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The Role of the Hunter/Seattle Doctrine in Adjudicating Measures Against Affirmative Action

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ABSTRACT

In 1997, the Ninth Circuit upheld the constitutionality of Proposition 209, a ballot initiative that the citizens of California passed to ban affirmative action programs in the state. However, over a decade later in 2011, the Sixth Circuit reached the opposite conclusion regarding Proposal 2, a nearly identical ballot initiative passed by the voters of Michigan. At the core of this circuit split is the applicability of a rarely invoked Equal Protection test: the Hunter/Seattle *Doctrine*.

Controversy stems from the incongruity of this doctrine with the Rehnquist Court's move towards a less deferential stance regarding affirmative action in key Equal Protection cases decided in the 1990s. In addition, the doctrine has never been invoked by the Supreme Court since its Washington v. Seattle School District No. 1 *decision in 1982, furthering questioning its modern relevance.*

This Comment argues that the Hunter/Seattle *Doctrine emerged from both a strong legal and policy basis and that it deserves to be afforded a certain degree of respect. However, the doctrine may be refined to better harmonize with more recent Supreme Court jurisprudence and to better judge the ballot initiative affirmative action bans that themselves revived the doctrine from obscurity. This Comment offers several possible modifications to the doctrine to ensure that it is an effective tool in protecting the equal protection rights of minorities in the future.*

INTRODUCTION

Born out of the civil rights movement in the 1960s, affirmative action in the United States has been and continues to be a controversial legal issue.[1] The basic premise behind affirmative action is that to create equality in various facets of society, it is necessary to grant preferences to certain minority groups.[2] The primary justification for this policy is that these measures are needed to remedy the lingering effects of past discrimination against these groups.[3]

Due to their controversial nature, there has been no shortage of litigation regarding affirmative action programs—much of it revolving around the Equal Protection Clause.[4] In fact, modern equal protection jurisprudence has evolved in response to the establishment of affirmative action. The *Hunter/Seattle* doctrine is just one of the many judicial constructs that

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[1] This Comment does not address private-sector affirmative action because the Equal Protection Clause does not apply to private actors. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979) (First time that the Supreme Court addressed a challenge to a private-sector affirmative action program; held that Equal Protection Clause was inapplicable because plaintiff-employer was a private actor.).

[2] Equal Rights Advocates and The S.F. Lawyers' Comm. for Urban Affairs, *The Affirmative Action Handbook: How to Start and Defend Affirmative Action Programs,* 3 YALE J.L. & LIB. 1 (1992).

[3] *Id.*; Theodore McMillian, *In Defense of Affirmative Action*, 54 WASH. U. J. URB. & CONTEMP. L. 39 (1998).

[4] The Equal Protection Clause is part of Section 1 of the Fourteenth Amendment, which states in relevant part that "no state shall . . . deny to any person within its jurisdiction the equal protection of the law." U.S. CONST. amend. XIV, § 1.

arose from this evolution. The basic gist of the *Hunter/Seattle* doctrine is that strict scrutiny[5] is applied to any laws that alter the political process such that minority groups face a special burden when attempting to utilize that process.[6] In essence, the doctrine benefited minority groups because it struck down any law that was judged to impede their equal access to the political system.

However, recent shifts in attitude have called the continued vitality of the *Hunter/Seattle* doctrine into question.[7] The doctrine originated in the 1970s and early 1980s with the specter of the Civil Rights Movement still fresh in the public conscience. As a result, public opinion was more favorable towards affirmative action programs. During the late 1980s and 1990s though—as the Civil Rights movement faded from memory—courts became more skeptical of affirmative action programs and their continuing value in society. More specifically, courts began applying greater scrutiny to affirmative action programs.[8]

The vitality of the *Hunter/Seattle* doctrine is relevant because it is central to a currently controversial legal issue: state constitutional bans on affirmative action. In the past, battles over the legality of affirmative action programs took place primarily in the court system.[9] However, in

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[5] Strict scrutiny is the most stringent standard of review used by U.S. courts. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1274 (2007).

[6] Richa Amar, *Unequal Protection and the Racial Privacy Initiative*, 52 UCLA L. REV. 1279, 1294 (2005). For example, a law that

[7] *Id.*

[8] *See infra* Part I.

[9] *See generally* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); City of Richmond v. J.A. Croson Co., 488 U.S. 496 (1989); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

1996, opponents of affirmative action took the fight to the state constitutional level by placing an initiative called Proposition 209 on the California state ballot.[10] Proposition 209 sought to amend the California constitution to effectively bar affirmative action in the state.[11] In particular, Proposition 209 stated that "[t]he State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." [12] California voters passed Proposition 209 by a 54 to 46 percent margin.[13]

Following this landmark initiative, other states began considering similar amendments to their respective constitutions.[14] One such state was Michigan, which in 2006 passed an initiative called Proposal 2 by a 58% to 42% margin.[15] Proposal 2 sought to add nearly identical language to the Michigan constitution as Proposition 209 did to the California constitution.[16]

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[10] Eryn Hadley, *Did the Sky Really Fall? Ten Years After California's Proposition 209*, 20 BYU J. PUB. L. 103 (2005).

[11] CAL. CONST. art. I, § 31.

[12] *Id*.

[13] Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 195 (1997).

[14] Joan Biskupic, *Justices Refuse to Block Calif. Anti-Preference Law; High Court May Rule on Constitutionality*, WASH. POST, Sept. 15, 1997, at A03.

[15] Coal. to Defend Affirmative Action v. Regents of Univ. of Michigan, 652 F.3d 607 (6th Cir. 2011), *reh'g en banc granted, opinion vacated* (Sept. 9, 2011).

[16] MICH. CONST. art. I, § 26. Both amendments use the same phrase: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of

Both of these initiatives were quickly challenged in the court system after they had passed.[17] In California, the Ninth Circuit held Proposition 209 constitutional under the Equal Protection Clause—rejecting the application of the *Hunter/Seattle* doctrine.[18] Conversely, in July 2011—eleven years after the Ninth Circuit's decision—the Sixth Circuit used the *Hunter/Seattle* doctrine to hold Michigan's Proposal 2 unconstitutional.[19] On September 9, 2011, the Sixth Circuit vacated its opinion and granted a rehearing *en banc*.[20]

Thus, although both initiatives were substantially identical in what they proposed to outlaw, the two Courts of Appeals arrived at opposite conclusions. This Comment explores this divergence and the reasons for it. In addition, this Comment argues that the *Hunter/Seattle* doctrine should continue to be applied when courts consider the constitutionality of state ballot

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race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

[17] Coal. for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996) *vacated*, 110 F.3d 1431 (9th Cir. 1997) *opinion amended and superseded on denial of reh'g*, 122 F.3d 692 (9th Cir. 1997) *and vacated*, 122 F.3d 692 (9th Cir. 1997); *Coal. to Defend Affirmative Action*, 652 F.3d 607 (6th Cir. 2011).

[18] *Coal. for Econ. Equity*, 122 F.3d 692. This decision was appealed to the Supreme Court but the Court denied certiorari. *Coal. for Econ. Equity v. Wilson*, 118 S. Ct. 397 (1997).

[19] *Coal. to Defend Affirmative Action*, 652 F.3d 607. The federal district court that the Sixth Circuit overruled based much of its rationale on the Ninth Circuit's analysis in *Coal. for Econ. Equity*. Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 539 F. Supp. 2d 924 (E.D. Mich. 2008).

[20] *Id.*

initiatives to outlaw affirmative action. This is because: (1) the facts in *Hunter* and *Seattle* are comparable to those in these ballot initiative cases; (2) from a policy standpoint, these initiatives are drastic measures and as such should be subject to a stringent standard. The purpose of this Comment is to analyze how courts should evaluate measures against affirmative action—it leaves aside subjective assessments regarding the merits of the policy.

Part I of this Comment focuses on the body of prior Supreme Court cases that hold precedential sway over this issue. This includes an analysis of both *Hunter v. Erickson* and *Washington v. Seattle School District No. 1* to show that the *Hunter/Seattle* doctrine that these cases pioneered is applicable to the state ballot initiatives in California and Michigan. In addition, Part I also examines the Supreme Court's recent trend against racial classifications as exemplified in *City of Richmond v. J.A. Croson Co.*, *Adarand Constructors v. Pena*, and *Shaw v. Reno*. Finally, this Part will also discuss *Crawford v. Board of Education*, a Supreme Court case regarding racial classifications that was relied on by the majority in *Coal. for Econ. Equity*.[21]

Part II of this Comment provides background information on the Ninth Circuit's decision in California (*Coal for. Econ. Equity*) and the Sixth Circuit's decision in Michigan (*Coal. to Defend Affirmative Action)*. It focuses on the reasoning used by the two respective courts to arrive at their holdings and their rationale for applying or refusing to apply the *Hunter/Seattle* test.

Part III of this Comment argues that the *Hunter/Seattle* Doctrine should be still be used by future courts in evaluating similar ballot initiatives to outlaw affirmative action. It asserts that the doctrine is grounded in and stems from two bedrocks of modern constitutional jurisprudence: footnote four of *United States v. Carolene Products* and James Madison's Federalist Papers.

