Website/AL-Statewide/AL-Statewide-Product-Final%20WAI%20Report.pdf> [<https://perma.cc/PP2H-FGW7>].

123 *Id.*

124 See Julie Anderson et al., *The Status of Women in the South*, INST. FOR WOMEN'S POLICY RESEARCH (2016), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/R462%20Status%20of%20Women%20in%20the%20South.pdf> [<https://perma.cc/MPP4-PGBD>]; *Alabama Women and the Wage Gap*, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES (2015), <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/4-2017-al-wage-gap.pdf> [<https://perma.cc/XC7J-7EAE>].

125 See *Low-Wage Jobs Are Women's Jobs: The Overrepresentation of Women in Low-Wage Work*, NAT'L WOMEN'S LAW CTR., <https://nwlc.org/resources/low-wage-jobs-are-womens-jobs-the-overrepresentation-of-women-in-low-wage-work/> [<https://perma.cc/CVX7-6FGA>].

American economic hierarchy.¹²⁶ Identifying the ways in which the multiple axes of a low-wage worker's identity might contribute to the obstacles and discrimination they face in earning a living helps to shine a light on the consequential impact those identifiers have in the context of labor regulation—a topic that is often only addressed in using the seemingly neutral lens of class or economics.¹²⁷ Furthermore, accounting for and acknowledging the intersectional identities of women of color in evaluating the effects of the current onslaught of minimum wage preemption more fully reveals the starkness of the disparate burden such legislative enactments effectuate.¹²⁸

Unfortunately, as the next section discusses, a second kind of “intersection”—that of the trajectory of the Supreme Court's recent political process jurisprudence and the increasingly pervasive political strategy of intrastate preemption—threatens to render this disproportionate burden wholly beyond the reach of antidiscrimination and equality law.

B. Equal Protection Jurisprudence and Minimum Wage Preemption as a Second Intersection of Consequence for Women of Color

The Supreme Court's decision in *Schuette* to call into question the political process doctrine warrants additional concern when considered in the context of both the recent anticlassification trajectory of the Fourteenth Amendment¹²⁹ and in light of the federalism debate around the proper balance between state and local power.¹³⁰ Much discussion of the potential impermissibility of intrastate minimum wage preemption has arisen in the context of whether such preemption might contravene a particulate state's constitutional

126 *Id.*

127 ROLF, *supra* note 84, at 195 (describing the public debate around minimum wage over the last hundred years as one concerned with the effect of increases on businesses and “economic growth”).

128 *Id.* at 175 (“The overrepresentation of women and people of color in low-wage industries means they benefit disproportionately from minimum-wage increases (and also explains much of the gender and race pay gap).”). Rolf's observation regarding the relationship between race and gender and benefits derived from minimum-wage increases suggests that any preemption or decrease in the minimum wage disproportionately harms women and people of color.

129 See, e.g., Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1473 (2005) (“Scholars debate what our constitutional understanding of equality ought to be, but most would agree that American equal protection law has expressed anticlassification, rather than antisubordination, commitments as it has developed over the past half-century.”).

130 See *infra* Section I.A.1.

provisions regarding the proper delegation of decision-making power to localities.¹³¹ However, the current trend of intrastate preemption also raises federal constitutional and statutory concerns in the equal protection context. There are two related theories that might support equal protection challenges to state statutes that preempt local laws: that these preemptive measures amount to impermissible intentional discrimination and that the measures constitute impermissible political restructuring under the political process doctrine.¹³²

1. Conventional Equal Protection Doctrine as Unamenable to Intersectional Discrimination

Over a number of decades, the Supreme Court has embraced an anticlassification, rather than antistatutory view of the underlying purposes of the Fourteenth Amendment and, in doing so, significantly narrowed the breadth and strength of possible antidiscrimination remedial efforts.¹³³ Under conventional equal protection jurisprudence, a court reviews challenges to statutes and legal enactments that intentionally discriminated against a protected class, like race or gender, under heightened scrutiny.¹³⁴ Under heightened scrutiny the State must provide a justification for the legislation that furthers an important government interest.¹³⁵ It is well-settled that the Equal Protection Clause dictates that to receive heightened scrutiny, it is not enough for plaintiffs to show that the challenged action creates a “disparate impact” on a suspect class.¹³⁶ Rather, the challenged action

131 Some state constitutions and statutes contain “home rule” provisions that delegate presumptive power to local governments on a number of matters understood to require the discretion of those with close ties and connections to a particular city. See Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1110 (2012); see also Briffault et al., *The Troubling Turn in State Preemption*, *supra* note 12, at 4 (discussing potential legal challenges to intrastate preemption in states with home rule provisions).

