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# Race, Restructurings, and Equal Protection Doctrine Through the Lens of *Schuette v. BAMN*

Steve Sanders<sup>†</sup>

## INTRODUCTION

The imperative of fair lawmaking processes is a fundamental principle of constitutional law.<sup>1</sup> It may well be that “in wide areas of life[,] majorities are entitled to rule, if they wish, simply because they are majorities,”<sup>2</sup> and that the political marketplace “will sometimes operate in favor of one faction; sometimes in favor of another.”<sup>3</sup> But if a majority prevails on a matter of public policy, it should not be because that majority rigged the lawmaking process in its favor so that the process itself was no longer neutral. The “ins” should not be able to alter the political process “to ensure that they will stay in and the outs will stay out.”<sup>4</sup>

In 2012, the U.S. Court of Appeals for the Sixth Circuit ruled that the voters of Michigan had violated these principles when they amended their state constitution to prohibit race-conscious affirmative action in public university admissions.<sup>5</sup> The Sixth Circuit reasoned that the amendment, known as the “Michigan Civil Rights Initiative” or “Proposal 2,” had “reordered

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<sup>1</sup> See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87 (1980) (observing that under the Constitution, “the selection and accommodation of substantive values is left almost entirely to the political process,” while the provisions of the document itself are “overwhelmingly concerned . . . with what might capaciously be designated process writ large[.]—with ensuring broad participation in the processes and distributions of government” (footnotes omitted)).

<sup>2</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 139 (1990).

<sup>3</sup> *Hunter v. Erickson*, 393 U.S. 385, 394 (1969) (Harlan, J., concurring).

<sup>4</sup> ELY, *supra* note 1, at 103.

<sup>5</sup> *Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN) v. Regents of Univ. of Mich.*, 701 F.3d 466, 467 (6th Cir. 2012) (en banc).

the political process”<sup>6</sup> by removing authority on affirmative action from elected university governing boards and placing it (i.e., forbidding it) in the state constitution. In itself, such a reordering of the lawmaking process—or a “political restructuring,” as it is more commonly known—does not violate the Constitution because it is commonly understood that states have “wide leeway when experimenting with the appropriate allocation of state legislative power.”<sup>7</sup> But the Sixth Circuit concluded that Proposal 2 violated the Fourteenth Amendment’s Equal Protection Clause because the restructuring worked to the political disadvantage of African-Americans, who overwhelmingly favor affirmative action as a government policy.<sup>8</sup>

“A student seeking to have her family’s alumni connections considered in her application to one of Michigan’s esteemed public universities,” the court said, had a variety of avenues available to her, such as petitioning the admissions committee or lobbying the school’s governing board.<sup>9</sup> A black student who wanted to see a university adopt a constitutionally valid affirmative action program, on the other hand, “could do only one thing to effect change: she could attempt to amend the Michigan Constitution—a lengthy, expensive, and arduous process—to repeal the consequences of Proposal 2.”<sup>10</sup> “[S]uch a comparative structural burden,” the court said, “undermines the Equal Protection Clause’s guarantee that all citizens ought to have equal access to the tools of political change.”<sup>11</sup>

The Sixth Circuit relied on the so-called *Hunter/Seattle*, or “political-process doctrine,” named for two of the Supreme Court’s racial equal protection decisions, *Hunter v. Erickson*<sup>12</sup> and *Washington v. Seattle School District No. 1*.<sup>13</sup> The Sixth Circuit said that the *Hunter/Seattle* doctrine stood for the principle that “an enactment deprives minority groups of the equal protection of the laws when it . . . target[s] a policy or program that ‘inures primarily to the benefit of the minority’; and . . . reallocates political power or reorders the decisionmaking process in a way

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<sup>6</sup> *Id.* at 483.

<sup>7</sup> *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978).

<sup>8</sup> *See, e.g.*, Bruce Drake, *Public Strongly Backs Affirmative Action Programs on Campus*, PEW RES. CTR. (Apr. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/04/22/public-strongly-backs-affirmative-action-programs-on-campus/> [<http://perma.cc/2HV8-R8CE>] (reporting that 84% of blacks believe that “affirmative action programs designed to increase the number of black and minority students on college campuses are a ‘good thing,’” while 8% think they are a “bad thing”).

<sup>9</sup> *Coal. to Defend Affirmative Action*, 701 F.3d at 470.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Hunter v. Erickson*, 393 U.S. 385 (1969).

<sup>13</sup> *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

that places special burdens on [that] minority group's ability to achieve its goals through that process."<sup>14</sup> Significantly, however, the Sixth Circuit was careful to avoid saying that Proposal 2 created a racial classification or was motivated by a purpose of discriminating on the basis of race. In other words, the Sixth Circuit did not say that the "comparative structural burden" of Proposal 2 arose from *intentional, race-conscious action* by Michigan voters. Consistent with the view that the *Hunter/Seattle* doctrine allowed for the finding of a constitutional violation based only on the detrimental political-process *effects* of a restructuring on a minority group, the court eschewed any need to apply what it called "traditional" equal protection analysis, which requires an intentional decision to create a racial classification or to otherwise discriminate invidiously.<sup>15</sup>

In a deeply fractured 2014 decision with no majority opinion, the Supreme Court reversed the Sixth Circuit in *Schuette v. Coalition to Defend Affirmative Action*.<sup>16</sup> As five Justices saw it, Proposal 2 simply reflected disagreement on the public policy question of affirmative action that the citizens of Michigan were entitled to settle as they saw fit.<sup>17</sup> None of the Justices, not even the dissenters, thought Proposal 2 had been impelled by an intent by Michigan voters to disadvantage racial minorities. According to Justice Kennedy's plurality opinion, courts must avoid "announc[ing] what particular issues of public policy should be classified as advantageous to some group defined by race."<sup>18</sup> To accept the Sixth Circuit's understanding—that in outlawing affirmative action, Proposal 2 violated equal protection because its *effect* was to place a "special burden" on African-Americans—would be, according to the plurality, to accept the "proposition that all individuals of the same race think alike" on issues of public policy.<sup>19</sup>

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<sup>14</sup> *Coal. to Defend Affirmative Action*, 701 F.3d at 477 (quoting *Seattle Sch. Dist. No. 1*, 458 U.S. at 462, 467).

<sup>15</sup> *Id.* at 489 ("Having found that Proposal 2 deprives the Plaintiffs of equal protection of the law under the political-process doctrine, we need not reach the question of whether it also violates the Equal Protection Clause when assessed using the 'traditional' analysis.").

<sup>16</sup> *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014).

<sup>17</sup> See *id.* at 1628 (plurality opinion by Kennedy, J., joined by Roberts, C.J., and Alito, J.); *id.* at 1639 (Scalia, J., joined by Thomas, J., concurring in the judgment).

<sup>18</sup> *Id.* at 1635 (plurality opinion).

<sup>19</sup> *Id.* at 1634 (plurality opinion); see also *id.* at 1643-44 (Scalia, J., concurring in the judgment) (arguing that the Sixth Circuit's approach would "promote[] the noxious fiction that, knowing only a person's color or ethnicity, we can be sure that he has a predetermined set of policy 'interests,' thus 'reinforc[ing] the perception that members of the same racial group—regardless of their age, education, economic status,

The Supreme Court's opinions in *Schuette* settled the constitutionality of Proposal 2, but they created confusion and uncertainty going forward about how we should think about political restructurings as a matter of constitutional equal protection. Three Justices in *Schuette* thought that the language in *Seattle* that the Sixth Circuit relied upon should be reinterpreted and narrowed, but this plurality did not address the matter of a larger restructuring doctrine other than to say that it remains an "unremarkable principle that the state may not alter the procedures of government to target racial minorities."<sup>20</sup> Two Justices would have overruled *Hunter* and *Seattle* as incompatible with their understanding of established equal protection doctrine.<sup>21</sup> Two other Justices strongly defended the *Hunter/Seattle* doctrine but thought the plurality had effectively gutted it.<sup>22</sup> One Justice thought Proposal 2 was not a restructuring at all.<sup>23</sup>

This article provides an in-depth exposition of the restructuring cases that came before *Schuette*, an analysis of the *Schuette* decision's place within equal protection doctrine, and some observations about judicial review of political restructurings in the future. It advances three arguments.

First, contrary to the understanding of the Sixth Circuit,<sup>24</sup> numerous commentators,<sup>25</sup> and Justices on both the right and left poles of the Supreme Court,<sup>26</sup> this article argues that the best-known political restructuring cases, *Hunter* and *Seattle*, did not create an exception to the principle that a violation of the

or the community in which they live—think alike, [and] share the same political interests" (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (alteration in original)).

<sup>20</sup> *Id.* at 1632 (plurality opinion).

<sup>21</sup> See *infra* notes 256-63 and accompanying text (discussing opinion concurring in the judgment by Scalia, J., joined by Thomas, J.).

<sup>22</sup> See *infra* notes 264-68268 and accompanying text (discussing dissent by Sotomayor, J., joined by Ginsburg, J.).

<sup>23</sup> See *infra* notes 252-55 and accompanying text (discussing opinion concurring in the judgment by Breyer, J.).

<sup>24</sup> See *infra* notes 220-25 and accompanying text.

<sup>25</sup> See, e.g., Kerrel Murray, Note, *Good Will Hunting: How the Supreme Court's Hunter Doctrine Can Still Shield Minorities from Political-Process Discrimination*, 66 STAN. L. REV. 443, 462 (2014) (arguing "that the *Hunter* doctrine does not overlap with conventional equal protection doctrine"); 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, 136 (1999) (arguing that *Hunter* and *Seattle* are not "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" because these cases stand for a principle of "equal access to the political process"); Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1021, 1035 (1996) (arguing that discriminatory intent is not required under a *Hunter/Seattle* analysis).

<sup>26</sup> See *infra* notes 256-68 and accompanying text.

Equal Protection Clause requires intentional discrimination.<sup>27</sup> The contrary view arises in large part, this article suggests, because the Court in an earlier era was willing to find that certain government actions constituted intentional race discrimination without openly accusing lawmakers or voters of race-conscious action or invidious purposes. *Hunter* and *Seattle* both involved alterations of the political process that worked to the disadvantage of racial minorities. But contrary to the conventional wisdom about the *Hunter/Seattle* doctrine, the effects of these process alterations, standing alone, are not what violated equal protection. Rather, the restructurings were invalidated because the Court perceived that they were designed to create what the Court characterized as “racial classifications.” “Classifications” do not arise by accident or as a matter of mere incidental effect. Although the Court has never defined exactly what constitutes a “racial classification,” we can at least infer from its jurisprudence that the term includes not only facial classifications of persons, but also policies that reflect intentional, race-conscious decisionmaking. The Court perceived that the harmful effects of the restructurings on racial minorities were not a matter of mere disparate impact, but rather were the restructurings’ actual purposes. Thus, *Hunter* and *Seattle*, properly understood, have been and remain compatible with “traditional” equal protection doctrine. This article’s conclusions on this point support the *Schuetz* plurality opinion; it argues that Justices Scalia and Thomas (concurring in the judgment) and Justices Sotomayor and Ginsburg (dissenting) rested their opinions on incorrect readings of *Hunter* and *Seattle*.

Second, *Schuetz* is, above all, a decision reflecting the current state of the Court’s racial equal protection jurisprudence, not a decision about political restructurings as such. The Court’s judgment that Proposal 2 did not violate the Equal Protection Clause was a logical extension of the current Court’s “colorblind” understanding of racial equal protection. In *Hunter* and *Seattle*, as well as in an earlier restructuring case, *Reitman v. Mulkey*,<sup>28</sup> the Court found intentional harm to minorities in large part because the restructurings in those cases intentionally targeted policies that the Court recognized as both beneficial to and supported by racial minorities. But today the Court is committed to the principle that, for constitutional purposes, there can be no such thing as a

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<sup>27</sup> See *infra* notes 269-317 and accompanying text.

<sup>28</sup> *Reitman v. Mulkey*, 387 U.S. 369 (1967).

“minority view” on a question of public policy, including affirmative action, the subject of Proposal 2. To label Proposal 2 a “racial classification” would be to assume that policy preferences on racial affirmative action can serve as a proxy for race itself, a suggestion that to the majority of Justices in *Schuette* would have been anathema. Since there was no evidence of overt racism or other invidious purpose in the campaign to enact Proposal 2, the Court could characterize Proposal 2 as nothing more than the product of a vigorous public policy debate with no equal protection implications.

Finally, *Schuette* does not alter an important lesson from the restructuring precedents, which properly include the gay rights case *Romer v. Evans*,<sup>29</sup> as well as the race cases of *Reitman*, *Hunter*, and *Seattle*. That lesson is that courts can and should give more careful scrutiny to political restructurings that affect minority or disadvantaged groups than is provided by the baseline, highly deferential form of rational basis review that is applied to ordinary legislative enactments. The purpose of such scrutiny should be for a court to satisfy itself that the restructuring is not a pretext for animus or other invidious purpose against the affected group. Restructurings are, by definition, *not* ordinary legislative enactments; they reflect a political majority’s intention to go *outside* the ordinary legislative process. 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 decisionmaking, it is not unreasonable to suspect that the restructuring might be intended to work constitutionally improper discrimination against some group. Restructurings require that courts be alert for “the ingenuity of those who would seek to conceal [improper discrimination] by subtleties and claims of neutrality.”<sup>30</sup> As the Court explained in *Romer*, for example, the use of a state constitutional amendment to selectively disadvantage a specific group by overriding the ordinary state and local lawmaking processes is a “[d]iscrimination[] of an unusual character” and therefore requires “especially . . . careful consideration to determine whether” it is “obnoxious” to the [C]onstitution[.]”<sup>31</sup>

This article proceeds in five parts. Part I explains how the political restructuring doctrine arises from a larger body of legal thought known as “political-process theory,” which is

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<sup>29</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>30</sup> *Mulkey v. Reitman*, 413 P.2d 825, 834 (Cal. 1966), *aff’d sub nom. Reitman v. Mulkey*, 387 U.S. 369 (1967).

<sup>31</sup> *Romer*, 517 U.S. at 633 (alteration in original) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

associated with Footnote Four of *United States v. Carolene Products Co.*<sup>32</sup> and the work of constitutional theorist John Hart Ely. Part II provides a close, detailed examination of the restructuring cases before *Schuette*. Part III discusses *Schuette*'s background, the Sixth Circuit decision, and the Supreme Court Justices' opinions. Part IV provides this article's two primary doctrinal arguments. It explains why the idea of a *Hunter/Seattle* doctrine never rested on solid ground and how the Court's "colorblind" racial equal protection jurisprudence largely explains the outcome in *Schuette*. Finally, Part V explains why careful judicial scrutiny of restructurings for invidious purposes remains both permissible and necessary, especially given the inherent flaws of direct democracy.