[21] *Coal. for Econ. Equity*, 122 F.3d at 705-06.

Next, it argues that there is also a strong policy basis for the existence of the *Hunter/Seattle* doctrine. The same social concerns that justified the creation of the doctrine still linger today. Thus, the core principle of the doctrine remains a relevant and necessary aspect of modern equal protection jurisprudence.

Part IV of this comment focuses on the current state of the *Hunter/Seattle* doctrine and proposes modifications to it. These modifications would help align the doctrine with modern equal protection trends and provide clarity in determining whether an initiative falls under its scope.

I. Overview of Supreme Court Precedent Regarding Racial Classifications

In determining the proper framework to judge the constitutionality of measures such as Proposition 209 and Proposal 2, it is necessary to consider both the *Hunter* and *Seattle* line of cases and the Supreme Court's rulings in subsequent race-based affirmative action cases. This is because there is some tension in the application of the laws developed in these lines of cases when courts consider state attempts to ban race-based affirmative action.

Section A begins by briefly summarizing the *Hunter/Seattle* doctrine and then exploring its genesis and development by analyzing the reasoning used by the Supreme Court in *Hunter* and *Seattle*. Finally, *Crawford v. Board of Education*[22]—a case where the Supreme Court distinguished both *Hunter* and *Seattle*—is analyzed to outline the subtleties and boundaries of the doctrine.

A. *The* Hunter/Seattle *Doctrine*

[22] Crawford v. Bd. of Educ., 458 U.S. 527, 538 (1982).

The *Hunter/Seattle* doctrine is an Equal Protection principle that imposes strict scrutiny[23] on state action that disadvantages a particular group by making it more difficult for them to participate in and benefit from the political process.[24] The doctrine is triggered when a law reallocates the political process such that racial minorities must appeal to a higher, more remote level of government to obtain legislative relief.[25] Lower courts have fashioned a two-prong test to evaluate whether a law violates the *Hunter/Seattle* doctrine: "(1) [the law] has a racial focus, targeting a goal or program that 'inures primarily to the benefit of the minority'; and (2) works a

[23] To pass strict scrutiny, a law must be narrowly tailored to achieve a compelling government interest. Fallon, Jr., *supra* note 5, at 1268.

[24] Hunter v. Erickson, 393 U.S. 385, 393 (1969). The forefather of *Hunter* and similar political process cases is *Reitman v. Mulkey*. *Reitman* involved a state initiative to the California constitution that would prevent the state from denying the right of citizens to refuse to sell their property. The Supreme Court struck down the initiative based on the Equal Protection Clause because it involved the state in private discrimination. However—relevant to *Hunter*—the Court also noted that this was not a "mere repeal" of the existing statute but instead placed it at a level immune from state government actions. Reitman v. Mulkey, 387 U.S. 369, 370-72, 376-77 (1967). *See also* Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1049 (1996) (discussing *Reitman* as the precursor to *Hunter*).

[25] Washington v. Seattle School District No.1, 458 U.S. 457, 483 (1982).

reallocation of the decision-making process that places 'special burdens' on a minority group's ability to achieve its goals through that process."[26]

1. Hunter v. Erickson

Hunter v. Erickson marked the first time the Supreme Court explicitly stated that the Equal Protection Clause guarantees minorities equal access to the political system.[27] The issue in *Hunter* was the constitutionality of an amendment to the city charter of Akron, Ohio.[28] This amendment, known as Section 137, stated that any ordinance enacted for the purpose of regulating real estate on the basis of "race, color, religion, national origin or ancestry" would require the approval of the majority of the voting constituency in Akron.[29] Thus, this amendment drew a distinction between laws attempting to fight race-based real estate discrimination and all other forms of real estate laws.[30] As the Court stated, "[o]nly laws to end housing discrimination based on 'race' . . . must run §137's gantlet."[31]

Of particular importance to the application of *Hunter* to initiatives like Proposition 209 and Proposal 2 is the Court's discussion of the facial neutrality of Section 137.[32] The Court noted

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[26] Coal. to Defend Affirmative Action v. Regents of Univ. of Michigan, 652 F.3d 607 (6th Cir. 2011).

[27] *Hunter*, 393 U.S. at 391-93.

[28] *Id*. at 386.

[29] *Id*. at 387.

[30] *Id*. at 390.

[31] *Id*.

[32] *Id*. at 391.

that although Section 137 is facially neutral in that it addresses all racial discrimination and not just discrimination against a particular race, in reality, the law affects minorities far more than whites.[33] The majority does not specifically need protection against racial discrimination so in essence, the law is directed specifically at minorities.[34] The key phrase here was that Section 137 "places special burden" on racial minorities.[35] The Court then introduced the Fourteenth Amendment into the discussion, stating that the core of the amendment is to prevent "meaningful and unjustified official distinctions based on race."[36] Under the Fourteenth Amendment, racial classifications are automatically subject to strict scrutiny.[37] Here, the Court found that Akron could not sufficiently justify the discrimination perpetuated by Section 137 and struck down the amendment.[38]

Hunter introduced the idea that altering the political structure, even in a facially neutral manner, to specifically burden minority interests, violates the Equal Protection Clause. Section 137 altered the political structure by transferring authority from the Akron city council to the

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[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] *Id*.

[37] *Id*. at 392 (citing Korematsu v. U.S., 323 U.S. 214 (1944) (first time the Supreme Court applied strict scrutiny to a racial classification)).

[38] *Id*.

voters of Akron.[39] This reallocation subjected those who wanted to pass laws against race-based discrimination to a "heavier legislative burden."[40] This burden is stated as such: groups seeking fair-housing legislation—in essence, minorities—would have to obtain a majority of all Akron voters, while all other housing legislation would continue to require just the approval of the Akron city council. This idea of impermissibly altering political structure was more fully developed thirteen years later by the Supreme Court in *Washington v. Seattle School District No. 1*.[41]

2. Washington v. Seattle School District No. 1

In *Seattle*, the proposal at issue—Initiative 350—essentially stated that public school districts in Washington could not require students to attend a school other than the one geographically closest to their residence.[42] The initiative was aimed at eliminating mandatory busing for racial integration in public schools.[43] However, the language of Initiative 350 set out

[39] Daniel P. Tokaji & Mark D. Rosenbaum, *Promoting Equality by Protecting Local Power: A Neo-Federalist Challenge to State Affirmative Action Bans*, 10 Stan. L. & Pol'y Rev. 129, 131 (1999).

[40] *Id*.

[41] Washington v. Seattle School District No.1, 458 U.S. 457 (1982).

[42] *Id*. at 462.

[43] *Id*. at 461. This initiative was a response to the "Seattle Plan" enacted by the Seattle School District in 1978. The plan used mandatory busing and school reassignments to reduce racial imbalance in public schools. However, this program was met with opposition from Seattle residents who then drafted the proposal that became Initiative 350. *Id*. at 461-62.

several broad exceptions to this general rule.[44] For example, busing was permissible if a student required special education or if there were safety hazards between a student's home and the school.[45]

The Court began its analysis by looking to *Hunter*; it stated that the central principle of *Hunter* is that states are not allowed to allocate government power non-neutrally.[46] It is impermissible for states to restructure the political process and thus make it more difficult for racial minorities, in comparison to other citizens, to "achieve legislation that is in their interest."[47]

The Court then compared Initiative 350 to Section 137[48] in *Hunter* to show that the same issue—a facially neutral statute masking a racially discriminatory purpose—existed here as well.[49] Indeed, the Court stated that it was "beyond reasonable dispute" that Initiative 350 was enacted to ban busing for the purposes of racial integration.[50] Because of the numerous

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[44] *Id*. at 462.

[45] *Id*.

[46] *Id*. at 470.

[47] *Id*.

[48] *See supra* note 29.

[49] *Seattle*, 458 U.S. at 471.

[50] *Id*.

exceptions built into it,[51] Initiative 350 allowed busing for nearly every purpose except integration.[52]

As in *Hunter*, the initiative here drew a distinction between the method of recourse for racial concerns and for all other concerns regarding busing.[53] Under Initiative 350, in order to reinstate integrative busing, citizens would have to pass another statewide referendum or appeal to the state legislature.[54] However, power over all other busing decisions would rest with the local school board.[55] Again, as in *Hunter*, the negative impact of the law would be felt by the minority,[56] and it was the minority itself that would have had to jump through additional hurdles to obtain a remedy.[57] The Court specifically noted that merely repealing the busing policy would not have presented a problem.[58] Instead, Initiative 350 "works something more than the 'mere

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[51] *See* supra note 45.

[52] *Seattle*, 458 U.S. at 471. The Court looked beyond the language of the initiative to make this determination. Initiative 350 never specifically mentioned race or integration. *Id.*

[53] *Id.* at 474.

[54] *Id.*

[55] *Id.*

[56] *Id.* The Court notes that "desegregation of public schools . . . inures primarily to the benefit of the minority." *Id.* at 472.