132 See Briffault et al., *The Troubling Turn in State Preemption*, *supra* note 12, at 13.

133 See Dale Larson, *Antidiscrimination Law in the Workplace: Moving Beyond the Impasse*, 9 U. MD. L.J. RACE RELIG. GENDER & CLASS 303, 306–10 (2009) (describing a broadening chasm between available antidiscrimination law remedies and the reality of how discrimination occurs in the workplace from World War II to present).

134 *Id.* at 13–14 (providing an overview of the burden-shifting litigation framework under a conventional equal protection claim).

135 *Id.*

136 See *Wash. v. Davis*, 426 U.S. 229, 239 (1976) (remarking that “our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose is unconstitutional *solely* because it has a racially disproportionate impact”).

must either include a facial classification or must be motivated by discriminatory intent.¹³⁷ In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court recognized that a facially neutral law that is motivated by discrimination violates the Equal Protection Clause of the Fourteenth Amendment.¹³⁸ However, the multi-factor balancing test announced by the Court in *Arlington Heights* maintains a requirement of some demonstration of discriminatory intent.¹³⁹ Given the clarity of the jurisprudence with regard to facial discrimination, it seems unlikely that states will draft preemption legislation based on facial classifications that would implicate heightened scrutiny.¹⁴⁰ Similarly, the intent requirement under the conventional equal protection doctrine sets such a high evidentiary bar for plaintiffs¹⁴¹ that it allows for racial discrimination to adapt to and thus evade legal accountability.¹⁴² This typically limits inquiry into discrimination to a single-axis of identity,¹⁴³ and antidiscrimination law has developed in such a way that it largely fails to provide accessible or effective avenues of legal recourse for race and gender-based discrimination as it is specifically experienced by women of color.¹⁴⁴ Before

137 *Id.*

138 *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

139 In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court applied a fact-intensive, multi-factored intent test to analyze a facially neutral law. *Id.* at 265–66. The Court identified the following factors as relevant to establishing the existence of a discriminatory purpose: 1) the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes; 2) the specific sequence of events leading up to the challenged decision; 3) departures from the normal procedural sequence; 4) substantive departures, particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached; and 5) the legislative or administrative history underlying the decision, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports. *Id.* at 267–68.

140 See Briffault et al., *The Troubling Turn in State Preemption*, *supra* note 12, at 14 n.70; Reed, *Pro-Business or Anti-Gay?*, *supra* note 26, at 160.

141 See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987) (explaining and critiquing the intent requirement in equal protection law).

142 See Elise Boddie, *Adaptive Discrimination*, 94 *N.C. L. REV.* 1235, 1239 (2016) (arguing that racial discrimination “adapts to the legal and social environment by mutating to evade prohibitions against intentional discrimination”).

143 See Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 93.

144 See Kimberlé Crenshaw, *Why Intersectionality Can't Wait*, *WASHINGTON POST* (Sept. 24, 2015), <https://www.washingtonpost.com/news/in-theory/wp/2015/09/24/why-intersectionality-cant-wait/> [https://perma.cc/33JA-2PAB] (highlighting the continued erasure of Black women and women of color in the ongoing fight for racial justice); Lauren Sudeall Lucas, *Here's Why Equal Protection May Not Protect Everyone Equally*, *WASHINGTON POST* (Sept. 23, 2015), <https://www.washingtonpost.com/news/in-theory/wp/2015/09/23/>

Schuette, the political process rationale and doctrine may have presented a creative avenue to challenge laws with disproportionate effects on women of color. The next subsection discusses the specific obstacles the *Schuette* plurality creates for political process claims seeking to remediate intersectional harms.