## I. RESTRUCTURINGS AS A POLITICAL PROCESS ISSUE

The doctrine of political restructurings has its roots in a larger body of legal thought that is typically called "political-process theory."<sup>33</sup> Political process theory is closely associated with the work of John Hart Ely, particularly his 1980 book *Democracy and Distrust*,<sup>34</sup> and with Footnote Four of *Carolene Products*. The core principle of political-process theory is that "judicial scrutiny should increase when a socially subordinated group cannot compete fairly in the political process," and thus "a court's ability to override" a law "ought to be calibrated based on the fairness of the political process that produced" it.<sup>35</sup>

While most business and social legislation receives deferential rational basis review, Footnote Four suggested that "more exacting judicial scrutiny" may be appropriate where an enactment "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or manifests "prejudice against discrete and insular minorities . . . [that] tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."<sup>36</sup> Building on these themes, Ely argued that these passages of Footnote Four "are concerned with participation: they ask us to focus not on whether this or that substantive value is unusually important or fundamental"—the usual stuff

<sup>32</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>33</sup> See, e.g., Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1378 (2011) (discussing the "specialized doctrine" within political-process theory "that closely scrutinizes acts of 'political restructuring' that adversely affect minority groups").

<sup>34</sup> See generally ELY, *supra* note 1.

<sup>35</sup> Schacter, *supra* note 33, at 1364.

<sup>36</sup> *Carolene Prods.*, 304 U.S. at 152-53 n.4.



of constitutional analysis on questions of individual rights and equality—“but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted.”<sup>37</sup>

Ely understood “participation” broadly to encompass more than simply voting (though equal access to the franchise is a core political-process value). We know that the lawmaking process is malfunctioning and “undeserving of trust,” Ely wrote, when “the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out,” or when “representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest.”<sup>38</sup> Such majoritarian abuses deny the minority “the protection afforded other groups by a representative system.”<sup>39</sup>

According to Ely, Footnote Four teaches that courts must “keep the machinery of democratic government running as it should” and “make sure the channels of political participation and communication are kept open.”<sup>40</sup> A focus on process allows for meaningful judicial review “without dragging courts into endlessly contested debates about substantive values and ideas.”<sup>41</sup> It is a way to maintain the principle that “substantive decisions are generally to be made democratically in our society and constitutional decisions are generally to be limited to policing the mechanisms of decision and distribution.”<sup>42</sup> The health and fairness of these process mechanisms is critical, Ely thought, because “[t]he constitutionality of most distributions . . . cannot be determined simply by looking to see who ended up with what, but rather can be approached intelligibly only by attending to the process that brought about the distribution in question.”<sup>43</sup>

Political restructurings are a natural concern for process theory because restructurings involve changing the *process* by which certain laws are made—usually by moving the locus of decisionmaking to a higher and more remote level of

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<sup>37</sup> ELY, *supra* note 1, at 77.

<sup>38</sup> *Id.* at 103.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 76.

<sup>41</sup> Schachter, *supra* note 33, at 1364.

<sup>42</sup> ELY, *supra* note 1, at 181.

<sup>43</sup> *Id.* at 136; accord Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 128 (1982) (arguing that the purpose of equal protection “is to prohibit unprincipled distributions of resources and opportunities. Distributions are unprincipled when they are not an effort to serve a public value, but reflect the view that it is intrinsically desirable to treat one person better than another”).

government—to help achieve a particular *substantive* outcome. Typically this means taking matters that are within the customary police powers of state legislatures or local governments away from those bodies and committing them to a state constitution or city charter. For example, want to get rid of legislatively approved fair housing laws and ensure that they won't be reenacted? Get the voters to amend your state constitution to give property owners the right to refuse to sell or lease their property to anyone for any reason.<sup>44</sup> Want to prevent gays and lesbians from using the ordinary legislative lawmaking process to advance their legal equality? Go over the heads of those elected legislators and ask the voters to ban “special rights” for homosexuals,<sup>45</sup> or insist that an ordinary question of statutory family law—the qualifications for marriage—be decided in a statewide constitutional referendum.<sup>46</sup> Restructurings are problematic because they intentionally bypass an ordinary lawmaking process that affords at least some protection for pluralism and minority interests (because it “offers time for reflection, exposure to competing needs, and occasions for transforming preferences”<sup>47</sup>) in favor of a different process—usually direct democracy—where the majority's numerical and resource advantages, and the minority's politically inferior position, both are magnified.

The rationales articulated by the Justices in the restructuring cases reflect many of these same principles. For example, concurring in *Hunter*, Justice Harlan observed that “laws which define the structure of political institutions” must be “designed with the aim of providing a just framework within which the diverse political groups in our society may fairly compete” and should not be “enacted with the purpose of assisting one particular group in its struggle with its political opponents.”<sup>48</sup> In itself, he said, a polity's decision to adopt a voter-referendum system, or a supermajority requirement for amending a state constitution, is grounded in a “neutral principle,”<sup>49</sup> even if it sometimes operates to the disadvantage of a minority group. But such procedures raise constitutional

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<sup>44</sup> See *infra* notes 73-79 and accompanying text (discussing *Reitman*).

<sup>45</sup> See *infra* notes 183-200 and accompanying text (discussing *Romer*).

<sup>46</sup> See Steve Sanders, *Mini-DOMAs as Political Process Failures: The Case for Heightened Scrutiny of State Anti-Gay Marriage Amendments*, 109 NW. U. L. REV. ONLINE 12, 13-14 (2014) (arguing that state constitutional amendments banning same-sex marriage are restructurings that should receive heightened scrutiny).

<sup>47</sup> Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1527 (1990).

<sup>48</sup> *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (Harlan, J., concurring).

<sup>49</sup> *Id.* at 395.

problems when they are invoked selectively for the “clear purpose” of imposing a special burden on a minority group.<sup>50</sup>

Similarly, in *Seattle*, the Court said that in addition to guaranteeing the right to vote and to participate equally in “the political life of the community,” the Equal Protection Clause is implicated when “a political structure’ . . . subtly distorts governmental processes in such a way as to place special burdens on . . . minority groups.”<sup>51</sup> A “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,” such as when racial considerations are used “to determine the decisionmaking process” that is prescribed by a law.<sup>52</sup> Quoting Footnote Four, the *Seattle* Court said that “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 political processes ordinarily to be relied upon to protect minorities.’”<sup>53</sup>

This article concludes by arguing that these basic principles of judicial engagement to prevent majoritarian abuses of the political process survive the judgment in *Schuette* and remain relevant to political restructurings. To fully appreciate that argument, though, it is first necessary to understand how the Court approached political restructurings before *Schuette* and how we should think about *Schuette* as an equal protection decision.

## II. RESTRUCTURING DOCTRINE BEFORE *SCHUETTE*

### A. “Traditional” Equal Protection

In *Schuette*, the central disagreement between the Sixth Circuit and a majority of the Supreme Court Justices, as well as among the Justices themselves, was whether the Court’s pre-*Schuette* restructuring cases gave rise to a “*Hunter/Seattle* doctrine” that is different from “traditional” equal protection

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<sup>50</sup> *Id.*

<sup>51</sup> *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982) (quoting *Mobile v. Bolden*, 446 U.S. 55, 84 (1980) (Stevens, J., concurring in judgment)).

<sup>52</sup> *Id.* at 470.

<sup>53</sup> *Id.* at 486 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

doctrine. An appropriate first step in this analysis is to set forth what “traditional” equal protection doctrine actually means.

An equal protection violation requires intentional or purposeful discrimination.<sup>54</sup> A disproportionate adverse effect or impact on a group, standing alone, will not establish an equal protection violation,<sup>55</sup> though the fact that a “law bears more heavily on one [group] than another” can be one factor in the analysis for intentional discrimination.<sup>56</sup> Before the mid-1970s, the Court did not distinguish as sharply as it does today between discriminatory *purpose* and discriminatory *effect*.<sup>57</sup> That change in the doctrine, as well as the Court’s treatment of affirmative action as part of a shift toward a so-called colorblind conception of racial equal protection, is helpful to understanding *Schuette*.<sup>58</sup>

For suspect and quasi-suspect classes, the intentional creation of a classification—regardless of whether the classification’s purpose is harmful or benign—triggers the appropriate level of judicial review (strict scrutiny for suspect classes, “intermediate” for quasi-suspect classes). For all other classifications or forms of discrimination involving nonsuspect groups, judicial review is supposed to determine whether the challenged law or policy bears a rational relationship to a legitimate government interest. Among the ways the rational basis test can be failed is where the discrimination is entirely arbitrary<sup>59</sup> or where it is impelled by animus or a purpose to inflict harm.<sup>60</sup>

In the simplest example concerning a suspect or quasi-suspect classification, a law may facially draw a classification—for example, “all white children go to School A, all black children go to School B”—and such a classification would automatically get heightened scrutiny. But a policy need not affect every member of a group in order to be labeled a “classification.” For instance, in the context of public higher education, even when race is used as a “plus’ factor” to benefit a relatively small number of minority students in a selective

<sup>54</sup> *Washington v. Davis*, 426 U.S. 229, 239 (1976) (observing 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”).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 242.

<sup>57</sup> See *infra* notes 326-29 and accompanying text.

<sup>58</sup> See *infra* Part IV.

<sup>59</sup> *E.g.* *Allegheny Pittsburgh Coal Co. v. Cty. Comm’n of Webster Cty.*, 488 U.S. 336, 344-46 (1989).

<sup>60</sup> *E.g.* *Romer v. Evans*, 517 U.S. 620, 632 (1996).

admissions process, the Court nonetheless considers it to be a “classification.”<sup>61</sup> That is because the process still employs race as a decisionmaking factor. The Court also has said that a racial classification may be found where a law is facially neutral or contains no “explicit racial distinctions,” but circumstances compel the conclusion that the law is a pretext for invidious discrimination or is “unexplainable on grounds other than race.”<sup>62</sup> The Court has never actually defined the term “classification” in any specific way,<sup>63</sup> and as this article will explain, the Court’s less-than-precise approach to the matter of classifications helps to explain disagreement about the existence, or not, of a *Hunter/Seattle* doctrine.<sup>64</sup>

Even without any sort of formal classification, evidence may demonstrate that “a motivating factor”<sup>65</sup> behind a law or practice was animus or some other form of invidious intent.<sup>66</sup> The Court has said that determining whether a law was motivated by an invidious purpose “demands a sensitive inquiry” to examine both “circumstantial and direct evidence.”<sup>67</sup> This inquiry takes place at the outset: before applying the appropriate level of judicial scrutiny, the court first must determine whether the law classifies or discriminates at all.<sup>68</sup> The Court has suggested a number of factors to guide this inquiry. For example, “[t]he impact of the official action”—whether it “bears more heavily” on one group than another—“may provide an important starting point.”<sup>69</sup> Other considerations may include “[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes,” legislative and administrative history, “[t]he specific sequence of events leading up to the challenged decision,” departures from normal procedures, and “[s]ubstantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one

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<sup>61</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 326, 335 (2003).

<sup>62</sup> *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

<sup>63</sup> Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 48-49 (2013) (observing that racial classification is “a term the Court has never once defined”).

<sup>64</sup> See *infra* notes 289-97 and accompanying text.

<sup>65</sup> *Arlington Heights*, 429 U.S. at 266.

<sup>66</sup> *E.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (finding that a pattern of discriminatory administration of an ostensibly neutral regulation could be explained only by “hostility to the race and nationality to which the petitioners belong”).

<sup>67</sup> *Arlington Heights*, 429 U.S. at 266.

<sup>68</sup> *Id.*; accord ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 718 (3d ed. 2009) (“Equal protection analysis always must begin by identifying how the government is distinguishing among people.”).

<sup>69</sup> *Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

reached.”<sup>70</sup> The Court has also said that improper “discriminatory purpose may often be inferred from the totality of the relevant facts” where the discrimination is “very difficult to explain on nonracial grounds.”<sup>71</sup>

### B. *The Supreme Court’s Restructuring Cases*

The *Hunter/Seattle* doctrine is said to stand for the principle that an equal protection violation can be found where a political restructuring results in an adverse impact or effect on a racial minority’s ability to achieve its goals in the political process, but without a finding that the restructuring was driven by either race-conscious decisionmaking or invidious purpose. In *Schuette*, a majority of Justices rejected this understanding of the *Hunter/Seattle* doctrine, but the fractured set of opinions provided virtually no guidance for thinking about future restructurings.

To evaluate whether *Schuette* was correct in rejecting a *Hunter/Seattle* doctrine, and to understand how political restructurings should be judicially analyzed in the future, a careful examination of the restructuring precedents is necessary. The following section lays that foundation, giving a closer, more detailed reading of these cases than previous scholarship has provided. This close reading demonstrates that political-process concerns, as such, were not dispositive for the outcomes in these cases. Rather, these process concerns informed the Court’s ultimate conclusions that the restructurings violated *substantive* constitutional guarantees of equal treatment. Later, this article discusses how this understanding of the restructuring precedents helps explain the outcome in *Schuette*, and it engages with the perspectives that other commentators have offered on these cases.<sup>72</sup>

#### 1. *Reitman v. Mulkey*

In the 1960s, California enacted several statutes prohibiting discrimination on the basis of race in the sale or rental of property. These laws provoked “considerable opposition” in the state,<sup>73</sup> and voters in the 1964 election adopted an amendment to the California constitution that provided, in pertinent part, that

[n]either the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is

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<sup>70</sup> *Id.* at 267.

<sup>71</sup> *Washington*, 426 U.S. at 242.

<sup>72</sup> *See infra* Section IV.A.

<sup>73</sup> *Reitman v. Mulkey*, 387 U.S. 369, 387 (1967) (Harlan, J., dissenting).

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.<sup>74</sup>

The amendment (referred to by the Court as “Section 26” for the place it would have occupied within Article I of the California state constitution) did not mention race or antidiscrimination laws, and on its face, the “right” conferred by the amendment had no apparent connection to these things.

*a. The California Amendment as a Restructuring*

The Supreme Court was careful to observe that the mere repeal of a law protecting a minority group would not, in itself, violate the Constitution.<sup>75</sup> But Section 26 was more than merely a repeal; it “struck more deeply and more widely.”<sup>76</sup> A mere repeal of fair housing laws, even if executed by citizen initiative, would have allowed the question to be brought up again in the future through the ordinary legislative process, where the laws might have been reenacted at some future date as the result of new evidence, changing social attitudes, elections, or the success of minority groups in building coalitions to persuade legislators to support new laws. But the purpose of elevating a legislative policy issue to the level of the state constitution is to check the operation of such normal political processes and prevent an ordinary legislative majority’s decision from being revisited down the road.