[57] *Id.* These two issues mirror the "twin concerns" noted in the seminal equal protection case *United States v. Carolene Products*. The twin concerns are "(1) barriers to participation in the political process and (2) laws disfavoring politically unpopular groups." Tokaji & Rosenbaum, *supra* note 39.

[58] *Id.* at 485.

repeal' of a desegregation law" and instead "burdens all future attempts to integrate Washington schools in districts throughout the state, by lodging decisionmaking authority over the question at a new and remote level of government."[59] Thus, the Court held Initiative 350 unconstitutional under the Fourteenth Amendment.[60]

3. Crawford v. Board of Education

When discussing *Seattle*, it would be remiss not to mention *Crawford*. Both of these cases addressed similar issues and were decided—in opposite ways—on the same day.[61] Examining the differences between the two cases further illuminates the nuances of the *Hunter/Seattle* doctrine.

At issue in *Crawford* was California's Proposition 1; this amendment, like Initiative 350 in *Seattle*, aimed to limit mandatory integrative busing.[62] However, the two amendments approached this objective in different ways. Here, Proposition 1 required that state courts could not mandate pupil assignments unless a federal court would be required to do so under the Equal Protection Clause.[63] Again, like the amendments in *Hunter* and *Seattle*, Proposition 1 was

[59] *Id*.

[60] *Id*. at 487.

[61] Crawford v. Bd. of Educ., 458 U.S. 527, 538 (1982). Both *Crawford* and *Seattle* were decided on June 30, 1982.

[62] *Id*. at 529-30.

[63] *Id*. at 529.

facially race-neutral.[64] The Court then made explicit an important concept in this area of the law: a distinction exists between "state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters."[65] States are allowed to repeal existing anti-discriminatory legislation but to do anything more than that may violate the Equal Protection Clause.[66]

Here, the Court adhered to this principle and found that Proposition 1 did nothing more than repeal existing legislation. [67] The standard previously required by California went beyond what was federally required; all Proposition 1 did was move the standard back to the federal baseline.[68] California school districts still had the authority to run integrative busing programs, they were just no longer required to. This aspect is crucial. Minorities in California could still appeal to their local school boards for anti-discriminatory relief. Power over racial discrimination measures was not removed from the local school boards and reallocated to a different area of government.[69] Conversely, the amendments in *Hunter* and *Seattle* placed racial relief in a different, more cumbersome part of the political structure.[70]

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[64] However, Proposition 1 differs from Initiative 350 in *Seattle* because there were no exceptions to the general rule in Proposition 1. One of the major points the Court in *Seattle* made was that those exceptions effectually caused Initiative 350 to ban only integrative busing. *Seattle*, 458 U.S. 462.

[65] *Crawford*, 458 U.S. at 538.

[66] *Id*. at 538-39.

[67] *Id*. at 541.

[68] *Id*.

[69] *Id*.

In his concurrence, Justice Blackmun specifically addressed the differences between this case and *Seattle*. He agreed with the majority that a simple repeal of a state legislature-created right does not restructure the political process.[71] If *Hunter* had been used to strike down Proposition 1, then statutory anti-discrimination programs could theoretically never be repealed.[72]

B. *Recent Developments in Supreme Court Equal Protection Jurisprudence Regarding Affirmative Action*

The big issue looming over the *Hunter/Seattle* doctrine is whether the Supreme Court still views the doctrine as relevant and necessary. *Seattle* was decided twenty-nine years ago in 1982; in that time, the Court's views towards affirmative action and similar race classification issues has evolved. Since deciding *Seattle* and *Crawford*, the Court has never cited *Seattle* in reference to restructuring the political process.[73] *Hunter* is an even rarer sight in Supreme Court opinions;

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[70] In both cases, the power to seek race-based, and only race-based, relief was moved from the local to the state level. *Hunter*, 393 U.S. 385; *Seattle*, 458 U.S. 462.

[71] *Id*. at 546 (Blackmun, J., concurring)

[72] *Id*. A repeal would mean that "enforcement authority previously lodged in the state courts was being removed by another political entity." *Id*.

[73] *Seattle* has been cited for different reasons by the Court in important Equal Protection cases like *Shaw v. Reno*, *Romer v. Evans*, and *Johnson v. California*. The most thorough discussion of *Seattle* by the Court was in *Parents Involved in Community Schools v. Seattle School District No. 1*. However, the Court did not explicitly use the *Hunter/Seattle* doctrine in this case. Shaw v. Reno, 509 U.S. 630 (1993); Romer v. Evans, 517 U.S. 620 (1996); Johnson v. California, 543

it has only been cited three times since *Seattle* and *Crawford* were decided.[74] As with *Seattle*, none of those citations related to a discussion or application of political restructuring.[75] With such limited jurisprudence involving these cases, it's difficult to say whether the doctrine has fallen out of favor.

Indeed, the scarcity of the cases may itself be a clue that the Court does not look favorably upon the doctrine. The fact that the Supreme Court denied certiorari from the Ninth Circuit's decision in *Coalition for Economic Equity* may in itself be an indication of the Court's opinion on the doctrine.[76] If the Court felt that it was appropriate to evaluate Proposition 209 through the *Hunter/Seattle* test, then it seems logical to assume that it would have granted

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U.S. 499 (2004); Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).

[74] The three cases are *Romer v. Evans*, *Denver Area Educ. Telecomm. Consortium v. F.C.C.*, and *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found. Romer*, 517 U.S. 620; Denver Area Educ.Telecomm. Consortium v. F.C.C., 518 U.S. 727 (1996); *City* of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188 (2003).

[75] *See supra* note 74.

[76] Coal. for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997). Traditionally, there is a doctrine of analysis that one should not draw conclusions from a denial of certiorari. However, a study by Peter Linzer found that in a significant amount of Supreme Court cases, a denial indicated that most of the Justices were not "strongly dissatisfied with the actions below." Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1229 (1979).

certiorari to reinforce the validity of the doctrine with respect to affirmative action. Instead, the Court left the question of how it wants courts to evaluate these challenges unanswered.

As a result, we are left with the Ninth and Sixth Circuit coming to opposite conclusions regarding nearly identical state amendments. Even if the Sixth Circuit reverses its holding in its en banc rehearing of *Coal. to Defend Affirmative Action*,[77] with the prevalence of similar amendments making their way through the political process in other states, it seems inevitable that the Supreme Court will have to address this issue in the future.[78]

1. City of Richmond v. J.A. Croson Co.

The *Hunter/Seattle* doctrine is in tension with the Supreme Court's equal protection jurisprudence following the *Seattle* and *Crawford* decisions. The Supreme Court has progressively become more stringent in evaluating affirmative action measures under the Equal Protection Clause. One of the first major cases in this trend was *City of Richmond v. J.A. Croson Co.*[79]

The issue in *Croson* was a plan implemented by Richmond that required contractors awarded city contracts to subcontract a minimum of 30% of the contract value to minority businesses (called Minority Business Enterprises).[80] Although the city offered evidence to show

[77] Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 652 F.3d 607 (6th Cir. 2011), *reh'g en banc granted*, *opinion vacated* (Sept. 9, 2011).

[78] *See supra* note 14 ("[M]ore than 20 states are currently working on similar measures" (referring to Proposition 209)).

[79] City of Richmond v. J.A. Croson Co., 488 U.S. 496 (1989).

[80] *Id*. at 477.

that minority businesses were underrepresented in the construction industry, there was no direct evidence of race discrimination.[81] The city claimed that it was making up for past discrimination but the Court found that there were not adequate findings to support this argument.[82] The Court further articulated that this racial quota system was not closely connected enough to the city's goal of righting past discrimination.[83] In doing so, the court applied strict scrutiny to the city's plan.[84] *Croson* marked the first time that a majority of the Court agreed that strict scrutiny is the proper standard of review for affirmative action programs.[85] The Court noted that past discrimination alone "cannot justify a rigid racial quota."[86]

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[81] *Id*. at 480. The city noted "while the general population of Richmond was 50% black, only .67% of the city's prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983." *Id*.

[82] *Id*. at 498.

[83] *Id*.

[84] *Id*. at 493.

[85] GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 164-65 (2000). However, in writing the majority opinion, Justice O'Connor limited the holding to state and local affirmative action. This was because a substantially identical federal program was upheld nine years earlier in *Fullilove v. Klutznick*. In order to avoid overruling *Fullilove*, Justice O'Connor distinguished between federal and all other affirmative action programs. The logic in this distinction was that Congress possessed special powers under section 5 of the Fourteenth Amendment that would allow it to remedy racial discrimination. *Id*.

[86] *Croson*, 488 U.S. at 498.

The major takeaways from *Croson* were that affirmative action measures that classify individuals or groups on the basis of race are subject to strict scrutiny and that affirmative action cannot be justified simply by pointing to past discrimination without clear evidence.