2. The Intersectional Problem with *Schuette* and the Political Process

How the Supreme Court further articulates the new test for impermissible political restructuring in the context of the trend of intrastate minimum wage preemption constitutes a second consequential “intersection” that threatens to push the unique burdens experienced by women of color further beyond the realm of legal remedy. Given the anticlassification turn of antidiscrimination law, the future of the political process doctrine takes on additional significance. As Justice Sotomayor made clear in her dissent from the plurality decision in *Schuette*: “without checks, democratically approved legislation can oppress minority groups.”¹⁴⁵

Indeed, prior to *Schuette*, a court might apply the political process doctrine to identify laws that shift decision-making power away from localities that have majority minority populations to a white-dominated state legislature, as a law that violated the equal protection clause on the basis that it substantially burdened a minority group.¹⁴⁶ However, if the *Schuette* plurality truly “rewrote” and effectively overturned the rationale that political restructuring can violate the Equal Protection Clause of the Fourteenth Amendment when it makes it more difficult for minorities to enact legislation that addresses racial issues,¹⁴⁷ Justice Sotomayor’s concerns about “majority rule without constitutional limits” become even more dire for women of color.¹⁴⁸ Given how “racial issues” like minimum wage might more accurately be described as intersectional issues, such an interpretation of the *Schuette* test will push the unique burdens experienced by women of color beyond the realm of legal remedy and effectively codify their status as second-class citizens.

heres-why-equal-protection-may-not-protect-everyone-equally/ [https://perma.cc/UL6N-ZQGZ] (providing examples of how the continued “categorical” natural of equality law erases women with multiple, intersecting minority identities).

145 *Schuette*, 134 S. Ct. at 1651 (Sotomayor, J., dissenting).

146 *See Recent Legislation*, *supra* note 26, at 600.

147 *See Equal Protection Clause—Political-Process Doctrine*, *supra* note 25, at 290.

148 *Schuette*, 134 S. Ct. at 1654 (Sotomayor, J., dissenting).

III. *Schuette*'s Test as an Opportunity to Correct Intersectional Erasure

Though some commentators have interpreted the *Schuette* plurality as the end of the political process doctrine,¹⁴⁹ the intersection of the current events involving intrastate minimum wage preemption and the Court's reconsideration of the political process doctrine might also provide a doctrinal opening to move equality law in the direction of increased inclusivity of intersectional harm. The new test's ambiguity around how to identify impermissible political restructuring arguably creates an opening for the Court to acknowledge and incorporate a multidimensional account of discrimination into its equality jurisprudence. As opportunities to clarify the new test laid out by the plurality opinion in *Schuette* present themselves, the Court should consider how challenged legislative enactments might impact those with intersectional identities.

Section III.A. identifies a number of ambiguities in the Supreme Court's articulation of the new test for identifying impermissible political restructuring and examines possible interpretations of the test in future political process cases. Section III.B. argues that the Court, in further developing the new trajectory of the political process doctrine, should acknowledge and consider a disparate impact on women of color as weighing against the constitutional validity of a challenged political restructuring.

A. Potential Doctrinal Openings under the *Schuette* Test

The *Schuette* plurality held that a political restructuring may violate the Fourteenth Amendment when newly enacted legislation or "state action in question . . . ha[s] the serious risk, if not purpose of causing specific injuries on account of race."¹⁵⁰ As a threshold matter, the new test announced in *Schuette* brings with it a number of potentially consequential ambiguities.¹⁵¹ The fractured nature of the Court's decision also highlights significant

149 See *Recent Legislation*, *supra* note 26, at 606 ("Given (1) this cabining [of *Seattle*], (2) the minimal amount of political process case law, and (3) the absence of a majority in *Schuette*, the current scope of the political process doctrine is unclear."); *Lewis v. Bentley*, No. 2:16-CV-690-RDP, 2017 WL 432464, at *13 (N.D. Ala. Feb. 1, 2017) (questioning the "so-called" political process doctrine).

150 *Schuette*, 134 S. Ct. at 1633; *Recent Legislation*, *supra* note 26, at 281.