Section 26 was thus a restructuring. It took a specific issue (nondiscrimination in housing), which was ordinarily decided by the legislature as a matter of statutory law, and moved it to a higher, more remote level of government by placing it in the state constitution. After the passage of Section 26, reinstating fair housing laws would require re-amending the state constitution, a far more arduous and expensive process (and at the time, a prohibitively difficult one for racial minorities) than working through the ordinary legislative process.

Uncovering the workings of Section 26 and explaining why, as a restructuring, it differed from an ordinary statutory enactment was key to the Court’s analysis. Amending a state constitution is different, both in its legal effect and its expressive power, from passing or repealing an ordinary statute. A constitutional provision controls and limits more

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<sup>74</sup> *Id.* at 371 (quoting Proposition 14).

<sup>75</sup> *Id.* at 376.

<sup>76</sup> *Id.* at 377.

government behavior and says more about government's values and priorities than does an ordinary statute. Section 26 did more than simply reverse the judgment of elected lawmakers on a statutory matter concerning race discrimination. It also prevented similar statutory enactments in the future. And it elevated the matter to the state's highest, most remote level of government decisionmaking: its constitution. Thus, as the California Supreme Court reasoned in one of the opinions below that the U.S. Supreme Court expressly endorsed, even if the state had not set out with a purpose to discriminate, it had "lent its processes"—that is, the initiative process by which the California constitution could be amended—to private individuals who aimed to remove barriers holding back those who *did* have such a discriminatory purpose.<sup>77</sup> Citizens who wanted to turn back the clock to the days before state government interfered with private racial discrimination were given access to the place where the state government announces its most profound values.

Elaborating on this theme, the U.S. Supreme Court observed,

Private discriminations in housing were now not only free from [the repealed nondiscrimination statutes] but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.<sup>78</sup>

In the same vein, Justice Douglas in a concurring opinion called Section 26 "a form of sophisticated discrimination whereby the people of California [attempted to] harness the energies of private groups to do indirectly what they cannot under our decisions allow their government to do."<sup>79</sup> In other words, the U.S. Supreme Court in *Reitman* was concerned not only by the *substance* of the change voters had made in their state's law, but also by the *process* they had used to engineer that change. The analyses of process and substance went hand in hand.

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<sup>77</sup> *Mulkey v. Reitman*, 413 P.2d 825, 831 (Cal. 1966), *aff'd sub nom.* *Reitman v. Mulkey*, 387 U.S. 369 (1967).

<sup>78</sup> *Reitman*, 387 U.S. at 377 (emphases added).

<sup>79</sup> *Id.* at 383 (Douglas, J., concurring) (footnotes omitted).



*b. The California Amendment as Race Discrimination*

The Fourteenth Amendment prohibits states from improperly discriminating, but it does not require states to legislate against discrimination by private citizens. And it is possible, of course, to oppose antidiscrimination laws based on political or philosophical principles without favoring race discrimination. The property owners defending Section 26 argued that the measure was innocent because it was merely a repeal; it simply made the state “neutral” on matters of race discrimination in private-property transactions.<sup>80</sup>

The Court refused to accept this characterization and instead held that Section 26 violated the Fourteenth Amendment. In the Court’s view, Section 26 was state action because it created “a [state] constitutional right to discriminate on racial grounds in the sale and leasing of real property.”<sup>81</sup> Rather than making the state neutral on the matter of private race discrimination, Section 26 “expressly authorized and constitutionalized the private right to discriminate”<sup>82</sup> and therefore would “encourage and significantly involve the State in private racial discrimination.”<sup>83</sup>

As support for this understanding, the Court looked to *Burton v. Wilmington Parking Authority*.<sup>84</sup> In that case, a lessee who operated a restaurant in a building owned by a Delaware state agency refused service to black customers.<sup>85</sup> The Court found that the lease arrangement created state action and implicated the state government in private race discrimination. By leasing space to the restaurant, the state had “place[d] its power, property and prestige behind the admitted discrimination.”<sup>86</sup> The *Reitman* Court also analogized Section 26 to an Oklahoma state law it had examined in *McCabe v. Atchison, Topeka, and Santa Fe Railway Co.*,<sup>87</sup> which, in the Court’s interpretation, affirmatively “authorized carriers to provide cars for white persons but not for Negroes.”<sup>88</sup> Such a “permissive state statute” was, in effect, “an authorization” for the private railroad company to discriminate

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<sup>80</sup> *Id.* at 374-75.

<sup>81</sup> *Id.* at 376.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *See id.* at 375 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)).

<sup>85</sup> *See Burton*, 365 U.S. at 716.

<sup>86</sup> *Id.* at 725.

<sup>87</sup> *McCabe v. Atchison, Topeka, & Santa Fe Ry. Co.*, 235 U.S. 151 (1914).

<sup>88</sup> *Reitman*, 387 U.S. at 379.

and thus was “sufficient state action to violate the Fourteenth Amendment.”<sup>89</sup>

The parallels between Section 26 and these cases are not perfect. But they make more sense if we understand the Court in *Reitman* as endeavoring to look behind Section 26 to better understand what was really happening in this ballot initiative. Rather than accepting the restructuring defenders’ characterization at face value, the Court said it was necessary to analyze Section 26 “in terms of its ‘immediate objective,’ its ‘ultimate effect[,]’ and its ‘historical context and the conditions existing prior to its enactment.’”<sup>90</sup> As support for this undertaking, the Court cited cases where it had provided close examination and ultimately found equal protection violations in situations where invidious discrimination was not immediately obvious, including *Yick Wo v. Hopkins*<sup>91</sup> and *Anderson v. Martin*.<sup>92</sup> In these cases, careful judicial examination at the outset helped to identify forms of intentional discrimination that were built into the design or enforcement of the laws but were not necessarily apparent on their face.

This analysis revealed that Section 26 had not been written on a blank slate. It did not, for example, emerge from a constitutional convention committee charged with developing protections for property rights. To claim that Section 26 only kept the state neutral on matters of private race discrimination was to ignore social facts and the political dynamics surrounding its enactment. In California and elsewhere, there were whites who held prejudiced views toward blacks and preferred to keep blacks out of their neighborhoods or apartment buildings. In the 1960s, California legislators took note of this phenomenon and outlawed such discrimination. Then, with Section 26, the state’s citizens came together not only to repudiate those laws but also to permanently prevent their reenactment. From this sequence of events—this “historical context”—the Court concluded that the real “objective” of the voters who had acted in the name of the state to approve Section 26, and the “ultimate effect” of the amendment, was not to protect property rights but rather to clear the way for private discrimination to resume under the

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

<sup>90</sup> *Id.* at 373 (quoting *Mulkey v. Reitman*, 413 P.2d, 825, 829 (Cal. 1966)).

<sup>91</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (finding that a pattern of discriminatory administration of an ostensibly neutral regulation could be explained only by “hostility to the race and nationality to which the petitioners belong”).

<sup>92</sup> *Anderson v. Martin*, 375 U.S. 399 (1964) (striking down Louisiana law that required a candidate’s race to be listed on an election ballot, because such a requirement encouraged race discrimination by voters).

state constitution's explicit protection.<sup>93</sup> The Court's analysis of the process that had led to Section 26 informed its conclusions about the amendment's substance.

Resting on its theory that Section 26 created state action, the Court did not explicitly address whether it thought voters' approval of Section 26 at the ballot box had been driven by actual invidious discriminatory purpose. But the opinion does contain some hints in that direction. The Court drew heavily on two opinions of the California Supreme Court, which *Reitman* affirmed.<sup>94</sup> The Justices described the California court as "armed . . . with the knowledge of the facts and circumstances concerning the passage and potential impact of [Section] 26, and familiar with the milieu in which that provision would operate."<sup>95</sup> This move allowed the Justices to gain the benefit of the candor that the California court brought to its own examination of Section 26 without overtly accusing California voters of racism. For example, the California court tartly observed that "if discrimination is . . . accomplished, the nature of proscribed state action must not be limited by the ingenuity of those who would seek to conceal it by subtleties and claims of neutrality."<sup>96</sup>

And so, although it is often overlooked as a restructuring case,<sup>97</sup> *Reitman* provides an important starting point for considering the political restructuring doctrine's core principles and analytical framework. *Reitman* demonstrates that the Court was aware that intentional discrimination might not always be facial or obvious. It supports the principle that when a political majority alters the ordinary lawmaking process in a way that inflicts disadvantage on an identifiable minority group, such as taking away statutorily created legal rights and preventing their reinstatement, courts must take a closer look to better understand the enactment's "immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment."<sup>98</sup> A restructuring in and of itself is not unconstitutional. But close, careful examination might reveal it

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<sup>93</sup> *Reitman*, 387 U.S. at 373, 375.

<sup>94</sup> *See id.* at 372 (discussing *Mulkey v. Reitman*, 413 P.2d 825 (Cal. 1966); *Prendergast v. Snyder*, 413 P.2d 847 (Cal. 1966)).

<sup>95</sup> *Id.* at 378.

<sup>96</sup> *Mulkey*, 413 P.2d at 834.

<sup>97</sup> *See, e.g.*, *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1631 (2014) (plurality opinion) (observing that "[t]hrough it has not been prominent in the arguments of the parties, . . . [*Reitman*] is a proper beginning point for discussing the controlling decisions").

<sup>98</sup> *Reitman*, 387 U.S. at 373 (quoting *Reitman*, 413 P.2d at 829).

as “a form of sophisticated discrimination” that *does* violate the Equal Protection Clause.

## 2. *Hunter v. Erickson*

In July 1964, the city council of Akron, Ohio, enacted an ordinance forbidding housing discrimination “on the basis of race, color, religion, national origin or ancestry.”<sup>99</sup> In a ballot initiative four months later, the city’s voters amended the city charter to repeal that ordinance and to require that any such fair housing legislation in the future “first be approved by a majority of the electors voting on the question at a regular or general election.”<sup>100</sup> In *Hunter v. Erickson*,<sup>101</sup> the second major case in the restructuring line, the Court struck down the Akron charter amendment as a violation of the Equal Protection Clause.

### a. *The Akron Charter Amendment as a Restructuring*

Like the California state constitutional amendment in *Reitman*, the Akron city charter amendment was a restructuring: it selectively repealed an existing antidiscrimination law passed by a representative legislative body and committed the issue to a higher, more remote level of government (the city charter), thereby making it far more difficult for the law’s beneficiaries and supporters to reenact such legislation in the future. Under existing city law, Akron voters could simply have repealed the fair housing ordinance that their city council had passed.<sup>102</sup> But they chose to go further by forbidding any such future legislation.

Unlike California’s Section 26, which was cloaked in supposedly neutral language about property rights, the Akron charter amendment specifically addressed itself to housing regulations involving “race, color, religion, ancestry or national origin.”<sup>103</sup> On its face, the law treated “Negro and white . . . in an identical manner.”<sup>104</sup> Thus, there was no automatic warrant for strict scrutiny—truly neutral laws of general applicability receive only the most deferential form of rational basis review. But the Supreme Court thought that a closer examination was needed because “the reality” was that the impact of the restructuring “falls on the minority.”<sup>105</sup> That was because

<sup>99</sup> *Hunter v. Erickson*, 393 U.S. 385, 386-87 (1969).

<sup>100</sup> *Id.* at 387 (quoting Akron City Charter § 137).

<sup>101</sup> *Id.* at 385.

<sup>102</sup> *Id.* at 390.

<sup>103</sup> *Id.* at 386 (quoting Akron Ordinance No. 873-1964 § 1).

<sup>104</sup> *Id.* at 391.

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

supporters of fair housing laws—which the Court must reasonably have assumed included most black city residents—would have to run a special “gauntlet” and thus find it “substantially more difficult” to reenact them.<sup>106</sup> Consequently, the Court reasoned, Akron’s voters had placed a “special burden[] on racial minorities within the governmental process.”<sup>107</sup> The restructuring’s suspicious *effect* in itself did not violate the Constitution, but it would cause the Court to more closely examine its intents and purposes.

Justice Harlan expanded on this theme in a concurrence. Most laws, he observed, “are designed with the aim of providing a just framework within which the diverse political groups in our society may fairly compete and are not enacted with the purpose of assisting one particular group in its struggle with its political opponents.”<sup>108</sup> Where truly neutral principles apply, the political marketplace “will sometimes operate in favor of one faction; sometimes in favor of another.”<sup>109</sup> The burden of having to amend a city charter or a state constitution is not in itself constitutionally suspicious, as long as the burden is not selectively imposed based on a characteristic like race. If the fair housing ordinance had simply lost in a referendum that was part of the ordinary processes of city government, the city’s black residents “would undoubtedly lose an important political battle, but they would not thereby be denied equal protection.”<sup>110</sup> But the actual situation here was different, Justice Harlan said, because “the charter amendment is discriminatory on its face.”<sup>111</sup>

*b. The Akron Charter Amendment as a Classification*

Actually, on its face, the Akron charter amendment did not mandate differential treatment for persons of different races. What it did do was mandate differential treatment—a new “gauntlet” and “special burden”—for those wishing to see the city maintain policies that prevented racial discrimination. And since blacks, not whites, were the obvious beneficiaries of such policies, “the reality,” the Court thought, was that the restructuring’s “impact falls on the minority.”<sup>112</sup> The Court

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<sup>106</sup> *Id.* at 390.

<sup>107</sup> *Id.* at 391.

<sup>108</sup> *Id.* at 393 (Harlan, J., concurring).

<sup>109</sup> *Id.* at 394.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 395.

<sup>112</sup> *Id.* at 391 (majority opinion).

called the amendment “an explicitly racial classification treating racial housing matters differently from other racial and housing matters.”<sup>113</sup>

The Court’s use of the word “classification” seems significant, signaling that the Justices saw the disproportionate impact on minority interests as intentional. “To classify” is, after all, to engage in a conscious process of sorting and line drawing. The Akron charter amendment was constitutionally repugnant not because it had an incidental disadvantageous effect on blacks, but because, in design and operation, the Court believed the amendment was *intended* to create an “official distinction[] based on race.”<sup>114</sup> In *Hunter*, as in *Reitman*, the Court’s analysis of the political *process* surrounding a restructuring led it to a conclusion about why the enactment produced a *substantive* constitutional violation. As in *Reitman*, the Court apparently thought that the charter amendment in *Hunter* represented the official validation and facilitation of private prejudice, even if it did not say this in so many words.<sup>115</sup>

*Hunter* is an example of a case where the Court found a “classification” based on something other than facial classification of persons according to their race. But it was not the first time the Court had done so, and it would not be the last. The Court analogized the Akron charter amendment to a Louisiana election law, struck down in *Anderson v. Martin*,<sup>116</sup> which required that a candidate’s race be specified on the ballot.<sup>117</sup> There the Court had also found what it called a “classification,”<sup>118</sup> even though on its face the state was not treating blacks and whites differently—both had their race specified on the ballot. But the social and historical context of the law mattered; this was, after all, the Deep South in the 1960s. “[B]y placing a racial label on a candidate at the most crucial stage in the electoral process,” the Court reasoned in *Anderson*, “the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another.”<sup>119</sup> The constitutional problem with the racial-label

<sup>113</sup> *Id.* at 389.