2. Adarand Constructors v. Pena

The next major affirmative action case before the Supreme Court to illustrate the trend towards a stricter approach was *Adarand Constructors v. Pena* in 1995.[87] For the first time, the Supreme Court struck down a federal affirmative action program by applying strict scrutiny as previously mandated in *Croson*.[88] The program at issue in essence provided financial incentives for contractors to hire subcontractors led by "socially and economically disadvantaged individuals."[89] What was troublesome here was that the statute listed certain minorities that would automatically fall under this category.[90] This aspect of the statute triggered strict scrutiny because it attempted to classify on the basis of race.[91] The Court justified its usage of strict scrutiny by quoting from Justice Stevens dissent in *Fullilove* stating that "classifications based

[87] Adarand Constructors v. Pena, 515 U.S. 200 (1995).

[88] *Id.*; SPANN, *supra* note 85, at 53.

[89] *Adarand*, 515 U.S. at 204.

[90] *Id.* at 205. "The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities." *Id.*

[91] *Id.*

on race are potentially so harmful to the entire body politic" and that racial classifications are "too pernicious" to be subject to anything less than strict scrutiny.[92]

Thus, the court extended *Croson* to require that federally mandated affirmative action programs be subject to strict scrutiny as well.[93] However, the Court did not actually reach a decision on the merits here and instead remanded the case.[94] Instead, the Court seemed to cushion its decision by attempting to refute the popular notion that strict scrutiny is "strict in theory, but fatal in fact."[95] It acknowledged that discrimination is still a problem in America and that this decision doesn't necessarily mean that the government is barred from acting to counteract past discrimination.[96]

Together, *Croson* and *Adarand* signify the Supreme Court's trend towards harsher judgment of affirmative action programs. By establishing that racial classifications are automatically subject to strict scrutiny, the two cases ensure that governments must be very careful in how affirmative action statutes are drafted.

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[92] *Id*. at 236-37 (citing Fullilove v. Klutznick, 448 U.S. 448 (1980) (Stevens, J., dissenting)).

[93] *Id*. at 237.

[94] *Id*. at 239.

[95] *Id*. at 237. This quote originated in Justice Marshall's concurrence in *Fullilove.*448 U.S. at 519. Subsequent decisions by the Court have justified the notion that strict scrutiny is "fatal in fact." None of the five Justices (O'Connor, Rehnquist, Scalia, Kennedy, and Thomas) that constituted the majority in *Adarand* have voted to uphold a constitutional challenge to an affirmative action program that was judged under strict scrutiny. SPANN, *supra* note 85, at 166-67.

[96] *Id*.

3. Shaw v. Reno

Separate from *Croson* and *Adarand*, another case that highlighted the Court's trend against racial classifications was *Shaw v. Reno*. [97] At issue in *Shaw* was a new plan for reapportioning North Carolina's congressional districts.[98] Prior to *Shaw*, the Court applied strict scrutiny to state and local affirmative action initiatives—as mandated by *Croson*[99]—but only intermediate scrutiny to congressional plans.[100] The state's initial plan was rejected by the state Attorney General because there was only one district in which racial minorities were the majority.[101] Accordingly, the state's second proposal contained two such districts.[102] This second minority-majority district was very peculiar in its shape.[103] Five North Carolina residents sued claiming that this redistricting constituted an "unconstitutional racial gerrymander" and thus violated the Fourteenth Amendment.[104]

The Supreme Court subjected the redistricting plan to strict scrutiny.[105] The main reason the Court articulated for this decision was that the redistricting was so "extremely irregular" and

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[97] Shaw v. Reno, 509 U.S. 630 (1993).

[98] *Id*. at 630.

[99] *See supra* note 85.

[100] SPANN, *supra* note 85, at 108.

[101] *Id*.

[102] *Id*.

[103] "The new district stretches approximately 160 miles along Interstate 85 and, for much of its length, is no wider than the I–85 corridor." *Id*.

[104] *Id*.

[105] *Id*. at 644.

"bizarre" that it seemed to defy traditional redistricting principles and seemed to be motivated entirely by the idea of racial segregation.[106] The Court stated that states can consider race in redistricting but gerrymandering as obvious as it is here is unconstitutional.[107]

Thus, *Shaw* introduced the idea that racial classifications do not have to be explicit to trigger strict scrutiny.[108] As the Court made clear, equal protection principles under the Fourteenth Amendment apply "not only to legislation that contains explicit racial distinctions, but also to those 'rare' statutes that, although race neutral, are, on their face, 'unexplainable on grounds other than race.'"[109] This assertion again showcases the Supreme Court's trend towards looking at racial classifications with disfavor.

Looked at as a whole, *Croson*, *Adarand*, and *Shaw* reflect the growing skepticism of the Supreme Court when it comes to race-based initiatives. As of today, all racial classifications are automatically subject to strict scrutiny, even those laws that implicitly classify based on race are not completely safe from the near-certain death knell of strict scrutiny. It is clear that the Court's attitude towards affirmative action programs is far less deferential than it would have been in

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[106] *Id*. at 642, 644.

[107] *Id*. at 646.

[108] *But see* Washington v. Davis, 426 U.S. 229 (1976) (held that state action is not unconstitutional simply because it disproportionately impacts a certain race—there must be a discriminatory motive).

[109] *Id*. at 642 (quoting Arlington Heights v. Metro. Hous. Dev. Corp, 429 U.S. 252, 266 (1977).

1982, when *Seattle* was decided.[110] Whatever the reasons for this evolution in evaluating such cases,[111] it is clear that the *Hunter/Seattle* Doctrine was forged in a far different era. With this background information in mind, the next part of this Comment will analyze the divergent approaches taken by the Ninth and Sixth Circuit in applying the *Hunter/Seattle* doctrine to basically identical initiatives.

II. ANALYSIS OF COALITION FOR ECONOMIC EQUITY AND COALITION TO DEFEND AFFIRMATIVE ACTION

A. Coalition for Economic Equity v. Wilson

Coalition for Economic Equity v. Wilson marked the first time that a Court of Appeals was asked to consider whether a state constitutional provision to ban affirmative action violated

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[110] *See* SPANN, *supra* note 85, at 84 ("The post-*Adarand* affirmative action decisions of the Supreme Court in ruling on petitions of certiorari seemed consistently skeptical about the value of affirmative action.").

[111] Spann argues that political considerations are mainly responsible for this evolution. He notes that most constitutional affirmative actions cases have been decided by a 5-4 vote with the majority consisting of the conservative voting bloc of Justices Rehnquist, O'Connor, Scalia, Kennedy and Thomas against the pro-affirmative action bloc of Justices Stevens, Souter, Ginsburg and Breyer. "The stability of these voting blocs, and their high correlation with the general political views of these justices who comprise them, suggest that the Supreme Court's law of affirmative action is heavily influenced by the politics of affirmative action." *Id*. at 191.

the Equal Protection Clause.[112] The Ninth Circuit began its discussion of the merits with what it called "conventional" equal protection analysis.[113] The court, quoting from *Washington v. Davis*, stated that the central purpose of the Equal Protection Clause was "the prevention of official conduct discriminating on the basis of race."[114] The court then sought to determine what classification Proposition 209 drew.[115] Proposition 209 did not classify individuals on the basis of race or gender but instead prohibited the state from doing such.[116] The Ninth Circuit thus reasoned that since the law prohibits classification, it follows that the law does not classify individuals by race or gender and is thus permissible under the Equal Protection Clause.[117]

The court next considered "political structure" analysis and the accompanying *Hunter/Seattle* doctrine.[118] The doctrine was used the district court here to invalidate Proposition 209. The district court reasoned that race and gender preferences, like the antidiscrimination laws in *Hunter* and integrative busing in *Seattle*, "are of special interest to minorities and women."[119] In its own analysis, the Ninth Circuit placed great emphasis on the fact that the majority of the California electorate was women and minorities.[120] Seizing on this fact, the court stated that "[i]t

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[112] *Coal. for Econ. Equity*, 122 F.3d 692.

[113] *Id*. at 701.

[114] *Id*. (quoting Washington v. Davis, 426 U.S. 229, 239 (1976)).

[115] *Id*. at 702.

[116] *Id*.

[117] *Id*.

[118] *Id*. at 703.

[119] *Id*.

[120] *Id*.

would seem to make little sense to apply 'political structure' equal protection principles when the group alleged to face special political burdens itself constitutes a majority of the electorate."[121]

The court then focused on the fact that the Fourteenth Amendment and thus the Equal Protection Clause is a guarantee to individuals and not groups.[122] *Hunter* and *Seattle* reconciled this by suggesting that an unconstitutional political structure imposed individual injuries by "denying [members of the racial minority] the vote, on an equal basis with others."[123] However, the Ninth Circuit once again relied on the fact that the majority of the California electorate consists of women and minorities by stating that "when the electorate votes up or down on a referendum alleged to burden a majority of the voters, it is hard to conceive how members of the majority have been denied the vote."[124]

The court then compared *Hunter* and *Seattle* with *Crawford v. Board of Education.*[125] As aforementioned, the key point made by the Supreme Court in *Crawford* was that there is a distinction between "state action that discriminates on the basis of race" and "state action that addresses, in neutral fashion, race-related matters."[126] *Crawford* mandated that the Equal Protection Clause is not violated by repealing policies that were not constitutionally required in

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[121] *Id*. at 704.