151 *Equal Protection Clause—Political-Process Doctrine*, *supra* note 25, at 290 (noting that without further direction from the Court, the "on account of race" standard appears to require a similar kind of racial interrogation the plurality suggested should be avoided in these cases); see *Sanders*, *supra* note 18, at 1434 ("*Schuette*'s lack of majority opinion, the plurality's failure to expressly confront the *Hunter / Seattle* doctrine on which the Sixth Circuit had relied, and the unwillingness of any of the Justices to candidly confront what role voters' racial attitudes might have played in the adoption of Proposal 2 all make the case an uneasy fit with

substantive disagreements between the justices over the future of the doctrine.¹⁵² The phrases “serious risk” and “on account of race” leave much room for further interpretation by the Court.¹⁵³ Furthermore, on its face, the plain language of the *Schuetz* test seems to be in tension with previously well-settled law regarding the insufficiency of a disparate impact alone in supporting a finding of an equal protection violation.¹⁵⁴ This tension, in addition to the changes in the Court’s composition since the *Schuetz* decision,¹⁵⁵ renders the future trajectory of the political process doctrine under the new test an uncertain one.

One possible elaboration of the new test might simply import the conventional equal protection rule regarding disparate impact into the new one. Like *Washington v. Davis*, under this interpretation a demonstration that a political restructuring did or would result in a disparate impact on women of color would not suffice to make out a political process violation.¹⁵⁶ Further developing the *Schuetz* test in this fashion would ease the current tension between the *Schuetz* test and conventional equal protection jurisprudence, and make the recognition of intersectional harm more difficult in the context of intrastate minimum wage preemption. The argument stands that the Court could, and should, reasonably think about disparate impact on women of color, or intersectional disparate impact, as inherently different from the single-axis impact at issue for the Court in a *Washington v. Davis* and

the precedents that came before it.”).

152 Justice Kennedy authored a plurality opinion joined by Chief Justice Roberts and Justice Alito. *Schuetz*, 134 S. Ct. at 1623. Justice Kagan took no part in the decision. *Id.* at 1638. Justice Breyer wrote a concurrence for himself and Justice Scalia wrote a concurrence for himself and Justice Thomas. *Id.* at 1639. Justice Scalia would have overruled *Hunter* and *Seattle* and rejected the political process doctrine entirely. *Id.* at 1643. Finally, Justice Sotomayor wrote a dissent joined by Justice Ginsburg.

153 *Schuetz*, 134 S. Ct. at 1633.

154 *Wash. v. Davis*, 426 U.S. 229, 239 (1976) (holding that “a law or other official act, without regard to whether it reflects a racially discriminatory purpose, [is not] unconstitutional solely because it has a racially disproportionate impact”); *see also supra* note 136 and accompanying text.

155 The Senate confirmed Justice Neil Gorsuch in April 2017 to fill the seat on the Supreme Court left vacant by the death of Justice Antonin Scalia. *See* Simon van Zuylen-Wood, *Little Scalia: Watching Neil Gorsuch, a Mild-mannered Good Boy from Denver, Become the Second-most-polarizing Man in Washington*, N.Y. MAGAZINE (May 28, 2018), <http://nymag.com/daily/intelligencer/2018/05/how-gorsuch-became-the-second-most-polarizing-man-in-d-c.html> [<https://perma.cc/36H3-PJXS>] (detailing Justice Gorsuch’s similarities to Justice Scalia and describing Justice Gorsuch as “the third-most-“Scalian” of the [Trump’s] nominees, based on everything from his originalist jurisprudence to his penchant for dashing off solo opinions”).

156 *See Wash. v. Davis*, 426 U.S. at 239.

Massachusetts v. Feeney.¹⁵⁷ That a challenged piece of legislation simultaneously harms two, overlapping protected classes might provide a stronger indicator, especially under the *Schuetz* test's concern with "risk" of racial harm, to find that a departure from the norms of the political process cannot be sustained under the Constitution. However, the Court has not found this particular argument persuasive.