<sup>114</sup> *Id.* at 391.

<sup>115</sup> *Accord* Adickes v. S.H. Kress & Co., 398 U.S. 144, 191 (1970) (Brennan, J., concurring in part and dissenting in part) (citing *Hunter* for the proposition that the Court “has condemned significant state involvement in racial discrimination, however subtle and indirect it may have been and whatever form it may have taken” (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Evans v. Newton*, 382 U.S. 296 (1966); *Hunter*, 393 U.S. 385)).

<sup>116</sup> *Anderson v. Martin*, 375 U.S. 399 (1964).

<sup>117</sup> *Hunter*, 393 U.S. at 391 (citing *Anderson*, 375 U.S. 399).

<sup>118</sup> *Anderson*, 375 U.S. at 402.

<sup>119</sup> *Id.*

law was that it placed “the power of the State behind a racial classification that induces racial prejudice at the polls.”<sup>120</sup>

The *Hunter* Court also analogized the Akron charter amendment to cases where it had struck down laws “denying [racial minorities] the vote, on an equal basis with others.”<sup>121</sup> And to make the point even more bluntly, the Court worked in citations to a battery of other landmark race cases that had dealt with laws commonly understood to have been designed to perpetuate white supremacy,<sup>122</sup> including *Loving v. Virginia* (marriage regulations),<sup>123</sup> *McLaughlin v. Florida* (interracial cohabitation),<sup>124</sup> *Bolling v. Sharpe* (de jure school segregation),<sup>125</sup> and *Strauder v. West Virginia* (exclusion of blacks from juries).<sup>126</sup>

Given its invocation of these cases, it seems fair to conclude that the use of the term “classification” signaled that the Court thought the Akron political restructuring was a form of intentional discrimination against blacks as a racial group, not just a political choice that happened to incidentally affect policies that were favored by or beneficial to blacks. In a later decision, the Court would say that the groups injured by *Hunter*’s referendum requirement for new fair housing laws were “presumptively racial minorities.”<sup>127</sup> To be sure, the Justices did not say that the supporters of the Akron charter amendment had employed messages of white supremacy or other forms of overtly racist appeal. But by invoking *Anderson*—and thus in effect analogizing the events in Akron to the machinations of white supremacists in the Deep South—as well as other cases that involved infamous examples of naked racial discrimination, the *Hunter* Court took a substantial step in that direction. As Cass Sunstein has observed about *Hunter*, “When the government puts in a separate category legislation that protects minority group members and imposes a special disability on those who seek such legislation, it is a reasonable inference that invidious purposes are at work.”<sup>128</sup>

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

<sup>121</sup> *Hunter*, 393 U.S. at 391 (citing, inter alia, *Avery v. Midland Cty.*, 390 U.S. 474 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

<sup>122</sup> *Id.* at 391-92 (citing *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873); *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1880); *Ex parte Virginia*, 100 U.S. 339, 344-45 (1880); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Loving v. Virginia*, 388 U.S. 1, 10 (1967)).

<sup>123</sup> *Loving*, 388 U.S. 1.

<sup>124</sup> *McLaughlin*, 379 U.S. 184.

<sup>125</sup> *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>126</sup> *Strauder*, 100 U.S. 303.

<sup>127</sup> *Crawford v. Bd. of Educ. of L.A.*, 458 U.S. 527, 541 (1982).

<sup>128</sup> Sunstein, *supra* note 43, at 148.

### 3. *Washington v. Seattle School District No. 1*

In the late 1970s, the Seattle public schools decided to address persistent racial segregation by implementing a program of mandatory busing.<sup>129</sup> A group opposed to busing, called the Citizens for Voluntary Integration Committee, or “CiVIC,” sued in state court to stop the busing program.<sup>130</sup> Unsuccessful in that forum, the group turned its energies to a statewide initiative, which came to be known as Initiative 350. The initiative provided in part that “no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student’s place of residence . . . and which offers the course of study pursued by such student.”<sup>131</sup> In the 1978 statewide election, the initiative prevailed easily, garnering 66% of the vote.<sup>132</sup>

#### a. *Initiative 350 as a Restructuring*

In *Washington v. Seattle School Dist. No. 1*,<sup>133</sup> the Court had no difficulty seeing Initiative 350 as a political restructuring. Although education is a state function and school districts are creatures of state law, decisions on education policy in Seattle, including matters involving student assignment and racial desegregation, had always been “firmly committed to the local board’s discretion.”<sup>134</sup> The Court framed the move of busing authority from the local to the state level as a matter of an elected local school board seeking to “defend” its integration program against an “attack by the State.”<sup>135</sup> The restructuring was more than a “‘mere repeal’ of a desegregation law by the political entity that created it.”<sup>136</sup> Instead, Initiative 350 made substantially more difficult “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”<sup>137</sup>—the classic definition of a political restructuring.

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<sup>129</sup> See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 460 (1982).

<sup>130</sup> *Id.* at 461-62.

<sup>131</sup> *Id.* at 462 (quoting WASH. REV. CODE § 28A.26.010 (1981)).

<sup>132</sup> *Id.* at 463.

<sup>133</sup> *Id.* at 457.

<sup>134</sup> *Id.* at 479-80.

<sup>135</sup> *Id.* at 459.

<sup>136</sup> *Id.* at 483.

<sup>137</sup> *Id.*



Drawing on a point developed in Justice Harlan's *Hunter* concurrence, the Court emphasized that there is nothing wrong with a state adopting "burdensome requirements for amending state constitutions" even though such requirements "may 'make it more difficult for minorities to achieve favorable legislation.'"<sup>138</sup> As long as "every group" is subject to the same burden—that is, as long as the "majority . . . restructure[s] the political process to place obstacles in the path of *everyone* seeking to secure the benefits of governmental action"—then there is no equal protection problem.<sup>139</sup> Seeming to echo Ely's principles that the "ins" cannot be allowed to manipulate the lawmaking process so that "the outs will stay out"<sup>140</sup> and so that a "minority . . . keeps finding itself on the wrong end of [lawmakers'] classifications, for reasons that in some sense are discreditable,"<sup>141</sup> the Court explained that "[i]f a governmental institution is to be fair, one group cannot always be expected to win[]"; by the same token, one group cannot be subjected to a debilitating and often insurmountable disadvantage."<sup>142</sup>

Initiative 350 failed that test because it took busing legislation away from "the usual legislative processes used for comparable legislation" selectively—that is, only where the matter involved busing intended to combat racial segregation.<sup>143</sup> Thus, it "impose[d] direct and undeniable burdens on minority interests."<sup>144</sup> Drawing on both the *Hunter* majority opinion and Justice Harlan's concurrence, the *Seattle* Court said that a restructuring requires a "different analysis"—that is, higher scrutiny—than ordinary legislation when it uses "the racial nature of a decision to determine the decisionmaking process,"<sup>145</sup> because doing so "places *special* burdens on racial minorities."<sup>146</sup> An enactment becomes "constitutionally suspect" where it "disadvantage[s a] particular group by making it more difficult to enact legislation in its behalf."<sup>147</sup>

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<sup>138</sup> *Id.* at 470 (quoting *Hunter v. Erickson*, 393 U.S. 385, 394 (1969)).

<sup>139</sup> *Id.* (emphasis added).

<sup>140</sup> ELY, *supra* note 1, at 103.

<sup>141</sup> *Id.* at 152.

<sup>142</sup> *Seattle*, 458 U.S. at 484 (quoting *Hunter*, 393 U.S. at 394) (citation omitted).

<sup>143</sup> *Id.* at 483-84.

<sup>144</sup> *Id.* at 484.

<sup>145</sup> *Id.* at 470.

<sup>146</sup> *Id.* (quoting *Hunter*, 393 U.S. 385).

<sup>147</sup> *Id.* at 468.

In *Schuette*,<sup>148</sup> the Sixth Circuit would read the language in the above paragraph from *Seattle* (as have numerous commentators, and as did four Justices in *Schuette*) as triggering strict scrutiny based on a finding that a restructuring has the *effect* of making it more difficult for a minority to pursue its legislative agenda—that is, “to achieve legislation that is in [its] interest” or “enact legislation in its behalf.”<sup>149</sup> The Sixth Circuit called this the *Hunter/Seattle* “political-process doctrine” and described it as an alternative to “traditional” equal protection analysis.<sup>150</sup> But that understanding only makes sense if the *Seattle* Court was troubled only by the disparate racial *effects* of Initiative 350, and not on the apparent intentions behind the initiative. A close reading of *Seattle* supports the view that the Court saw Initiative 350 as a form of intentional race discrimination.

### *b. Initiative 350 as a Classification*

The Court found it to be “beyond reasonable dispute . . . that the initiative was enacted “because of,” not merely “in spite of,” its adverse effects upon” race-based busing.<sup>151</sup> The Court saw more than just a good faith policy dispute about the wisdom of busing. The large number of loopholes it contained where busing remained permissible<sup>152</sup> demonstrated that Initiative 350 was not, in fact, a neutral measure that merely had an unintended or incidental impact on blacks; in fact, it was “carefully tailored to interfere *only* with desegregative busing.”<sup>153</sup>

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<sup>148</sup> *Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN) v. Regents of the Univ. of Mich.*, 701 F.3d 466, 474 (6th Cir. 2012) (en banc).

<sup>149</sup> *Id.* at 487.

<sup>150</sup> *Id.* at 489 (“Having found that Proposal 2 deprives the Plaintiffs of equal protection of the law under the political-process doctrine, we need not reach the question of whether it also violates the Equal Protection Clause when assessed using the ‘traditional’ analysis.”).

<sup>151</sup> *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) (quoting *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

<sup>152</sup> *Id.* at 462. The initiative contained a number of “broad exceptions” where busing remained legal. For example, a student could be assigned beyond his or her neighborhood school if the student

“require[d] special education, care or guidance,” or if “there are health or safety hazards, either natural or man made, or physical barriers or obstacles . . . between the student’s place of residence and the nearest or next nearest school,” or if “the school nearest or next nearest to [the student’s] place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities.”

*Id.* (alteration in original) (quoting WASH. REV. CODE § 28A.26.010 (1981)).

<sup>153</sup> *Id.* at 471 (emphasis added).

Despite the initiative's purported purpose of preserving neighborhood schools, "it is evident that the campaign focused almost exclusively on the wisdom of 'forced busing' for integration."<sup>154</sup> This made the initiative a "distinction[] based on race," because the only aspect of school busing policy that was "singled out for peculiar and disadvantageous treatment" was the aspect affecting the integration of black and white students.<sup>155</sup> "[D]espite its facial neutrality," the Court said it saw "little doubt" that Initiative 350 was "*effectively drawn for racial purposes.*"<sup>156</sup> For all these reasons, the Court concluded, Initiative 350—like the Akron city charter amendment in *Hunter*—created a "racial classification."<sup>157</sup>

Since the text of Initiative 350 did not mention race, the Court's use of "classification" in this context strongly suggests it saw an intention to disadvantage blacks as a group. Verbs like "drawn," "tailored," and "singled out" indicate that the Court thought the voters of Washington had made a conscious choice to adopt a busing policy because of, not in spite of, its anticipated effect of frustrating racial desegregation. To say that the initiative was "drawn for racial purposes" suggests not only that the initiative's subject matter was race, but also that its adverse racial impact was intentional, not incidental or merely foreseeable. In other words, the Court seemed to think that in banning race-based busing, the voters of Washington were motivated by hostility toward busing *as a remedy for racial segregation*. As Cass Sunstein has observed, the Court's "lengthy effort to show that such interference [was] extraordinary as a matter of Washington law" signaled its "belief that highly selective interference provides a substantial basis for fear that an impermissible motive is at work."<sup>158</sup> Moreover, the Court had held in an earlier case that a racial classification provides grounds to "*infer antipathy.*"<sup>159</sup> And so it seems difficult to escape the conclusion that when the Court labeled Initiative 350 a "racial classification," it was zeroing in on intentions, not merely discriminatory effects.

Again, as in *Hunter*, the Court did not find a *facial* classification of persons. Initiative 350 did not place all blacks in a different legal category from all whites. But it targeted a

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<sup>154</sup> *Id.* at 463 (quoting *Seattle Sch. Dist. No. 1 v. Washington*, 473 F. Supp. 996, 1009 (W.D. Wash. 1979)).

<sup>155</sup> *Id.* at 485 (quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971)).

<sup>156</sup> *Id.* at 471 (emphasis added).

<sup>157</sup> *Id.* at 471, 497-98.

<sup>158</sup> Sunstein, *supra* note 43, at 164.

<sup>159</sup> *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (emphasis added) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

policy—desegregative busing—that the Court clearly understood to be beneficial to blacks and that the Court undoubtedly assumed was favored by many, if not most, of them. By calling it a “racial classification” as well as a “meaningful and unjustified official distinction[] based on race,”<sup>160</sup> the Court was saying that it thought those who had drafted and ratified Initiative 350 intended not just to consciously target busing, but also to actively subvert the goals of integration and racial equality that busing was supposed to promote.<sup>161</sup> Even under “traditional” equal protection, those are forbidden purposes.

Between *Hunter* in 1969 and *Seattle* in 1982, an increasingly conservative Court had moved equal protection doctrine in a more restrictive direction. In *Washington v. Davis*,<sup>162</sup> it emphasized that only intentional discrimination, not merely the racially disproportionate impact of a government policy, violates the Fourteenth Amendment, though the Court was careful to note that “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact . . . that the law bears more heavily on one race than another.”<sup>163</sup> And in *Personnel Administrator of Massachusetts v. Feeney*,<sup>164</sup> the Court held that the discriminatory effects of a law, even if such effects were or could be anticipated by those drafting or approving the law, do not render the law unconstitutional so long as the law pursues a valid purpose.<sup>165</sup> *Feeney* involved a state employment preference for veterans that would have the effect of benefitting far more men than women, but the Court rejected the argument that this necessarily amounted to unconstitutional sex discrimination. The *Feeney* Court underscored that “the Fourteenth Amendment guarantees equal laws, not equal results.”<sup>166</sup>

The district court opinion in *Seattle* had examined Initiative 350 in light of these cases, considering not only “[t]he racially disproportionate impact of the initiative” but also “its historical background, the sequence of events leading to its

<sup>160</sup> *Seattle*, 458 U.S. at 486 (quoting *Hunter v. Erickson*, 393 U.S. 385, 391 (1969)).