[122] *Id*.

[123] *Id*. (quoting Washington v. Seattle School District No. 1, 458 U.S. 457, 470 (1982)).

[124] *Id*.

[125] *Id*.

[126] *See supra* note 65.

the first place.[127] *Hunter* and *Seattle*, the court said, prohibit states from altering the political structure to place decision making authority over racial issues at higher levels of government.[128] The plaintiffs here argued that Proposition 209 fell more in line with *Hunter* and *Seattle* and was distinguishable from *Crawford.*[129] However, the court rejected this argument and instead held that *Hunter* and *Seattle* were distinguishable from Proposition 209.[130]

The court's reasoning rested on the breadth of Proposition 209 in comparison to the laws at issue in *Hunter* and *Seattle*.[131] In particular, the court looked at *Seattle* and noted that the law there "differentiated the treatment of racial problems in education from that afforded educational and racial issued generally."[132] Conversely, Proposition 209 bans affirmative action in any state-run function in a neutral fashion.[133] The court then cited *Adarand* for the proposition that a violation of the Equal Protection Clause requires that a classification treat individuals unequally.[134] Since Proposition 209 is neutral in its application and treats all individuals equally,

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[127] *Coal. for Econ. Equity*, 122 F.3d at 705 (quoting *Crawford v. Bd. of Educ.*, 458 U.S. 527, 538 (1982)).

[128] *Id*.

[129] *Id*.

[130] *Id*.

[131] *Id*. at 707.

[132] *Id*.

[133] *Id*.

[134] *Id*.

Adarand and similar racial classification cases demand that it is constitutional under the Equal Protection Clause.[135]

The Ninth Circuit also addressed the plaintiffs' claim that Proposition 209 is not an impediment to protection from unequal treatment but an impediment towards receiving preferential treatment.[136] The court attacked this position aggressively stating that just because the Constitution allows racial preferences does not mean that states cannot ban those preferences.[137]

B. Coalition to Defend Affirmative Action v. Regents of University of Michigan

Although the Sixth Circuit's opinion in this case has been vacated for an en banc rehearing, this case is useful to better understand how similar affirmative action claims should be treated in the future.[138] As in *Coalition for Economic Equity*, there were two major arguments regarding the Equal Protection Clause in this case: (1) the Clause is violated because Proposal 2 impermissibly restructures the political process along racial lines (the *Hunter/Seattle* doctrine); and (2) the Clause is violated because Proposal 2 impermissibly classifies individuals by race ("conventional" EPC analysis[139]).[140]

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[135] *Id*.

[136] *Id*. at 708.

[137] *Id*. at 708.

[138] Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 652 F.3d 607 (6th Cir. 2011).

[139] *Coal. for Econ. Equity*, 122 F.3d at 701.

[140] *Coal. to Defend Affirmative Action*, 652 F.3d at 613.

The court began by considering the political process argument.[141] It first stated that the Supreme Court's rulings in *Hunter* and *Seattle* act as an assurance that the majority may not manipulate the political process to uniquely burden racial minorities in regard to important social issues.[142] The court then noted that "ensuring a fair political process is nowhere more important than in education" and that "in the context of education, we must apply the 'political process' protection with the utmost rigor."[143]

The basic gist of the *Hunter/Seattle* test is that strict scrutiny is applied to any laws that change the political process with a racial focus.[144] Under the test, a law violates the Equal Protection Clause when the law "(1) has a racial focus, targeting a goal or program that 'inures primarily to the benefit of the minority'; and (2) works a reallocation of the decision-making process that places 'special burdens' on a minority group's ability to achieve its goals through that process."[145]

Looking at the first prong, the Sixth Circuit found that Proposal 2 had a "racial focus" because the affirmative action programs at Michigan universities primarily benefit minorities and are designed for that purpose.[146] The court compared these programs to the busing program at issue in *Seattle*. Just as the affirmative action programs were meant to increase the presence of racial minorities in higher education, the busing program in *Seattle* was meant to improve

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[141] *Id*.

[142] *Id*. at 614.

[143] *Id*.

[144] *Id.* at 614-15. The specifics of both *Hunter* and *Seattle* are detailed later on in this Comment.

[145] *Id*. at 617.

[146] *Id*. at 617-18.

minority representation in certain public schools.[147] The court then—perhaps as a response to the reasoning employed by the Ninth Circuit in *Coalition for Economic Equity*[148]—noted that the Supreme Court had stated in *Seattle* that even policies benefiting the majority can have a "racial focus" and still be subject to the *Hunter/Seattle* test.[149]

The court then turned to the second prong of the test: whether Proposal 2 alters the political process to place "special burdens" on racial minorities.[150] The first issue in this prong was determining if the Michigan admissions committees are "political."[151] The Sixth Circuit held that the committees were "political" by adopting a broad definition of the word.[152] It defined "political" as any process that relates to government.[153] The court then detailed how the regents of the public universities in Michigan are part of the government of the state.[154] It then noted that these regents have the power to alter the admissions standards for their respective universities.[155] Thus, if the public wanted to change admissions policies at a particular university, it could elect a board more in line with its views.[156]

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[147] *Id*.

[148] *See supra* note 121.

[149] *Coal. to Defend Affirmative Action*, 652 F.3d at 618.

[150] *Id*. at 619.

[151] *Id*.

[152] *Id*.

[153] *Id*. The court adopted this definition from Webster's Third New International Dictionary.

[154] *Id*. at 621-22.

[155] *Id*. at 622.

[156] *Id*.

The second and final issue of this prong was whether Proposal 2 reorders the political process, thus specially burdening racial minorities.[157] The court first discussed the reordering in *Seattle* and explained that the initiative in that case forced those seeking to eliminate school segregation to go through the state legislature rather than—as with all other decisions—through the local school board.[158] In comparison, the procedural hurdle that Proposal 2 creates for proponents of race-based affirmative action is "of the highest order possible."[159] To change a non-racial admissions policy, a citizen need only lobby the university's admissions committee directly or to a higher-level authority like the dean or the board.[160] However, Proposal 2 mandates that in order to initiate race-based affirmative action, the public must convince the Michigan electorate to amend the state constitution and then pass through additional political hurdles.[161] Thus, the Sixth Circuit held that Proposal 2 did specially burden racial minorities and that the proposal fails the *Hunter/Seattle* test.[162]

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[157] *Id*. at 624.

[158] *Id*.

[159] *Id*.

[160] *Id*.

[161] *Id*. Placing a constitutional amendment on the ballot in Michigan requires either a two-thirds vote from both the Michigan House of Reps. and the Senate or the signatures of the number of voters equal to 10% of the number of votes cast in preceding gubernatorial election. Following this, the amendment must then actually be approved by a majority vote. Only then would the public be able to lobby admission committees or higher figures. *Id*.

[162] *Id*.

The court then addressed two of the arguments that the Ninth Circuit advanced in support of its decision in *Coalition for Economic Equity*: (1) whether prohibiting "preferential treatment" differs from prohibiting "discrimination; and (2) whether a law places a special burden on minorities even when the aggregate of multiple minorities affected by a law would altogether constitute a numerical majority.[163]

In addressing the first argument, the court explained that the Ninth Circuit's argument boiled down to the view that a law violates the Equal Protection Clause under *Hunter/Seattle* only if it undermines constitutionally mandated state action as opposed to constitutionally permitted state action.[164] In essence, a law is unconstitutional under the *Hunter/Seattle* test only if the law is already unconstitutional under "conventional" Equal Protection Clause analysis.[165] Thus, the Ninth Circuit's interpretation would render the *Hunter/Seattle* test superfluous.[166] Stated more broadly, the purpose of the *Hunter/Seattle* test is to evaluate the procedural obstacles placed before minorities; the purpose is not to judge what the outcome or purpose of the law at issue is.[167] Applied to this case, the injury here is not the actual substantive effect of Proposal 2 to bar affirmative action but the method by which it was done.[168]

The court then addressed the second argument: that Proposal 2 does not impose a special burden on minorities because the aggregate of racial minorities and women constitutes a

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[163] *Id*. at 626, 629.

[164] *Id*. at 626.

[165] *Id*. at 627.

[166] *Id*.

[167] *Id*. at 629.

[168] *Id*.

numerical majority of voters in Michigan.[169] Thus, this group could band together and repeal Proposal 2.[170] The Sixth Circuit quoted from the district court which stated that this argument "borders on nonsense" because aggregating such a group misses the point of affirmative action.[171] The point being that affirmative action programs are targeted to benefit certain insular groups to atone for past discrimination.[172] It doesn't make sense to group all of these minority groups together and assume that they could feasibly operate in unison as a voting bloc.[173] In addition, the court notes that even though a minority group may have a numerical advantage, it may still be a bit player in the political arena because of a history of unequal treatment or political powerlessness.[174]

Because Proposal 2 failed the *Hunter/Seattle* test, it was subject to strict scrutiny, meaning that the defendant must prove that it was "necessary to further a compelling state interest."[175] Since the defendant had made no argument in furtherance of that, the court held that the proposal failed strict scrutiny and that thus it was unconstitutional under the Equal Protection Clause.[176] Since Proposal 2 failed the *Hunter/Seattle* test, the court did not address the merits of the proposal under "conventional" equal protection analysis.[177]

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[169] *Id*. at 629.