Some aspects of the *Schuetz* decision suggest, however, that even though directly importing the conventional equal protection standard may present the most streamlined path of further developing the *Schuetz* test, the Court intended to leave the political process rationale in place, as a discrete, albeit newly refined, doctrine. One such aspect is the Court's use of the language: "serious risk, if not purpose of injury on account of race."¹⁵⁸ On its face the *Schuetz* test explicitly accounts for capturing intentionally discriminatory political restructuring with the "purpose" element of the test. Extending the test to capture political restructuring which threatens a "serious risk" of harm in addition to that with a "purpose" to harm then suggests a broader class of impermissible political restructuring than would a pure intent standard.¹⁵⁹ Indeed, if the Court wanted to maintain a consistent, pure intent standard, it could have expressly overruled the political process cases in *Schuetz*, leaving in place the *Arlington Heights* precedent as the solitary doctrinal tool to identify and capture intentional discrimination.¹⁶⁰

Another possible future interpretation of the *Schuetz* test might track the structure of the *Arlington Heights* multi-factor inquiry into circumstantial evidence.¹⁶¹ Under this iteration of the *Schuetz* test, the presence of a number of factors that constitute circumstantial evidence might be sufficient, absent discriminatory intent, for the Court to find a "serious risk" or "purpose of causing specific injuries on account of race." The Court might draw from the previous political process cases to identify factors like a state history of explicit discrimination and ongoing division in the political process¹⁶², the singling out

157 In *Wash. v. Davis*, based on a disparate impact on black applicants, plaintiffs brought a single-axis race-based challenge to the Washington D.C. Police Department's use of a formal test in their hiring practices. 436 U.S. 229 (1976). *Feeney* involved a single-axis gender-based challenge to a state law giving a hiring preference to Veterans over non-Veterans. *Feeney*, 442 U.S.

158 *Schuetz*, 134 S. Ct. at 1633.

159 *Id.*

160 See *supra* note 139 for discussion of the *Arlington Heights* factors.

161 *Id.*

162 The discriminatory history behind Alabama's state constitution might weigh against a political

of municipalities with atypically large minority populations as compared to the rest of the state, procedural anomalies in enacting preemptive legislation,¹⁶³ and a single-axis or intersectional disparate impact on protected classes as factors weighing against the permissibility of an instance of political restructuring.

B. A Disparate Impact on Women of Color Should Warrant Significant Concern under the New *Schuette* Test

As discussed above, when states enact preemptive legislation in response to local efforts to raise minimum wage, like Act 2016–18, those measures disproportionately harm and burden Black women and women of color.¹⁶⁴ The reality of gendered allocation of caregiving responsibilities and higher rates of poverty and single income households for women of color¹⁶⁵ further transform this disparate burden on women of color into a harm against their entire communities. If the Court refuses to recognize laws such as these that have a disproportionate effect on women of color as indicative of impermissible racial discrimination, it will perpetuate the theoretical erasure of the lived experiences of women of color, and in doing so, further perpetuate gendered and race-based subordination.¹⁶⁶

If the Court does further interpret the *Schuette* test as including a pure intent standard that implicates *Washington v. Davis*, the future of the NAACP’s challenge to Act 2016–18 seems inevitably bleak. Similarly, for arguments challenging intrastate minimum wage preemption based on an intersectional disparate impact an interpretation of *Schuette* that imports the Court’s conventional equal protection approach to disparate impact would be a likely insurmountable obstacle to success. The various ambiguities in the new test discussed above do offer an alternative trajectory for the Court, and the relative unlikelihood that the Court will vindicate intersectional interests on its own accord makes it all the more

restructuring in the presence of other circumstantial evidence under this kind of test. *See supra* note 101 and accompanying text.

163 *See supra* notes 81–83 and accompanying text discussing the uncharacteristic speed with which Act 2016–18 passed through the Alabama state legislature.

164 *See infra* Section II (discussing the racial and intersectional wage gap in Alabama).

165 *See supra* notes 122, 126 and accompanying text.

166 Professors Angela Harris and Zeus Leonardo emphasized the insufficiency of equality reforms that fail to explicitly acknowledge what they call “race-gender subordination” point in the educational context: “[To] speak to the multiplicity of subordination cannot be accomplished absent a clear attempt to explain and alleviate the challenges experienced by Black women and other marginalized groups.”). Angela Harris & Zeus Leonardo, *Intersectionality, Race-Gender Subordination, and Education*, 42 REV. RES. IN EDUC. 1, 18 (2018).

necessary to make the Court's opportunity to do so known here. In so far as the Court begins to more clearly articulate the *Schuette* test in future cases, the Court should consider the high stakes of constructing the standard with regard to only one axis of identity—the erasure of disproportionate harms caused to and burdens shouldered by women of color.