<sup>161</sup> *Accord Murray*, *supra* note 25, at 452 (“It did not matter that some proponents of racial busing were not minorities, nor was it fatal to the holding that some minorities actually opposed the Seattle Plan. What mattered was the inescapable inference that Initiative 350 disguised an anti-minority intent.” (footnote omitted)).

<sup>162</sup> *Washington v. Davis*, 426 U.S. 229 (1976) (holding that the Equal Protection Clause was not violated where blacks failed a government job test at a higher rate than whites since there was no evidence that the test was biased or was anything other than a neutral qualification for employment).

<sup>163</sup> *Id.* at 242.

<sup>164</sup> *Feeney*, 442 U.S. 256.

<sup>165</sup> *Id.* at 257, 275-77.

<sup>166</sup> *Id.* at 273.

adoption and the departure from the procedural norm”—that is, the restructuring—that it represented.<sup>167</sup> From this record, the district court concluded that, although it was “impossible to ascertain the *subjective* intent of those who enacted Initiative 350” because “[i]t was a measure adopted by the electorate at the ballot box,”<sup>168</sup> nonetheless, from an objective standpoint, “a racially discriminatory intent or purpose was at least one motivating factor in the adoption of the initiative.”<sup>169</sup> In affirming, the Ninth Circuit analogized Initiative 350 to the challenged city charter amendment in *Hunter*. It explained that “Initiative 350 create[d a] differential classification indirectly by omission” because it “treat[ed] a single purpose for student assignment, racial balancing, differently from all others.”<sup>170</sup> If Initiative 350 were allowed to stand, “[l]awmakers who seek to establish impermissible racial classifications will in the future be able to achieve, by artfully worded statutes like Initiative 350, constitutionally forbidden goals.”<sup>171</sup> Although the Supreme Court did not use language that was quite so pointed, its conclusions may have been influenced by the lower courts’ analyses.

In response to an argument by the state, the Supreme Court denied that *Hunter* had been effectively abrogated by *Washington* and other intervening cases that refused to find equal protection violations based on effects or disparate impact alone. “Appellants unquestionably are correct when they suggest that ‘purposeful discrimination,’ not simply disproportionate effect, ‘is ‘the condition that offends the Constitution,’” it said.<sup>172</sup> Logically, then, since the Court held Initiative 350 unconstitutional, it is hard to see how the Court could have viewed the measure as anything *other* than “purposeful discrimination.” The Court added, “We have not insisted on a particularized inquiry into motivation in all equal protection cases” because “[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.”<sup>173</sup>

In other words, the finding of a racial classification and a particularized finding of invidious purpose can be, analytically, two different things, even though both involve intentional, and

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<sup>167</sup> Seattle Sch. Dist. No. 1 v. Washington, 473 F. Supp. 996, 1013-16 (W.D. Wash. 1979).

<sup>168</sup> *Id.* at 1013 (emphasis added).

<sup>169</sup> *Id.* at 1016.

<sup>170</sup> Seattle Sch. Dist. No. 1 v. Washington, 633 F.2d 1338, 1344 (9th Cir. 1980).

<sup>171</sup> *Id.*

<sup>172</sup> Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 484 (1982) (quoting Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 274 (1979)).

<sup>173</sup> *Id.* at 485 (quoting *Feeney*, 442 U.S. at 272).

thus impermissible, discrimination. The Court was, in effect, denying the need to inquire into the *subjective* motivations—that is, the individual motivations or racial attitudes—of the people who had designed and approved Initiative 350. But consideration of the objective circumstances surrounding a law’s passage can still lead to the finding of a racial classification. As Justice Stevens suggested in his concurring opinion in *Washington*, “Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.”<sup>174</sup> After all, the Court in several past race cases had found “racial classifications” without undertaking such an investigation into motives. In *Anderson*, the Court did not undertake a “particularized inquiry” into the subjective motivations of the Louisiana legislators who had approved a law requiring that a candidate’s race be specified on the ballot; against the background of Louisiana racial politics and voter attitudes, the law’s improper purpose seemed to speak for itself. Similarly, in *Gomillion v. Lightfoot*,<sup>175</sup> the Court invalidated an Alabama redistricting map that had “alter[ed] the shape of Tuskegee from a square to an uncouth twenty-eight-sided figure.”<sup>176</sup> The Court did not rely on any particularized inquiry into the subjective motivations of those who drew the map in determining that the map was, objectively, intended to work purposeful discrimination—“that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.”<sup>177</sup> No one would suggest that *Anderson* or *Gomillion* had been implicitly abrogated by *Washington*.

On the same day it decided *Seattle*, the Court also decided *Crawford v. Board of Education of Los Angeles*.<sup>178</sup> In *Crawford*, the Court upheld a California state constitutional amendment, Proposition I, that prohibited the state’s courts from ordering school desegregation remedies that addressed de facto, as opposed to de jure, segregation and thus went beyond the requirements of the Fourteenth Amendment. The Court said that the Equal Protection Clause was not implicated by what was, in effect, no more than a repeal of a policy enforced by state courts. Proposition I did “not embody a racial classification” because “[i]t neither says nor implies that persons are to be

<sup>174</sup> *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

<sup>175</sup> *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

<sup>176</sup> *Id.* at 340.

<sup>177</sup> *Id.* at 341.

<sup>178</sup> *Crawford v. Bd. of Educ. of L.A.*, 458 U.S. 527 (1982).

treated differently on account of their race.”<sup>179</sup> The Court distinguished between “state action that discriminates on the basis of race” and “state action that addresses, in neutral fashion, race-related matters.” Proposition I was an example of the latter, while presumably the Court thought Washington’s Initiative 350 was an example of the former. The Court also said that Proposition I did not “distort[] the political process for racial reasons or . . . allocate[] governmental or judicial power on the basis of a discriminatory principle”<sup>180</sup>—again, presumably in contradistinction to the busing initiative in *Seattle*. Proposition I also did not prevent local school boards from adopting busing programs to address de facto segregation. Cass Sunstein has suggested that the outcomes in *Seattle* and *Crawford* can be reconciled because Proposition I in *Crawford* “closely resembles a mere repeal,” whereas Initiative 350 in *Seattle* was “a ‘repeal plus,’ a race-specific classification in the form of a special burden on those who sought certain sorts of actions from the local school board.”<sup>181</sup>

In sum, as with the city charter amendment in *Hunter*, even if it could have more candidly or explicitly explained its reasoning, the Court refused to believe that the Washington busing ban had been enacted for legitimate, neutral purposes but just happened to burden blacks with negative effects. Here, “the political process or . . . decisionmaking mechanism” used to address government policies aimed at remediating racial discrimination and segregation had been “singled out for peculiar and disadvantageous treatment.”<sup>182</sup> The discriminatory intent that the Court perceived to be behind the restructuring of the political process created a substantive equal protection violation.

#### 4. *Romer v. Evans*

In the 1980s and 1990s, gay and lesbian political groups focused a substantial amount of their organizing and resources on persuading state and local governments to pass laws prohibiting discrimination on the basis of sexual orientation in employment, housing, public accommodations, and other realms.<sup>183</sup> These efforts frequently were met with backlash, as social and

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<sup>179</sup> *Id.* at 537.

<sup>180</sup> *Id.* at 541.

<sup>181</sup> Sunstein, *supra* note 43, at 159.

<sup>182</sup> *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 485 (1982).

<sup>183</sup> *See, e.g.*, SUSAN GLUCK MEZEY, *QUEERS IN COURT: GAY RIGHTS LAW AND PUBLIC POLICY* 59 (2007) (noting that “[b]y 1993, at least 139 jurisdictions had adopted antidiscrimination policies” related to sexual orientation).

religious conservatives mounted efforts to have the laws repealed, often using ballot initiatives to do so.<sup>184</sup> These campaigns “established an environment that was distinctly suspicious of the gay movement as militant, radical, contagious, unhealthy, and essentially unfair.”<sup>185</sup> In November 1992, voters in Colorado approved Amendment 2, an amendment to the Colorado state constitution that repealed gay-rights ordinances that had been enacted in Aspen, Boulder, and Denver and prohibited any city, or the state itself, from enacting such antidiscrimination legislation in the future.<sup>186</sup>

*a. Amendment 2 as a Restructuring*

Amendment 2 was challenged in state court, and the case eventually reached the Colorado Supreme Court. The state Supreme Court drew heavily on *Reitman*, *Hunter*, and *Seattle*, but also on a separate line of equal protection cases concerning electoral district reapportionment, ballot access for political parties, and the right to vote.<sup>187</sup> From this diverse group of cases, the Colorado court synthesized the rule that “the Equal Protection Clause guarantees the fundamental right to participate equally in the political process and that any attempt to infringe on an independently identifiable group’s ability to exercise that right is subject to strict judicial scrutiny.”<sup>188</sup> In specifying strict scrutiny, the Colorado court said it was relying on *Kramer v. Union Free School District No. 15*,<sup>189</sup> a case about eligibility to vote in school board elections in which the Court had held that “the deference usually given to the judgment of legislators does not extend to decisions concerning [who] may participate in the election of legislators and other public

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<sup>184</sup> See *id.*

<sup>185</sup> Sharon E. Debbage Alexander, *Romer v. Evans and the Amendment 2 Controversy: The Rhetoric and Reality of Sexual Orientation Discrimination in America*, 6 TEX. F. ON CIV. L. & CIV. RTS. 261, 273 (2002).

<sup>186</sup> *Romer v. Evans*, 517 U.S. 620, 624 (1996). The full text of Amendment 2 read:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

*Id.* (quoting COLO. CONST. art. II, § 30b).

<sup>187</sup> *Evans v. Romer*, 854 P.2d 1270, 1276-80 (Colo. 1993).

<sup>188</sup> *Id.* at 1276.

<sup>189</sup> *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).



officials”<sup>190</sup> and that rational basis review and its presumption of constitutionality do not apply when a challenge involves whether “the institutions of state government are structured so as to represent fairly all the people.”<sup>191</sup>

In other words, the Colorado Supreme Court seemed to believe that Amendment 2 had, in effect, *disenfranchised* gays and lesbians. Based on the combined force of the restructuring and election cases, it reasoned inductively to the broad principle that “close judicial scrutiny” is required any time a law “impairs a group’s ability to effectively participate . . . in the process by which government operates.”<sup>192</sup> This statement is arguably consistent with the core principles of Footnote Four and John Hart Ely, discussed in Section I.A.<sup>193</sup> But it was an ambitious synthesis of the Court’s precedents, stated at a high level of abstraction, and it lacked clear standards and definitions. Creative lawyers could no doubt come up with many ways to argue that their clients had been impaired from “effective[] participat[ion] . . . in the process by which government operates,” and such a rule likely would have licensed a great deal more roving judicial intervention into the lawmaking process than the Justices were ready to accept.<sup>194</sup> And so it was not surprising that the U.S. Supreme Court took a somewhat different approach.

Justice Kennedy’s majority opinion in *Romer v. Evans*<sup>195</sup> politely declined to adopt the Colorado Supreme Court’s analysis.<sup>196</sup> But that does not mean *Romer* is not a political restructuring case. It clearly is. Amendment 2 did not prevent gays and lesbians from voting or engaging in political activity, but it still restructured the political process to their clear disadvantage: it selectively changed the rules under which the political/lawmaking system dealt with a particular policy question (antidiscrimination laws related to sexual orientation, which had been within the power of municipal governments and the state legislature to enact), moving the question to a higher, more remote level of government.<sup>197</sup> As the Court

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<sup>190</sup> *Id.* at 627.

<sup>191</sup> *Id.* at 628.

<sup>192</sup> *Evans*, 854 P.2d at 1277.

<sup>193</sup> See *supra* notes 33-47 and accompanying text.

<sup>194</sup> *Evans*, 854 P.2d at 1277.

<sup>195</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>196</sup> *Id.* at 626 (“We . . . now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court.”).

<sup>197</sup> *Accord* *Schuetz v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1671 (Sotomayor, J., dissenting) (“Although the Court did not apply the political-

emphasized, Amendment 2 thus “withdr[ew] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination,” and “it forb[ade] reinstatement of these laws and policies.”<sup>198</sup> It put gays and lesbians in a “solitary class.”<sup>199</sup> All this was achieved by altering the ordinary political process—by taking the issue of gay/lesbian antidiscrimination laws away from the regular state or local lawmaking processes and placing it in the state constitution. It would be hard to imagine a purer example of the kind of political-process problem that concerned Ely: “the ins . . . choking off the channels of political change to ensure that they will stay in and the outs will stay out.”<sup>200</sup>

The operation and effects of Amendment 2 as a restructuring informed the Court’s view about why it required close scrutiny rather than the default presumption of constitutionality. Gays and lesbians were not a suspect class, and so discrimination on the basis of sexual orientation would normally have called for only the most deferential form of rational basis review. But the Court found that the “disqualification of a class of persons from the right to seek specific protection from the law”—that is, the effect of Amendment 2 as a restructuring—was “unprecedented,” an “unusual” form of discrimination that required “careful consideration.”<sup>201</sup>

### *b. Amendment 2 as Unconstitutional Animus*

This careful consideration revealed that the “[s]weeping”<sup>202</sup> disadvantages Amendment 2 placed on gays and lesbians were far out of proportion to the state’s purported justifications for them (to wit, respecting the liberties of landlords or employers with personal or religious objections to homosexuality and conserving resources to fight discrimination against other groups).<sup>203</sup> Amendment 2’s “sheer breadth is so discontinuous with the reasons offered for it,” the Court said, “that the amendment seems inexplicable by anything but animus toward” gays and lesbians.<sup>204</sup> This was the rare rational basis case where a law “lack[ed] a rational relationship to legitimate state interests.”<sup>205</sup>

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process doctrine in *Romer*, the case resonates with the principles undergirding the political-process doctrine.” (footnote omitted).

<sup>198</sup> *Romer*, 517 U.S. at 627.

<sup>199</sup> *Id.*

<sup>200</sup> ELY, *supra* note 1, at 103.

<sup>201</sup> *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

<sup>202</sup> *Id.* at 627.

<sup>203</sup> *Id.* at 635.

<sup>204</sup> *Id.* at 632.