[170] *Id*.

[171] *Id*. (quoting *Coal. to Defend Affirmative Action*, 539 F. Supp. 2d at 956).

[172] *Id*.

[173] *Id*.

[174] *Id*. at 630.

[175] *Id*. at 630-31.

[176] *Id*. at 631.

III. JUSTIFICATION FOR THE RELEVANCE OF THE *HUNTER/SEATTLE* DOCTRINE

To justify the continued use of the *Hunter/Seattle* Doctrine by courts in affirmative action cases, it is necessary to show that the doctrine exists on a solid legal basis. In essence, that the doctrine is firmly grounded in equal protection principles. The following section will argue that the *Hunter/Seattle* Doctrine is consistent with the Supreme Court's equal protection jurisprudence and furthermore, is rooted in the basis of the democratic process.

A. *The Legal Basis for the Hunter/Seattle Doctrine* – Carolene Products *and The Federalist Papers*

1. *The First Legal Basis:* United States v. Carolene Products

The basis and rationale for the existence and application of the *Hunter/Seattle* Doctrine can be traced back to the seminal equal protection case *United States v. Carolene Products*.[178] *Carolene Products* is the rare case where a footnote has come to overshadow the actual holding of the case itself. Footnote four of *Carolene Products* has been referred to as the fountainhead of "the heightened scrutiny framework for minority groups."[179] This footnote expanded on the holding that the Court should use rational basis review when evaluating legislative judgments.[180] Justice Stone explained that legislation may be subject to "more exacting judicial scrutiny" under

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[177] *Id.*

[178] U.S. v. Carolene Products Co., 304 U.S. 144 (1938).

[179] Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 758 (2011).

[180] *Carolene Products*, 304 U.S. at 154.

two circumstances.[181] The first is when courts consider "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[182] The second circumstance is when considering legislation involving "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[183]

The *Hunter/Seattle* Doctrine is a natural and logical extension of the principles espoused by Justice Stone in *Carolene Products*. The first prong of the doctrine narrows the focus to those laws that have a "racial focus" and that target a goal or program that "inures primarily to the benefit of the minority."[184] This language is almost synonymous with the *Carolene Products* notion that "prejudice against discrete and insular minorities" should be subject to stricter judicial review. The second prong of the doctrine states that a law cannot reallocate the decision-making process to place special burdens on a minority group's ability to achieve its goals through that process.[185] Again, this language dovetails nearly perfectly with Justice Stone's footnote. Specifically, it melds the notions that laws restricting political processes that would: (1) normally be used to repeal undesirable legislation; and (2) ordinarily be relied on to protect minorities, are subject to a higher level of scrutiny. In essence, these two ideas embed "political process concerns" within equal protection jurisprudence.[186]

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[181] *Id*. at 153 n.4.

[182] *Id*.

[183] *Id*.

[184] *See supra* page 9.

[185] *Id*.

[186] Amar & Caminker, *supra* note 24, at 1041.

This relationship between the *Hunter/Seattle* Doctrine and *Carolene Products* is important in establishing the validity and worthiness of the doctrine in the equal protection universe. As aforementioned, footnote four of *Carolene Products* established the modern, tiered-scrutiny framework used by courts in evaluating all equal protection cases.[187] Suffice to say, *Carolene Products* is a bedrock case in the evolution of equal protection jurisprudence. At least in part because of its derivation from this case, the *Hunter/Seattle* Doctrine should not simply be cast off as an archaic, anachronistic test. Instead, it should be noted that the principles espoused in *Carolene Products*, and thus, those furthered by the doctrine, are as relevant today as they were when the case was decided in 1938.

The basic principles of the *Hunter/Seattle* doctrine were laid out by legal scholar Charles L. Black in 1967, well before either *Hunter* or *Seattle* were decided.[188] Black stated that "where a racial group is in a political duel with those who would explicitly discriminate against it as a racial group, and where the regulatory action the racial group wants is of full and undoubted federal constitutionality, the state may not place in the way of the racial minority's attaining its political goal any barriers which, within the state's political system taken as a whole, are especially difficult of surmounting, by comparison with those barriers that normally stand in the way of those who wish to use political processes to get what they want."[189] Black made this

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[187] *See supra* note 181.

[188] Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 82 (1967).

[189] *Id.*

statement to rationalize and explain the Supreme Court's holding in *Reitman v. Mulkey*.[190] Black's statement clearly explains the core principles that the *Hunter/Seattle* Doctrine stands for and how it addresses the issues laid out in the *Carolene Products* footnote.[191]

2. *The Second Legal Basis: The Federalist Papers*

Going further back than the *Carolene Products* footnote, there is another, more fundamental, legal basis for the *Hunter/Seattle* Doctrine. The argument that the *Hunter/Seattle* Doctrine "has its foundation in the very bedrock of American constitutional law," was originated by Daniel P. Tokaji and Mark D. Rosenbaum.[192] Tokaji and Rosenbaum first state that the doctrine stands for the requirement that all citizens of a democracy have the right to equal access to the political process.[193] They then argue that this right is even more fundamental than the right to equality in the actual outcome of the political process.[194] The rationale for this claim comes

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[190] *Id*. In *Reitman*, the Court held that states had the power to overturn an initiative-based amendment to the state constitution if that amendment encouraged racial discrimination. Reitman v. Mulkey, 387 U.S. 369 (1967). *See also supra* note 24.

[191] See Elizabeth T. Bangs, *Who Should Decide What Is Best for California's LEP Students? Proposition 227, Structural Equal Protection, and Local Decision-Making Power*, 11 LA RAZA L.J. 113, 141 (2000).

[192] Tokaji & Rosenbaum, *supra* note 39, at 136.

[193] *Id*.

[194] *Id*.

from one of the most influential documents regarding democracy and the U.S. Constitution, James Madison's Federalist Papers—specifically, The Federalist No. 10.[195]

In The Federalist No. 10, Madison warned of the dangers of the "ruling passion" of the majority and how it could warp the integrity of the democratic process.[196] He was worried that a strong majority presence would result in the compromising of the rights of other citizens. Madison's solution to this issue with a republican government was to ensure the "proper structure of the Union."[197] He pushed for both a republican and federalist form of government because he believed such a structure was "less prone to factionalism and especially to the dangers of an impassioned political majority trampling the interest of other citizens."[198]

Madison's focus and concern regarding the structure of the political process reflects the deep concern he had for guaranteeing the right of equal access to the political process for minority groups. He notes that a certain degree of structural control should be placed on majority interests because they have "apparent impunity" in popular governments.[199] Thus, this principle of equal access is deeply rooted in the vision of how our government should ideally operate. It follows then that the *Hunter/Seattle* Doctrine, which seeks to ensure that equal access is afforded to minority groups, has a firm legal basis on which to stand on. The doctrine operates as an

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[195] THE FEDERALIST NO. 10 (James Madison).

[196] Tokaji & Rosenbaum, *supra* note 39, at 136 (citing THE FEDERALIST NO. 10, at 80 (James Madision) (Clinton Rossiter ed., 1961)).

[197] *Id*.

[198] *Id*.

[199] DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 90 (1984).

embodiment of the two *Carolene Products* principles within the structural framework envisioned by Madison.

B. *The Policy Basis for the* Hunter/Seattle *Doctrine*

There is also a policy aspect to evaluating the continued existence of the *Hunter/Seattle* doctrine. Simply put, are the same social circumstances that warranted the introduction and establishment of the doctrine still present with enough force to justify its continued application? If in society, there is relatively less worry about Madison's fears that minority groups would not be afforded equal access to the political process, then the Supreme Court would be justified in abandoning the use of the doctrine. This section argues that this is not yet the case and that consequently, the *Hunter/Seattle* Doctrine should remain in use.

The phrase "affirmative action" first entered the American lexicon in 1961 in an Executive Order[200] issued by President John F. Kennedy.[201] Just three years later, the Civil Rights Act of 1964 was passed prohibiting workplace discrimination and banning exclusion from participating in, or being denied the benefits of, any program or activity receiving Federal

[200] Known as Executive Order 10925, it stated in relevant part that federal agencies were required to "promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts." Richard N. Appel et. al., *Affirmative Action in the Workplace: Forty Years Later*, 22 HOFSTRA LAB. & EMP. L.J. 549, 552 (2005).

[201] JAMES P. STERRA, AFFIRMATIVE ACTION FOR THE FUTURE 15 (2009).

funding, because of race.[202] Simultaneously and in the years to follow, the Civil Rights movement engulfed the United States, marking the birth of the modern social era.