Yet the Court might conscientiously articulate the standards required by the *Schuette* test, and also avoid the further erasure of intersection identities. With regard to the evidentiary burden and relevant standards under the *Schuette* test for detecting impermissible political restructuring, the Court should take into account intersectional harms enacted on intersectional subsets of a minority community when it considers whether a law causes a “serious risk of injury on account of race.”¹⁶⁷ More specifically, when political restructuring is challenged as a violation of the political process, the Court should find that a disparate impact on women of color is a factor weighing in toward the “serious risk of causing harm of account of race,” if not probative of discriminatory intent.¹⁶⁸ An application of these inclusive standards might provide an avenue for local communities to seek redress where citizens work to enact legislation that addresses obstacles that disproportionately affect women of color.¹⁶⁹ Given the racial polarization of cities and rural areas in many states,¹⁷⁰ the demographic concentration of people of color in these areas,¹⁷¹ and the reality that women make up the vast majority of low-wage workers and are disproportionately burdened with caretaking responsibilities,¹⁷² an interpretation of *Schuette* test which does not recognize and redress intersectional harm will render some of America's most politically powerless citizens without any legal avenues of self-governance and self-determination.

Whether the Supreme Court, in light of the addition of a new conservative justice in the time since the *Schuette* decision, will reach the same conclusions regarding the ambiguities in the *Schuette* test as has this Note, is both debatable and unlikely. That said, given the multiple justifications available to the Court for incorporating a recognition of intersectional harm into the *Schuette* test, a future finding that a disparate impact on

167 *Schuette*, 134 S. Ct. at 1633.

168 *Id.*

169 See *infra* Section II (identifying the intersectional harm caused by intrastate minimum wage preemption).

170 See David A. Graham, *Red State, Blue City*, THE ATLANTIC (Mar. 2017), <https://www.theatlantic.com/magazine/archive/2017/03/red-state-blue-city/513857/> [<https://perma.cc/4XT9-A6FY>].

171 See Complaint at 2, *Lewis v. Bentley*, (No. 16-00690) 2016 WL 1720457 (Apr. 28, 2016).

172 See Katherine Gallagher Robbins & Julie Vogtman, *Higher State Minimum Wages Promote Fair Pay for Women*, *supra* note 119 (noting disparate rates in single-parent responsibilities for Black women).

women of color creates a serious risk of harm on account of race is not entirely beyond the realm of possibility. In so far as the Court has a goal of protecting the equal rights and opportunities of even the most marginalized Americans to participate meaningfully in the political process to vindicate their interests, the Court should affirmatively incorporate intersectional harm into its political process analysis in future cases.

CONCLUSION

As a result of the many ambiguities stemming from the plurality opinion in *Schuette v. BAMN*, open questions about the future of the political process doctrine abound. Indeed, excavating the various possible iteration of the new standards under *Schuette* test provides little more comfort for progressively-minded advocates than the murky predictions of a magic eight ball. What remains certain, however, is that a reality in which the Court continues to ignore intersectional harm is a reality without true equality and freedom for all Americans.

If the NAACP's appeal challenging Act 2016–18 in the Eleventh Circuit provides any indication, the Court may need to consider intrastate minimum wage preemption in the context of the political process doctrine in the near future. Though much of the discussion of intrastate minimum wage preemption identifies one-dimensional concerns related to economics, federalism, and even racial discrimination, any single-axis or one-dimensional account of intrastate minimum wage preemption obscures a fundamental aspect of the impact of the phenomenon. An intersectional analysis of intrastate minimum wage preemption reveals that such preemptive measures can especially burden Black women and women of color when they limit progressive change. As the Court considers whether measures like those taken by the majority-white state legislature of Alabama single out a majority-minority municipality and strip it of political decision-making power over issues of particular importance to minority communities, the Court should apply an intersectional analysis in order to fully recognize the many forms racial and gendered discrimination prohibited by the Equal Protection Clause of the Fourteenth Amendment can and do take.