<sup>205</sup> *Id.*

Such “[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself,” the Court said, “a denial of equal protection of the laws in the most literal sense.”<sup>206</sup>

The Court’s conclusion of “animus” was deductive, because no other explanation made sense. In *Romer*, as in the previous restructuring cases, the Court did not go on a search for subjective discriminatory intent or invidious purpose among the voters who had approved Amendment 2. Rather, animus could be inferred as an objective matter because the measure’s harmful effects on gays and lesbians far outran its purported justifications.<sup>207</sup> Even under rational basis review, when a law’s obvious harmful effects for a particular group are “far removed from [its] particular justifications,” a court will not “credit” those justifications.<sup>208</sup>

In short, even though it eschewed the reasoning of the Colorado state courts that had relied on *Reitman*, *Hunter*, and *Seattle*, among other decisions, *Romer* fits within the political restructuring line of cases. Confronted with a situation where a restructuring had taken away rights and forbidden their reinstatement, the Court gave the matter, from the outset, something more rigorous than ordinary rational basis review. After considering the restructuring’s evident *effects*, the Court concluded that it violated equal protection because it had been accomplished with a purpose “not to further a proper legislative end but to make [gays and lesbians] unequal to everyone else” and to deem the class “a stranger to its laws.”<sup>209</sup> Once more, in the Court’s analysis, process and substance were inextricable.

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<sup>206</sup> *Id.* at 633.

<sup>207</sup> Be that as it may, there was no shortage of information available about the homophobia and animus that had propelled the Amendment 2 campaign, and it is difficult to imagine that the Justices, relatively cloistered though they may be, were not aware of it. In the Colorado courts, “the state’s position was that Amendment 2 was essential to avoid the effects of a ‘militant gay aggression’ in validating a ‘homosexual agenda,’” and many of the state’s rationales “appeared to be based on blatant prejudice.” MEZEY, *supra* note 183, at 61. Antigay hostility was so common and so passionate that “the president of the University of Colorado was forced to wear a bulletproof vest while addressing a gathering of lesbians and gay men because of threats on his life for addressing what had been termed a ‘fag rally’ by one opponent.” LISA KEEN & SUZANNE B. GOLDBERG, *STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL* 119 (2000); *see also* Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 90 (1997) (arguing that “[t]he Court’s inference of unconstitutional animus was central to its holding” in *Romer*).

<sup>208</sup> *Romer*, 517 U.S. at 635.

<sup>209</sup> *Id.*

### III. THE COURT CONFRONTS MICHIGAN'S PROPOSAL 2

#### A. Background and Sixth Circuit Opinion

Proposal 2 made Michigan one of eight states to ban affirmative action in public university admissions and other state functions.<sup>210</sup> Six of these bans, including Michigan's, were adopted by voters.<sup>211</sup> The first was California's Proposition 209, approved in 1996 after a campaign led by Ward Connerly, a black former regent of the University of California, who gained fame for his vigorous activism against affirmative action.<sup>212</sup> Michigan's Proposal 2 was a direct response to the Court's 2003 decision in *Grutter v. Bollinger*,<sup>213</sup> which involved the admissions policy at the University of Michigan Law School and held that the Equal Protection Clause allows narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits of a diverse student body. The lead proponent and spokesperson for Proposal 2 was Jennifer Gratz, who had been involved in anti-affirmative-action activism and litigation since she was rejected as an undergraduate by the University of Michigan in the mid-1990s.<sup>214</sup> Michigan voters adopted Proposal 2 in the November 2006 election by a vote of 58% to 42%.<sup>215</sup> Exit polls showed that Proposal 2 was supported by 59% of whites but only 14% of blacks.<sup>216</sup> Proposal 2 was a restructuring because it took authority over race-conscious admissions policies away from its normal locus in Michigan government—popularly elected university boards of regents<sup>217</sup>—and placed it in the state constitution.

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<sup>210</sup> Drew Desilver, *Supreme Court Says States Can Ban Affirmative Action; 8 Already Have*, PEW RES. CTR. (Apr. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/04/22/supreme-court-says-states-can-ban-affirmative-action-8-already-have/> [http://perma.cc/9SRE-ZTE5].

<sup>211</sup> *Id.*

<sup>212</sup> *California Affirmative Action, Proposition 209 (1996)*, BALLOTPEdia, [http://ballotpedia.org/California\\_Affirmative\\_Action,\\_Proposition\\_209\\_%281996%29](http://ballotpedia.org/California_Affirmative_Action,_Proposition_209_%281996%29) [http://perma.cc/38XA-SM2G] (last visited Apr. 7, 2016).

<sup>213</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>214</sup> Maggie Severns, *Woman Who Killed Affirmative Action*, POLITICO (Apr. 22, 2014, 5:31 PM), <http://www.politico.com/story/2014/04/jennifer-gratz-affirmative-action-michigan-105913.html> [http://perma.cc/QJ36-8CZL].

<sup>215</sup> *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 539 F. Supp. 2d 924, 931 (E.D. Mich. 2008).

<sup>216</sup> Scott Jaschik, *Michigan Votes Down Affirmative Action*, INSIDE HIGHER ED (Nov. 8, 2006), <https://www.insidehighered.com/news/2006/11/08/michigan> [http://perma.cc/3YLV-XVWN].

<sup>217</sup> For example, the eight members of the Board of Regents of the University of Michigan are elected in biennial statewide elections. *Regents of the University of Michigan*, UNIV. OF MICH., <http://www.regents.umich.edu/> [http://perma.cc/R4J5-26MN] (last visited June 2, 2016).

Two separate challenges to Proposal 2 were filed in federal district court, one by a group of organizations and individuals led by the Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary (the “Coalition plaintiffs”), and a second by 18 students, prospective students, and professors at the University of Michigan.<sup>218</sup> On March 18, 2008, Judge David Lawson dismissed the suits, holding that Proposal 2 did not violate the Equal Protection Clause.<sup>219</sup>

On July 1, 2011, a divided panel of the Sixth Circuit reversed the district court, relying primarily on *Hunter* and *Seattle* to hold that Proposal 2 violated the Equal Protection Clause because it “modifie[d] Michigan’s political process ‘to place special burdens on the ability of minority groups to achieve beneficial legislation.’”<sup>220</sup> The panel rejected the state’s argument that “a reallocation of political decisionmaking violates the Equal Protection Clause only if the Plaintiffs can demonstrate it was motivated by purposeful racial discrimination.”<sup>221</sup> Rather, the panel thought strict scrutiny was triggered as long as a measure “restructures the political process along racial lines and places special burdens on racial minorities.”<sup>222</sup> Since the state did not argue that Proposal 2 served a compelling interest, the panel held that it violated the Equal Protection Clause. The panel opinion was vacated when the full Sixth Circuit granted en banc review.

On November 15, 2012, the majority opinion for a deeply divided Sixth Circuit sitting en banc reached the same conclusion as the earlier panel, on essentially the same reasoning: that *Hunter* and *Seattle* together represented a special category of equal protection analysis—“the political-process doctrine”<sup>223</sup>—which applies when an enactment “(1) has a racial focus, targeting a policy or program that ‘inures primarily to the benefit of the minority’; and (2) reallocates political power or reorders the decisionmaking process in a way that places special burdens on a minority group’s ability to

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<sup>218</sup> *Coal. to Defend Affirmative Action*, 539 F. Supp. 2d at 933-34.

<sup>219</sup> *Id.* at 960.

<sup>220</sup> *Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN) v. Regents of the Univ. of Mich.*, 652 F.3d 607, 631 (6th Cir. 2011) (quoting *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982)).

<sup>221</sup> *Id.* at 630.

<sup>222</sup> *Id.* at 630-31.

<sup>223</sup> *Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN) v. Regents of the Univ. of Mich.*, 701 F.3d 466, 488-89 (6th Cir. 2012) (en banc).

achieve its goals through that process.”<sup>224</sup> Having found these criteria satisfied, the court said it was unnecessary to analyze Proposal 2 under “traditional” equal protection analysis, which would require the finding of a racial classification or discriminatory purpose or intent.<sup>225</sup>

### B. *The Supreme Court’s Plurality Opinion*

The Supreme Court reversed the Sixth Circuit’s judgment on the constitutionality of Michigan’s Proposal 2, but the Court was unable to coalesce around a majority opinion. Justice Kennedy wrote for a plurality of himself, Chief Justice Roberts, and Justice Alito.<sup>226</sup> Justices Scalia and Breyer each filed opinions concurring in the judgment (and Justice Thomas joined Justice Scalia’s opinion).<sup>227</sup> Justice Sotomayor, joined by Justice Ginsburg, dissented.<sup>228</sup> Chief Justice Roberts filed a brief concurrence that is not relevant to the discussion here.<sup>229</sup> Justice Kagan had recused herself and did not participate.

The plurality opinion identified *Reitman*, *Hunter*, and *Seattle* as the relevant precedents. (It did not mention *Romer*.) But the opinion did not address the phenomenon of political restructurings generally, or even acknowledge Proposal 2 as being one. Nor did it refer explicitly to a *Hunter/Seattle* doctrine. Essentially, the plurality approached *Schuette* as a case to be addressed by applying what it called the Court’s “settled equal protection jurisprudence” on race.<sup>230</sup> In the plurality’s view, Proposal 2 enacted a public policy on a question that was within the state’s competency to decide for itself: whether or not to practice the limited race-conscious affirmative action that *Grutter* allows but does not require. The plurality did not think Proposal 2 enacted a racial classification. Rather, it saw Proposal 2 simply as evidence that Michigan had engaged in

<sup>224</sup> *Id.* at 477 (quoting *Seattle*, 458 U.S. at 467).

<sup>225</sup> *Id.* at 473.

<sup>226</sup> *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1624 (2014) (plurality opinion).

<sup>227</sup> *Id.* at 1639 (Scalia, J., concurring in the judgment); *id.* at 1648 (Breyer, J., concurring in the judgment).

<sup>228</sup> *Id.* at 1651 (Sotomayor, J., dissenting).

<sup>229</sup> *Id.* at 1638 (Roberts, C.J., concurring). The Chief Justice’s two-paragraph concurring opinion took issue with various statements in Justice Sotomayor’s dissent advocating for the continued need to take race into account in college admissions. *Id.* at 1638-39.

<sup>230</sup> *Id.* at 1634 (plurality opinion).

“innovation and experimentation” on a “contested and complex policy question among and within States.”<sup>231</sup>

The plurality characterized *Reitman*, *Hunter*, and *Seattle* as cases that all involved, in one form or another, intentional discrimination on the basis of race (though it discussed and dissected these cases in far less detail than provided here in Section II.B). In *Reitman*, it said, the California constitutional amendment “expressly authorized and constitutionalized the private right to discriminate”<sup>232</sup> and “significantly encourage[d] and involve[d] the State in private racial discriminations.”<sup>233</sup> *Reitman* was a case where “the state action in question encouraged discrimination, causing real and specific injury.”<sup>234</sup> This explanation largely tracked the explanation given in *Reitman* itself.

Moving on to *Hunter*, the plurality found it significant that Akron’s fair housing ordinance had originally been approved amid circumstances of “widespread racial discrimination,” causing segregation that “forc[ed] many to live in ‘unhealthful, unsafe, unsanitary and overcrowded conditions.’”<sup>235</sup> The city charter amendment repealing this ordinance was “targeted” at a racial matter that the city council had been attempting to address, “singling out antidiscrimination ordinances.”<sup>236</sup> Thus, it was “as impermissible as any other government action taken with the invidious intent to injure a racial minority.”<sup>237</sup> *Hunter*’s facts, the plurality said, “established that invidious discrimination would be the necessary result of the procedural restructuring.”<sup>238</sup> The plurality thought that the amendment was different from the sort of enactment that foreseeably harms a group as a matter of collateral effect but remains constitutional because its primary motivation is the pursuit of a permissible purpose.<sup>239</sup> Rather than grapple with how the *Hunter* Court had found the city charter amendment to have been a “classification,” the *Schuetz* plurality explicitly characterized the amendment as having been motivated by “invidious intent.”<sup>240</sup>

Coming to *Seattle*, the plurality noted that the Washington initiative had been “carefully tailored to interfere

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<sup>231</sup> *Id.* at 1630.

<sup>232</sup> *Id.* at 1631 (quoting *Reitman v. Mulkey*, 387 U.S. 369, 376 (1967)).

<sup>233</sup> *Id.* (quoting *Reitman*, 387 U.S. at 381).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 1632 (quoting *Hunter v. Erickson*, 393 U.S. 385, 391 (1969)).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> See *supra* notes 164-66 and accompanying text.

<sup>240</sup> *Schuetz*, 134 S. Ct. at 1632.

only with desegregative busing.”<sup>241</sup> But Justice Kennedy offered a somewhat different rationale than the *Seattle* Court itself had given for striking down the initiative. After describing the backdrop of racial school segregation in Seattle at the time, Justice Kennedy said that Initiative 350 violated the Equal Protection Clause because it created “an aggravation” of a preexisting “racial injury”—segregated schools—“in which the State itself was complicit.”<sup>242</sup> “*Seattle* is best understood,” the plurality opined, “as a case in which the state action in question (the bar on busing enacted by the State’s voters) had the serious risk, if not purpose, of causing specific injuries on account of race, just as had been the case in [*Reitman*] and *Hunter*.”<sup>243</sup> Justice Scalia was perhaps not wrong in characterizing this reading of *Seattle* as “cloudy and doctrinally anomalous.”<sup>244</sup> But in any event, the plurality recognized the restructuring in *Seattle* as causing “specific injuries from hostile discrimination”<sup>245</sup> that are cognizable under “traditional” equal protection analysis.

The plurality did not directly engage with the Sixth Circuit’s discussion of a “*Hunter/Seattle*” or “political-process doctrine” concerning restructurings. But it effectively pulled the rug out from under such an analysis by emphasizing that *Seattle* did not create a new category of equal protection violation where a plaintiff need show only that a political restructuring detrimentally affects a policy that “inures primarily to the benefit of the minority.”<sup>246</sup> This language from *Seattle*, the plurality said, appeared to sweep in “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.’”<sup>247</sup> And that, the Court said, proved too much. Such an “expansive reading of *Seattle* has no principled limitation and raises serious questions of compatibility with the Court’s settled equal protection jurisprudence.”<sup>248</sup> *Seattle*, the plurality said, should not be “read to require the Court to determine and declare which political policies serve the ‘interest’ of a group defined in racial terms.”<sup>249</sup> Such reasoning, the plurality claimed,

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<sup>241</sup> *Id.* at 1633 (quoting *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982)).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 1640 (Scalia, J., concurring in the judgment).

<sup>245</sup> *Id.* at 1634.

<sup>246</sup> *Id.* (quoting *Seattle*, 458 U.S. at 472).