Hunter v. Erickson was decided in the beginning of 1969, near the end of the Civil Rights Movement.[203] However, the actual facts of the case took place in 1964.[204] It was around this time that tensions between blacks and whites—regarding housing discrimination in middle-class neighborhoods and the proliferation of urban ghettos—threatened to divide the nation.[205] Blacks were frustrated by their inability to move out of isolated, primarily black ghettos into suburban, predominantly white neighborhoods because of overt discrimination and threats of violence by whites, later to be characterized as "[w]hite racism."[206]

It was against this backdrop that the citizens of Akron, Ohio repealed an existing fair housing ordinance and required that any future ordinances banning racial discrimination be approved by a referendum.[207] Here was a clear case of a strong majority denying the minorities of Akron an equal right to the political process, an equal right to reinstate the ordinance in the

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[202] *Id*. at 15-16.

[203] Hunter v. Erickson, 393 U.S. 385 (1969).

[204] *Id*. at 386.

[205] Brian Patrick Larkin, *The Forty-Year "First Step": The Fair Housing Act As an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1617-20 (2007).

[206] *Id*. at 1620-22. "White racism" was the term used by the Kerner Commission in its report on the factors that had led to civil unrest in many large cities. The Commission was put together by President Lyndon Johnson to better understand the underlying basis for increasingly prevalent urban riots. *Id*.

[207] *Hunter*, 393 U.S. 386-87. *See supra* page 9.

same way that it was repealed. This is exactly the situation that Justice Stone outlined in *Carolene Products*. This law restricted "those political processes which can ordinarily be expected to bring about a repeal of undesirable legislation" and involved prejudice against "discrete and insular minorities" intended to "curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[208] It is clear that the social circumstances and environment surrounding *Hunter* warranted the application of the doctrine.

A similar, yet milder social unrest due to racism underscored the Supreme Court's decision in *Seattle*. Desegregative busing is one of the most controversial affirmative action programs. In modern times, mandatory busing to increase diversity in public schools has been routinely criticized as ineffective and socially stigmatizing.[209] However, the goal of such programs is to benefit minority students. In *Seattle*, the majority white citizens of Washington passed a state ballot initiative to in effect, outlaw only that busing relating to racial integration.[210]

What's interesting to note is that the only two state legislative districts where the initiative did not command a majority were located in Seattle itself.[211] This fact seems to suggest that the main opposition for the initiative came from those minorities in Seattle that actually

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[208] *See supra* page 10. Although the decision in Hunter seems to be derived and firmly justified from footnote four of *Carole Products*, the Court does not actually cite to the case.

[209] *See* DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW (1995); Davison M. Douglas, *The End of Busing?* 95 MICH. L. REV. 1715, 1732 (1997).

[210] Washington v. Seattle School District No.1, 458 U.S. 457 (1982).

[211] *Id*. at 463.

benefited from the busing program. However, the initiative took away this benefit[212]—and crucially—forced those who wanted the program back to appeal to the state legislature. rather then their local school board as with any non-racial issue.[213] Again, the existence of this racial divide between the majority and minority in this situation warranted the usage of the *Hunter/Seattle* Doctrine.

As aforementioned, the Supreme Court has yet to revisit the *Hunter/Seattle* doctrine since it decided *Seattle* in 1982.[214] However, this is not due to any social changes with regard to majority-minority relations that would render the doctrine unnecessary. There have still been attempts by majority voters to do exactly what *Carolene Products* warns against: to uniquely burden minority interests by altering the political structure. The most glaring and noteworthy such situation was the factual basis of *Romer v. Evans*.[215]

At issue in *Romer* was the validity of a state amendment (Amendment 2) prohibiting "all legislative, executive and judicial action designed to protect homosexual persons from discrimination."[216] What this amendment effectively did was shut out an entire class of people (homosexuals) from ever being able to petition the government for any sort of aid or protective

[212] This, in itself, is perfectly legal and does not violate equal protection principles. The majority has a right to use their advantage to achieve their goals; they cannot however restrict or alter the political processes available to minorities.

[213] *See supra* page 13.

[214] *See supra* note 73.

[215] Romer v. Evans, 517 U.S. 620 (1996).

[216] *Id*. at 620.

legislation.[217] Homosexuality, both in Colorado and the U.S. as a whole, was a very controversial issue at this time.[218] The sponsors of Amendment 2 aimed to put an end to antidiscrimination legislation benefiting homosexuals.[219] They felt that such legislation was "the first step in a gay rights agenda that would ultimately lead to a social plague, including child molestation."[220]

Again, almost immediately here, the concerns of *Carolene Products* are realized. We have the majority here enforcing prejudice against a discrete minority by not just restructuring the political process to restrict the minority's right to it, but by instead completely foreclosing them from ever being able to use the political process.

And yet, what's curious about the Supreme Court's opinion in *Romer* is that it mentioned neither *Hunter* nor *Carolene Products*. Legal scholars have also expressed their curiosity towards this seeming anomaly.[221] The most likely explanation is that Amendment 2 was so

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[217] *Id*. at 624.

[218] Stephen M. Rich, *Ruling by Numbers: Political Restructuring and the Reconsideration of Democratic Commitments After* Romer v. Evans, 109 YALE L.J. 587, 626 & n. 22 (1999).

[219] *Id*.

[220] *Id*. In fact, the respondent's brief talked about a leaflet distributed by sponsors of Amendment 2 stating that ""[s]exual molestation of children is a large part of many homosexuals' lifestyle--part of the very lifestyle 'gay-rights' activists want government to give special class, ethnic status!")." *Id*.

[221] "Yet [Romer's] central statement of principle unmistakably echoes that contained in *Hunter* and *Seattle*: 'Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.... A law declaring that in general it shall be more

egregiously broad in scope and so discriminative that the Court did not even have to use the *Hunter/Seattle* Doctrine to invalidate it. Indeed, the Court noted that the amendment seemed to be rooted in animus and that it failed even rational basis review; that is, the reasons presented for the amendment bore no rational relationship to legitimate state interests.[222] There simply seemed to be no need to apply a strict scrutiny analysis.

Romer illustrates the need for the continued usage of the *Hunter/Seattle* Doctrine. Minority interests in America must still be protected from being trampled on by an ill-meaning majority. Most forms of political restructuring are not as blatant and extreme as in *Romer*; however, this supports the use of the doctrine to flush out instances where minority interests are implicitly compromised.

IV. REFINING THE *HUNTER/SEATTLE* DOCTRINE

Although the fundamentals of the *Hunter/Seattle* doctrine are firmly entrenched both legally and socially, there are still improvements that can be made to ensure the continued relevancy of the doctrine. This Part will provide three such solutions: (1) using a sliding-scale approach regarding the scope of the initiative; (2) creating a clearer way to differentiate between—as *Crawford* stated—"state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters"; and (3) clearly establishing what constitutes a "political process" for the purposes of the doctrine.

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difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.'" Tokaji & Rosenbaum, *supra* note 39, at 137.

[222] *Romer*, 517 U.S. at 632.

A. *Sliding-Scale Approach Regarding the Scope of the Initiative*

One possible adjustment, especially in light of Proposition 209 and Proposal 2, is to place a strong emphasis on the overall scope of the law at issue. Proposition 209 and Proposal 2 are extremely broad in scope and their enactment affects millions of citizens in each respective state. This consideration would introduce a substantive aspect to a primarily procedural test.

In practice, this approach would involve balancing scope with the degree to which "special burdens" are placed on a minority group through reallocation.[223] In effect then, a broad initiative that would potentially affect millions of people need only cause a minor reallocation in the decision-making process to be subjected to strict scrutiny under the doctrine. Conversely, a simple city initiative[224] focusing on just a particular affirmative action program would be afforded more leniency in how it restructures the decision-making process.

This approach better harmonizes with cases like *Adarand* and *Croson* in that it is not as deferential when it comes to attacking the rationale behind affirmative action programs. However, it also maintains protection of minority interests by judging larger scale anti-affirmative action initiatives in a far more skeptical light than more specific initiatives.

B. *Drawing the Line Between* Seattle *and* Crawford

One major issue with the *Hunter/Seattle* doctrine is the lack of a clear framework for evaluating whether an initiative falls under *Seattle* (subject to strict scrutiny under the doctrine) or *Crawford* (held constitutional because both *Hunter* and *Seattle* were distinguishable). Clarifying this distinction is crucial for ensuring that the *Hunter/Seattle* doctrine is a useful tool

[223] *See supra page* 9 for a description of the two prongs of the *Hunter/Seattle* Doctrine.

[224] Similar to the legislation in *Hunter*.

in adjudicating future political structure cases. Indeed, this distinction is central to the divergent holdings in *Coalition for Economic Equity* and *Coalition to Defend Affirmative Action*.[225] As discussed in Part I, both *Seattle* and *Crawford* involved facially neutral ballot initiatives restricting school busing. However—to the surprise and confusion of legal commentators[226]—the initiative in *Seattle* was struck down as unconstitutional while the initiative in *Crawford* was upheld.[227]

In determining whether an initiative falls under *Seattle* or *Crawford*, the key inquiry should be whether the initiative uses race—either implicitly or explicitly—to define the governmental structure. This inquiry should be used in any case where an initiative is argued to

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[225] *See supra* pages 26-27 (discussing how the Ninth Circuit held that Proposition 209 was more comparable to *Crawford* than *Seattle* or *Hunter*).

[226] *See* Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 Sup. Ct. Rev. 127, 155 (1982) ("it is difficult to believe that *Crawford* was decided by the same Court as *Seattle*, much less that it was decided during the same Term and on the same day"); Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 485 (1999) (noting the difficulty in reconciling these opinions.); Maura Irene Strassberg, Note, *The Constitutionality of Excluding Desegregation from the Legal Services Program*, 84 COLUM. L. REV. 1630, 1644 (1984) ("Crawford and Seattle taken together create confusion about when an impact on a minority group will be found"); Gregory Ellis, Note, *Rethinking the Hunter Doctrine*, 8 S. CAL. INTERDISC. L.J. 323, 337 (1998) ("The final difficulty with the Hunter line comes when one tries to distinguish Seattle and Crawford.").

[227] *See supra* pages 12-17 (analyzing both *Seattle* and *Crawford*).

fall under one case or the other. If the initiative does use race to define the governmental structure, then it must pass muster under the *Hunter/Seattle* doctrine to avoid strict scrutiny.

To further elaborate on the usage and meaning of the inquiry, it will be applied to the initiatives at issue in *Seattle*, *Crawford*, and *Coalition for Economic Equity*[228]. Initiative 350 in *Seattle* was a facially-neutral statute that sought to ban desegregative busing.[229] Although the statute was facially neutral, a list of numerous exceptions made it obvious that the sole purpose of the initiative was to outlaw racial integration.[230] This racial distinction made it so that only race-based busing decisions were moved from the local school board level to the state level.[231]

Seattle thus exemplifies an implicit use of race in this inquiry. Such a finding should be made only when it is abundantly clear that the facial neutrality of the statute is masking a racial intent. This high burden of proof comports with the modern equal protection trend towards increasing scrutiny regarding affirmative action programs. In addition, establishing such a stringent standard reduces uncertainty over whether a statute is implicitly discriminating—only the most obvious of initiatives would satisfy this standard.

Looking next to *Crawford,* the facially-neutral initiative at issue—Proposition 1—sought to amend the California constitution to prevent mandatory busing unless such busing would be mandatory under the Fourteenth Amendment.[232] There were two major differences between

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[228] *Coalition to Defend Affirmative Action* is not addressed since Proposal 2 is substantively identical to Proposition 209—thus the inquiry process would be identical.

[229] Washington v. Seattle School District No.1, 458 U.S. 457, 462 (1982).

[230] *Id*. at 471.

[231] *Id*. at 474.

[232] Crawford v. Bd. of Educ., 458 U.S. 527, 529 (1982).

Proposition 1 and Initiative 350: (1) Proposition 1 did not contain any exceptions, it merely repealed the state's power to order busing for any reason[233]; (2) it did not restructure the political process—the initial action and the repeal both took place at the state level.[234] Because Proposition 1 is facially neutral and contains no exceptions, it does not single out race—either explicitly or implicitly. Thus, it cannot be said that it uses race to define the governmental structure, in fact it does not restructure the political process at all.

Finally, Proposition 209 in *Coalition for Economic Equity* explicitly used race to define the government structure. From the plain language of the initiative, it banned any state actor from enacting benefits towards groups on the "basis of race, sex, color, ethnicity, or national origin."[235] In effect, Proposition 209 removed the ability of a political body (the public universities in California for example) from ever considering enacting race-based remedies. Instead, a minority group seeking racial remedies must pass a state ballot initiative overturning Proposition 209. However, groups seeking preferential treatment for other groups—for example, veterans, or students from low-income households—can still appeal to the university's decision-making body. Thus, minorities must overcome a special political hurdle to obtain relief in their interest.

This is the same flaw that doomed Initiative 350 in *Seattle*. As Cass Sunstein noted regarding *Seattle*, "[t]he problem lies in determining precisely why it was thought necessary, not to abolish the local busing plan, but instead to reallocate governmental power so as to erect a

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[233] *Id*. at 539.

[234] *Id*. at 541.

[235] *See supra* note 16.

permanent barrier."[236] Indeed, Proposition 209 works the same effect as *Seattle*'s Initiative 350. The proponents of Proposition 209 could have simply aimed their efforts at simply repealing existing racial preference programs—analogous to the initiative in *Crawford*. Instead, by defining the political structure by race and implementing an additional hurdle to those seeking race-based relief in the future, Proposition 209 should have been subject to the *Hunter/Seattle* doctrine.

These examples showcase how this inquiry—by incorporating the key factual differences between the initiatives in *Seattle* and *Crawford*—clearly delineates which way future initiatives should fall.

C. *Establishing What Constitutes a "Political Process"*

Another ambiguity in the *Hunter/Seattle* doctrine is the scope of the phrase "political process." An initiative must reorder the political process to fall under the scope of the doctrine—thus, defining this phrase outlines the doctrine's bounds.

To best effectuate the underlying purpose of the *Hunter/Seattle* doctrine, the phrase "political process" should be interpreted broadly to encompass all governmental decision-making bodies. Viewed broadly, the core idea of the doctrine is to prevent the majority from restricting or hindering the ability of minorities to obtain benefits. It should not matter whether the political process at issue involves a local school board, the state legislature or an administrative panel, restricting access to any such body has the potential to cause harm.

This position is supported by language from both *Hunter* and *Seattle*. In *Hunter*, although the initiative at issue involved the legislative system, the Court stated that it was impermissible to

[236] Sunstein, *supra* note 226, at 159.

place special burdens within the *governmental* process.[237] Similarly, in *Seattle*, the Court used the term "political process" interchangeably with "decisionmaking process" and "governmental process."[238] This usage suggests that the Court envisions a broad definition where any process related to governmental decision-making falls under the doctrine's scope. This interpretation squares with the modern reality of government. More and more, governmental power is delegated to administrative agencies, special committees and boards and similar bodies.[239] To exclude these bodies would create a substantial loophole in the doctrine.

Governing boards of public universities should also fall under the scope of governmental decision-making. This issue was thoroughly explored in *Coalition to Defend Affirmative Action* since the *Hunter/Seattle* doctrine would have been inapplicable if the governing boards of Michigan's public universities—the entities from which decision-making power was being reallocated—did not fall under its scope.[240] The court noted two important facts: (1) the Michigan constitution established the state's public universities and granted the governing boards control of each university; and (2) the boards are publicly elected and have authority to alter the framework for admissions decision.[241]

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[237] Strassberg, *supra* note 226, at 1651 (citing Hunter v. Erickson, 393 U.S. 385, 391 (1969)).

[238] Coal. to Defend Affirmative Action v. Regents of Univ. of Michigan, 652 F.3d 607, 619 (6th Cir. 2011) (citing Washington v. Seattle School District No.1, 458 U.S. 457, 470 (1982)).

[239] Strassberg, *supra* note 226, at 1652.

[240] *Coal. to Defend Affirmative Action*, 652 F.3d at 619-25.

[241] *Id*. at 621-22.

The first fact clearly established that the power wielded by these boards is governmental in nature because the Michigan constitution is "the foundation of Michigan's government."[242] The second fact showed that groups could alter the policies of the board by publicly electing new officials. This is important to show that it was possible for minorities to obtain beneficial policies from this level of government and that this right would be taken away by moving the decision-making process to a higher level of government. Taken together, the governing bodies of public universities serve substantially the same function in substantially the same way as other governmental decision-making bodies.

Opting for a narrower interpretation of "political process" runs counter to the role the *Hunter/Seattle* doctrine plays in equal protection law. The doctrine serves to ensure that the majority can't work around the Equal Protection Clause by burdening the ability of minorities to seek beneficial legislation.[243] A narrow interpretation allows invidious majority interests to target decision-making bodies that are ambiguous in whether they are a part of the political process. Such an interpretation also introduces further uncertainty into the inquiry. Establishing a strict rule that all bodies vested with decision-making power by the government fall under the term "political process" leaves relatively little room for ambiguity.

CONCLUSION

One of the tenets of our democratic society is ensuring equal access to the political process for all citizens. In the context of the Equal Protection Clause, the *Hunter/Seattle* doctrine serves a crucial function in policing when the majority alters the political process to specially

[242] *Id*. at 621.

[243] Ellis, *supra* note 226, at 374.

burden minority interests. Although there is some tension between the doctrine and more recent equal protection jurisprudence, its strong foundational basis warrants its continued usage.

This is especially true in light the recent initiatives in California and Michigan to completely outlaw affirmative action measures in each state. Looking to the future, as other challenges to affirmative action arise, it is important to ensure that such challenges do not violate the equal protection rights of minorities. This Comment offers improvements to the *Hunter/Seattle* doctrine so it can function effectively as a safeguard against potential equal protection violations.