<sup>247</sup> *Id.* (quoting *Seattle*, 458 U.S. at 470).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*



“was unnecessary to the decision in *Seattle*; it has no support in precedent; and it raises serious constitutional concerns.”<sup>250</sup>

In the plurality’s view, Michigan’s Proposal 2 was constitutional because, unlike the events in *Reitman*, *Hunter*, and *Seattle*, “[h]ere there was no infliction of a specific injury” based on race.<sup>251</sup> In other words, the plurality thought that a voter initiative that prohibited affirmative action could not be considered an intentional racial classification or assumed to have been impelled by invidious purpose. The plurality opinion treated it as self-evident that a measure prohibiting affirmative action could not have involved the sorts of racial dynamics that troubled the *Reitman*, *Hunter*, and *Seattle* Courts.

### C. *The Concurrences and Dissent*

The five Justices not in the plurality came to starkly varying conclusions about the issues raised by Proposal 2. Unlike the plurality, they all acknowledged a “political-process doctrine” arising from *Hunter* and *Seattle*. But they did so with different levels of conviction and from very different perspectives.

Justice Breyer wrote briefly to concur in the judgment.<sup>252</sup> He appeared to recognize the existence of the “*Hunter/Seattle* doctrine” as an exception to traditional equal protection principles.<sup>253</sup> But he concluded that the doctrine did not apply in the circumstances of *Schuette* because, in his view, Proposal 2 did “not involve a reordering of the political process; it does not in fact involve the movement of decisionmaking from one political level to another.”<sup>254</sup> That was because in Michigan, affirmative action had been implemented not by statute but by universities acting administratively under authority delegated by their elected boards of regents.<sup>255</sup> No other Justice pursued this understanding of the case.

Justice Scalia, joined by Justice Thomas, also concurred in the judgment that Proposal 2 did not violate equal protection.<sup>256</sup> The key difference between the plurality and Justice Scalia was that the plurality did not believe that the Sixth Circuit’s reliance on the *Hunter/Seattle* doctrine represented the only

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 1636.

<sup>252</sup> *Id.* at 1648 (Breyer, J., concurring in the judgment).

<sup>253</sup> *See id.* at 1650 (Breyer, J., concurring in the judgment) (observing that “the parties do not here suggest that [Proposal 2] violates the Equal Protection Clause if not under the *Hunter-Seattle* doctrine”).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 1639 (Scalia, J., concurring in the judgment).

possible reading of those two cases. By contrast, Scalia excoriated the “so-called political-process doctrine,”<sup>257</sup> because, in his view, *Hunter* and *Seattle* are outliers in equal protection jurisprudence that “endorse[] a version of the proposition that a facially neutral law may deny equal protection solely because it has a disparate racial impact,” in violation of *Washington v. Davis*.<sup>258</sup> In *Hunter* and *Seattle*, he charged, the Court had “deemed the [restructuring] an equal-protection violation *regardless* of whether it facially classified according to race or reflected an invidious purpose to discriminate.”<sup>259</sup>

According to Justice Scalia’s reading, the *Hunter* Court did not find that the Akron city charter amendment “target[ed] racial minorities.” Rather, it “bypass[ed] the question of intent entirely, satisfied that its newly minted political-process theory sufficed to invalidate the charter amendment.”<sup>260</sup> Similarly, he seemed to ignore the *Seattle* Court’s characterization of Initiative 350 as “purposeful discrimination”<sup>261</sup> and asserted that the Court had found the initiative unconstitutional only because “it removed ‘the authority to address a racial problem . . . from the existing decisionmaking body, in such a way as to burden minority interests.’”<sup>262</sup> For these reasons, Justice Scalia said, “*Hunter* and *Seattle* should be overruled,” because they are “[p]latently atextual, unadministrable, and contrary to our traditional equal-protection jurisprudence.”<sup>263</sup>

In a lengthy and impassioned dissent, Justice Sotomayor, joined by Justice Ginsburg, also claimed, similarly to Justice Scalia, that *Hunter* and *Seattle* did not address whether the enactments in those cases “reflected an invidious purpose to discriminate.”<sup>264</sup> Articulating the conventional understanding of the *Hunter/Seattle* doctrine, she argued that “[t]he presence (or absence) of invidious discrimination has no place in” restructuring analysis because the doctrine “operates irrespective of discriminatory intent, for it protects a process-based right.”<sup>265</sup> The equal protection holdings in *Hunter* and *Seattle* were based, she said, on the fact that the enactments “reconfigure[d]

<sup>257</sup> *Id.* at 1640.

<sup>258</sup> *Id.* at 1647.

<sup>259</sup> *Id.* at 1641.

<sup>260</sup> *Id.* at 1642.

<sup>261</sup> *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484 (1982) (quoting *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979)).

<sup>262</sup> *Schuetz*, 134 S. Ct. at 1641 (Scalia, J., concurring in the judgment) (quoting *Seattle*, 458 U.S. at 474).

<sup>263</sup> *Id.* at 1643.

<sup>264</sup> *Id.* at 1663 (Sotomayor, J., dissenting).

<sup>265</sup> *Id.* at 1663 n.8.

the political process to the detriment of racial minorities”<sup>266</sup> and singled out policies related to race “for peculiar and disadvantageous treatment.”<sup>267</sup> But whereas Justice Scalia saw this as a reason to repudiate *Hunter* and *Seattle*, Justice Sotomayor saw it as a reason to celebrate them. Justice Sotomayor concluded that the Court’s judgment “eviscerates an important strand of our equal protection jurisprudence.”<sup>268</sup>

#### IV. SITUATING *SCHUETTE* WITHIN THE COURT’S EQUAL PROTECTION DOCTRINE

*Schuette*’s lack of a 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 the restructuring precedents that came before it. In an effort to make some sense of the decision, this part of the article advances two doctrinal arguments about *Schuette*. First, the Court was correct to reverse the judgment of the Sixth Circuit, because the *Hunter/Seattle* doctrine as understood by the circuit court did not have a sufficiently strong basis in the Supreme Court’s own equal protection cases. Second, the outcome in *Schuette* is a logical extension of the Court’s current racial equal protection jurisprudence, which is skeptical of affirmative action and denies as a matter of law that racial groups are capable of having distinct policy preferences.

##### A. *The Tenuous Existence of the Hunter/Seattle Doctrine*

The conventional understanding of *Hunter* and *Seattle*, represented in the opinions of both Justice Scalia and Justice Sotomayor, was that the cases created a special category of equal protection law for certain political restructurings. A plaintiff could establish a constitutional claim without showing a facial classification or proof of invidious intent as long as the restructuring had both a “racial focus” and the effect of disadvantaging the interests of a racial minority group. Consistent with this view, Vikram Amar and Evan Caminker have distinguished what they call the “*Hunter* framework” from

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<sup>266</sup> *Id.* at 1663.

<sup>267</sup> *Id.* at 1674 (quoting *Seattle*, 458 U.S. at 485).

<sup>268</sup> *Id.* at 1683.

“conventional equal protection analysis,”<sup>269</sup> though they acknowledge that the restructuring cases are “controversial” because “[t]he laws in question did not expressly single out minorities at all, but instead singled out issues that the Court deemed to be of particular interest to minorities.”<sup>270</sup>

In *Schuetz*, the Court’s plurality did not acknowledge a *Hunter/Seattle* doctrine by name, but it effectively rejected the idea of such a doctrine by saying that the Sixth Circuit had read *Seattle* too expansively. The plurality characterized both *Hunter* and *Seattle* as compatible with conventional equal protection analysis. When the plurality opinion is joined with Justice Scalia’s concurrence for himself and Justice Thomas, the Court’s judgment effectively announced the demise of the *Hunter/Seattle* doctrine as a distinct category of equal protection analysis.

All of this raises the question: Did a *Hunter/Seattle* doctrine ever really exist in the first place? The plurality avoided discussing that question.<sup>271</sup> But its reading of *Seattle* left no room for the sort of *Hunter/Seattle* analysis that had prevailed in the Sixth Circuit. Justice Scalia, joined by Justice Thomas, thought that such a doctrine had existed but that the plurality had not gone far enough to bury it. Justice Sotomayor, joined by Justice Ginsburg, also thought that the doctrine had existed but that the Court’s judgment had “eviscerate[d]” it.<sup>272</sup>

The better view is that the *Hunter/Seattle* doctrine never actually had a viable existence. The extended analysis of the restructuring cases that came before *Schuetz* in Section II.B demonstrated that these cases all involved one form or another of what the Court viewed as *intentional* discrimination. In the Court’s view, the constitutional violations in those cases did not arise merely from the incidental effects or disparate impacts on minority groups of some otherwise legitimate government undertaking. For all of those restructurings, the Court believed that intentional discrimination was part and parcel of their purpose and design. If this reading is correct, then the restructuring cases before *Schuetz* are consistent

<sup>269</sup> Amar & Caminker, *supra* note 25, at 1022, 1024; see also GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 542 (4th ed. 2001) (noting that “the statute invalidated in *Seattle* nowhere mentioned race” and questioning whether *Seattle* is consistent with *Davis*).

<sup>270</sup> Amar & Caminker, *supra* note 25, at 1027.

<sup>271</sup> Accord Mark Strasser, Schuetz, *Electoral Process Guarantees, and the New Neutrality*, 94 NEB. L. REV. 60, 99 (2015) (“While resisting Justice Scalia’s call to overrule the doctrine, the plurality applied a doctrine without explaining what it is or how it works.” (footnote omitted)).

<sup>272</sup> *Schuetz*, 134 S. Ct. at 1683 (Sotomayor, J., dissenting).

with “traditional” equal protection doctrine. Accordingly, this article’s analysis contradicts the proposition that there has existed a separate “*Hunter/Seattle* doctrine” where an equal protection violation would arise only from the negative *effects* that a restructuring has on a minority group, rather than from purpose and intention.

In *Hunter*, recall, the Court called the Akron city charter amendment an “official distinction[] based on race”<sup>273</sup> and implicitly analogized it to cases involving some of the most notorious forms of intentional race discrimination.<sup>274</sup> Two Justices in *Hunter* stated explicitly that they thought the Akron city charter amendment had been enacted for “the *clear purpose* of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest.”<sup>275</sup> Just seven years after *Hunter*, in *Washington v. Davis*, the Court would underscore that its “cases have not embraced the proposition that a law or other official act . . . is unconstitutional *solely* because it has a racially disproportionate impact” and that “the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”<sup>276</sup> The Court gave no indication in *Washington* that it was repudiating or intending to disturb *Hunter*.

Furthermore, in *Seattle*, the Court said that it had “little doubt that [Initiative 350] was effectively drawn for racial purposes”<sup>277</sup> and created a “meaningful and unjustified official distinction[] based on race.”<sup>278</sup> While Initiative 350 was ostensibly a measure to preserve the principle of neighborhood schools, in fact it allowed for so many exceptions that it was not neutral. Instead, it selectively blocked local school district busing policies only where those policies were aimed at remediating racial segregation. The initiative had been “carefully tailored to interfere only with desegregative busing.”<sup>279</sup> To say something is “carefully tailored” is necessarily to say that it was done with conscious intent. Moreover, the *Seattle* Court affirmed categorically that “purposeful discrimination is ‘the condition that offends the Constitution,’” and nowhere in the opinion did it say that it was creating an exception to that rule.<sup>280</sup> A law

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<sup>273</sup> *Hunter v. Erickson*, 393 U.S. 385, 391 (1969).

<sup>274</sup> See *supra* notes 116-26 and accompanying text.

<sup>275</sup> *Hunter*, 393 U.S. at 395 (Harlan, J., joined by Stewart, J., concurring) (emphasis added).

<sup>276</sup> *Washington v. Davis*, 426 U.S. 229, 240 (1976).

<sup>277</sup> *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982).

<sup>278</sup> *Id.* at 486 (quoting *Hunter*, 393 U.S. at 391).

<sup>279</sup> *Id.* at 471.

<sup>280</sup> *Id.* at 484 (quoting *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979)).

with a purpose and design of neutral, constitutionally permissible objectives but that incidentally burdened blacks in their political goals—even if the incidental burden could be anticipated ahead of time—could not be said to have been “drawn for racial purposes.”<sup>281</sup> The Court was not (as proponents of the *Hunter/Seattle* doctrine would see it) merely invalidating a procedural change with effects that happened to burden minority interests. The Court said that it was “beyond reasonable dispute . . . that the initiative was enacted “because of,” not merely “in spite of,” its adverse effects upon’ busing for integration.”<sup>282</sup>

Of course, opposition to desegregative busing might be held as a good faith policy view and need not be driven by racial animus.<sup>283</sup> But the Court never indicated that it thought the purpose was merely a good faith disagreement about busing. Rather, the Court perceived the debate to have been about the merits of racial integration itself. The Court believed that the purpose and design of the restructuring was to disadvantage blacks as a class. The Court observed somewhat archly that the initiative’s sponsors had no “difficulty perceiving the racial nature of the issue settled by Initiative 350.”<sup>284</sup> The Court’s use of the term “racial purposes” in this context cannot mean anything other than intentionally race-conscious action.

The key point of the *Hunter/Seattle* doctrine, according to Justice Sotomayor’s dissent in *Schuette*, is that it “operates irrespective of discriminatory intent, for it protects a process-based right.”<sup>285</sup> But this understanding seems plainly incorrect in light of this article’s exposition of those two cases. A close reading of *Hunter* and *Seattle*, together with some reasonable inferences from the Court’s language, its tone, and the social history of the times when the cases were decided, supports the conclusion that (1) the Court *did* see the restructurings in both of those cases as the products of intentional discrimination, and (2) the analysis of the process problems in these cases (that is, their character as restructurings) was inextricably intertwined with the analysis of the substantive equal protection violations. The process irregularities led the Court to examine

<sup>281</sup> *Id.* at 471.

<sup>282</sup> *Id.* (quoting *Feeney*, 442 U.S. at 279) (emphasis added).

<sup>283</sup> Sunstein, *supra* note 43, at 157 (“Opposition to busing for purposes of racial balance is different from opposition to antidiscrimination legislation [as in *Hunter*], because it is more easily supportable with noninvidious justifications.”).

<sup>284</sup> *Seattle*, 458 U.S. at 471.

<sup>285</sup> *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1663 n.8 (2014) (Sotomayor, J., dissenting).

facts and circumstances more carefully than it otherwise might have done, and this examination ultimately persuaded the Court that the challenged enactments amounted to race-conscious decisionmaking.<sup>286</sup>

A significant weakness of *Hunter* and *Seattle* as judicial opinions—and likely the reason why some jurists and commentators have failed to acknowledge them as cases about intentional discrimination—is the Court’s relative delicacy and indirection about the racial dynamics behind the challenged measures in those cases. The *Hunter* and *Seattle* opinions can be criticized for the Court’s apparent unwillingness to be more forthcoming and candid about the racial prejudice it perceived behind the restructurings. By invoking the term “racial classification” in both cases, the Court categorized the discrimination as intentional, but in both cases it largely failed to discuss candidly the basis for that conclusion. Thus, a certain amount of reading between the lines is necessary to appreciate why the Court believed that these enactments violated equal protection as traditionally understood.

Other scholars who have examined these cases have reached a range of conclusions. Amar and Caminker have acknowledged that it is possible to read *Hunter* and *Seattle* as cases where the Court applied strict scrutiny because it saw “some indicia of invidious intent”—what Amar and Caminker call a “soft intent” standard—that could bring the cases under the umbrella of traditional equal protection analysis.<sup>287</sup> But Amar and Caminker ultimately reject this reading, calling such a soft intent standard an “unarticulated rationale” that should not be accepted as an alternative to what they term a “carefully developed” *Hunter/Seattle* “doctrinal framework.”<sup>288</sup> The analysis provided in this article differs from Amar and Caminker’s. There are few signs here of a “carefully developed” doctrine. Indeed, it seems more apparent that the *Hunter/Seattle* doctrine has been primarily the creation of academic commentary and conjecture rather than a true doctrine that the Court has ever acknowledged or applied. No decision after *Seattle* acknowledges a *Hunter/Seattle* doctrine or suggests that an equal protection violation can be established based on anything other than intentional discrimination.

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<sup>286</sup> *Accord* Sunstein, *supra* note 43, at 138 n.42 (observing that while equal protection analysis generally is substantive, rather than process-based, “relative burdens of proof” on an equal protection claim can be “dependent on the likely functioning of the political process”).

<sup>287</sup> Amar & Caminker, *supra* note 25, at 1034-35.

<sup>288</sup> *Id.* at 1035.

Stephen Rich has referred to the measures struck down in *Hunter* and *Seattle* as “inferred classifications.”<sup>289</sup> Inferred classifications, he writes, “overlap” with discriminatory-purpose inquiry,<sup>290</sup> and the Court has sometimes found them when “it determines that a formally race neutral state action threatens constitutional equality values typically understood to be threatened by the use of explicit racial classifications.”<sup>291</sup> In *Hunter* and *Seattle*, Rich says, the Court was responding to “the social meanings communicated by” the restructurings, social meanings that “were sufficient to trigger strict scrutiny because of the sociohistorical context in which” they took place.<sup>292</sup>

David Bernstein makes a similar point, though more bluntly. On *Hunter*, he says, “It seems undeniable in retrospect that electoral support for repeal of the fair housing laws in question,” though it may have involved some element of principled disagreement with such policies, “also had a substantial racist component.”<sup>293</sup> The Court “could have but did not explicitly state that the referenda in question were both motivated by discriminatory intent [and had] discriminatory effects.”<sup>294</sup> In a similar vein, though not addressing *Hunter* or *Seattle* specifically, Richard Primus has noted that “courts often decide whether to apply strict scrutiny based on a normative sense that a statute is constitutionally problematic and then, reasoning backwards, announce that something in the statute constitutes an express classification.”<sup>295</sup>

Daniel Tokaji has observed that it is “easy to view” *Hunter* and *Seattle*, along with *Romer*, “as constitutional oddballs, difficult or impossible to explain in light of accepted equal protection principles.”<sup>296</sup> But he argues that these cases “share a concern that—absent a more stringent test [than ordinary rational basis review] for determining whether equal protection has been denied—intentional discrimination on the part of the polity may escape detection.”<sup>297</sup> Cass Sunstein has made the same point: “The classification in *Hunter* was not quite

<sup>289</sup> See Stephen M. Rich, *Inferred Classifications*, 99 VA. L. REV. 1525 (2013).

<sup>290</sup> *Id.* at 1553.

<sup>291</sup> *Id.* at 1560.

<sup>292</sup> *Id.* at 1547.

<sup>293</sup> David E. Bernstein, “Reverse Carolene Products,” *the End of the Second Reconstruction, and Other Thoughts on Schuette v. Coalition to Defend Affirmative Action*, 2013-2014 CATO SUP. CT. REV. 261, 263-64 (2014).

<sup>294</sup> *Id.*

<sup>295</sup> Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 509 (2003).

<sup>296</sup> Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2476 (2003).

<sup>297</sup> *Id.*



a racial classification on its face; but, by its very nature, it gave rise to suspicion that an impermissible motive was at work.”<sup>298</sup>

These insights all are helpful in illuminating why the Court came to the conclusions it did in *Hunter* and *Seattle*. But it is also important to appreciate that *Hunter* and *Seattle* were never really unique. They were neither the first race cases nor the last where the Court found what it called a “classification” without either a facial classification of persons or a specific finding of invidious purpose. The point further undercuts support for the idea that the *Hunter/Seattle* doctrine had a viable existence as a separate category of equal protection.

Some of the Court’s racial equal protection cases seem driven by a certain quality of *res ipsa loquitur*: even where laws were formally race neutral, the Court seemed to think the racially motivated thinking behind them was clear. Like *Hunter* and *Seattle*, these cases involve unspoken assumptions about the dynamics of prejudice, assumptions that make the Court’s analysis seem less rigorous and transparent than we might like. In *Anderson*, the Court simply assumed that being given information about a candidate’s race would encourage Louisiana voters to make racially prejudiced voting decisions. In *Gomillion*, the Court saw that the effect of the “strangely irregular twenty-eight-sided” electoral district map of Tuskegee, Alabama, was “to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident.”<sup>299</sup> But to understand the effect was to understand the purpose: the map was “tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.”<sup>300</sup> Other cases from the same era had explained that a law can be deemed a racial classification and thus trigger strict scrutiny if “the framework of the peculiar facts or circumstances”<sup>301</sup> leads the Court to conclude that a law “encourage[s] and significantly involve[s] the State in private racial discrimination.”<sup>302</sup>

In arguing that *Hunter* and *Seattle* should be overruled, Justice Scalia insisted that an equal protection violation can arise only from a *facial* classification on the basis of race or an

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<sup>298</sup> Sunstein, *supra* note 43, at 149.

<sup>299</sup> *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).

<sup>300</sup> *Id.*

<sup>301</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961).

<sup>302</sup> *Reitman v. Mulkey*, 387 U.S. 369, 376 (1967).

express, on-the-record finding of invidious purpose.<sup>303</sup> But in light of what the Court has actually said and done in the cases discussed above, that cramped, narrow description of equal protection doctrine is quite obviously wrong. If accepted, it would effectively abrogate a clutch of other important race cases that no one seriously argues were wrongly decided. *Hunter* and *Seattle* both found “classifications,” and that word has a specific meaning in the Court’s race cases signaling a violation of equal protection as traditionally understood. The Court’s other racial equal protection cases do not use the term “classification” to describe laws that merely impose incidental discriminatory effects. *Washington v. Davis*, which Justice Scalia himself invoked, distinguished a constitutionally forbidden “racial classification[]” from “a law, neutral on its face and serving ends otherwise within the power of government to pursue” that “may affect a greater proportion of one race than of another.”<sup>304</sup> The *Washington* Court said that even where a law does not draw “racial lines,” it is still invalid if it was “motivated by racial considerations.”<sup>305</sup> Further, the Court has previously referred to both *Hunter* and *Seattle*, together with *Reitman*, as “precedents involving discriminatory restructuring of government decisionmaking.”<sup>306</sup> In short, the Court has always given itself much more flexibility than Justice Scalia suggested in deciding what qualifies as an intentional, unconstitutional racial classification.

More than 10 years after *Seattle* was decided, in *Shaw v. Reno*,<sup>307</sup> the Court again found that a highly irregular voting map could amount to a “racial classification,” even though there was no facial classification of persons, and the Court did not inquire into the possible invidious motives of the legislators who had drawn the map. Unlike the situation in *Gomillion*, here the racial gerrymandering worked in favor of black voters, as it created two majority-minority districts and enabled black voters to elect the state’s first black representatives to Congress since 1898. The Court struck down the map. (It should be noted

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<sup>303</sup> See *Schuetz v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1641 (2014) (Scalia, J., concurring in the judgment) (criticizing *Hunter* and *Seattle* for finding “an equal-protection violation *regardless* of whether [the challenged measure] facially classified according to race or reflected an invidious purpose to discriminate”).

<sup>304</sup> *Washington v. Davis*, 426 U.S. 229, 242 (1976).

<sup>305</sup> *Id.* at 240 (quoting *Wright v. Rockefeller*, 376 U.S. 52, 56, 58 (1964)).

<sup>306</sup> *Romer v. Evans*, 517 U.S. 620, 625 (1996) (emphasis added); *accord*, Sunstein, *supra* note 43, at 159 (suggesting that “both *Hunter* and *Seattle* conformed to the Court’s usual understanding of the evil at which the Equal Protection Clause is aimed and to the ordinary role of heightened scrutiny in ensuring that that evil does not occur”).

<sup>307</sup> *Shaw v. Reno*, 509 U.S. 630 (1993).

that in *Shaw*, Justice Scalia joined Justice O'Connor's majority opinion in full.)

The *Shaw* Court underscored the by then well-established principle that the Equal Protection Clause prohibits actions which "although race neutral, are, on their face, 'unexplainable on grounds other than race.'"<sup>308</sup> This was consistent with the Court's teaching in *Arlington Heights* that "[d]etermining whether invidious discriminatory purpose" was behind a law sometimes "demands a sensitive inquiry" into both "circumstantial and direct evidence."<sup>309</sup> And *Washington v. Davis* rejected the idea that "discriminatory racial purpose must be express or appear on the face of the statute," explaining that a finding of improper discrimination "may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."<sup>310</sup>

And so, call it an "inferred classification," call it reasoning backwards, or call it simply the Court being too polite to actually label lawmakers or voters as racists, the point is that the analyses that were the basis for the decisions in *Hunter* and *Seattle* fit within "traditional" equal protection doctrine. Traditional equal protection doctrine does not allow for an equal protection violation based solely on discriminatory effects, but the doctrine has never been as narrow and rigid as Justice Scalia claimed.

It is not difficult to suspect that, for its proponents, part of the attractiveness of the *Hunter/Seattle* doctrine was that it could be used to attack perceived racial unfairness without actually accusing anyone of conscious, intentional race discrimination. At the Supreme Court, the plaintiffs in *Schuette* did not attempt to argue that Michigan Proposal 2 had been impelled by racial animus or race-conscious voter decisionmaking (though there were such suggestions in that direction in some of their early district court filings).<sup>311</sup> And Justice Sotomayor

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<sup>308</sup> *Id.* at 643 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

<sup>309</sup> *Arlington Heights*, 429 U.S. at 266.

<sup>310</sup> *Davis*, 426 U.S. at 241-42.

<sup>311</sup> In their summary judgment briefing, the Coalition plaintiffs did make some effort to argue that Proposal 2 had been propounded and adopted out of subtle racial animus, noting that the proponents "used the code word 'preference' to appeal to white people's fears of being displaced by the growing minority populations of this nation," and that support for Proposal 2 came lopsidedly from whites. Plaintiff Coal. to Defend Affirmative Action et. al.'s Brief in Opposition to the Motions for Summary Judgment Filed by the Attorney General and Eric Russel at 4-5, Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN) v. Regents of the Univ. of Mich. (E.D. Mich. Jan. 8, 2008) (No. 06-15637). "Connerly and his supporters," the Coalition plaintiffs said, were

specifically disclaimed any suggestion “that Michigan’s voters acted with anything like the invidious intent . . . of those who historically stymied the rights of racial minorities.”<sup>312</sup>

But attempting to attack alterations to the political process that cause racial injury without actually accusing anyone of intentional discrimination leads to imprecision, if not incoherence. Remember that the *Hunter* Court directly analogized the Akron city charter amendment to the racist chicanery of the Louisiana law that required that a candidate specify his race on the ballot, and in *Seattle*, the Court characterized Initiative 350 as an “attack” on local school authority. Yet the Sixth Circuit and Justice Sotomayor eschewed such loaded and candidly judgmental language and analysis. Neither was willing to call Proposal 2 a “racial classification,” even though that is the label both the *Hunter* and *Seattle* Courts had used.

Justice Sotomayor said that a political majority may not have “free rein to erect selective barriers against racial minorities”<sup>313</sup> or “create one process for racial minorities and a separate, less burdensome process for everyone else.”<sup>314</sup> She said that Proposal 2 “alter[ed] the political process to the detriment of a racial minority”<sup>315</sup> and drew a “racial distinction,”<sup>316</sup> because “[a] majority of the Michigan electorate changed the basic rules of the political process in that State in a manner that uniquely disadvantaged racial minorities.”<sup>317</sup> Those formulations come right up to the edge of describing intentional discrimination without actually accusing Michigan voters of race-conscious action. This approach illustrates the central problem with the *Hunter/Seattle* doctrine: it was understood as a means to strike down measures that caused racial disadvantage without actually having to make the argument that the disadvantage was intentionally imposed.

Similarly, there is a gingerly, let’s-not-get-our-hands-dirty quality to the Sixth Circuit’s opinion. According to its understanding of the *Hunter/Seattle* doctrine, the court could

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“pil[ing] up . . . victories” in Michigan and other states “based on the white vote.” *Id.* at 6. Continuing residential and educational segregation, as well as “racial stereotyping and bias,” they argued, “still structures everyone’s worldview and consciousness.” But these assertions were more in the nature of a manifesto than a legal argument, and none of them were supported by citations to any sources or evidence. *Id.*

<sup>312</sup> *Schuetz v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1652 n.1 (2014) (Sotomayor, J., dissenting) (citation omitted).

<sup>313</sup> *Id.* at 1683.

<sup>314</sup> *Id.* at 1653.

<sup>315</sup> *Id.* at 1663.

<sup>316</sup> *Id.* at 1674.

<sup>317</sup> *Id.* at 1652.

strike down Proposal 2 without any need to pass judgment on, or even consider, whether the action taken by Michigan voters was race conscious. The Sixth Circuit said that *Hunter* and *Seattle*'s "central principle" was "that the Equal Protection Clause prohibits requiring racial minorities to surmount more formidable obstacles than those faced by other groups to achieve their political objectives."<sup>318</sup> Did the Sixth Circuit *really* believe this "requirement" had come about incidentally, merely as a matter of effect rather than purpose? It didn't need to say. The court could sidestep the messy question of whether Proposal 2 actually amounted to intentional discrimination. In the context of the current politics of affirmative action, that conclusion might have been explosive.

The *Hunter/Seattle* doctrine avoided candor on issues of race discrimination. It is a foreseeable consequence that anti-affirmative-action measures like Proposal 2 will redistribute resources in favor of whites to the detriment of blacks.<sup>319</sup> If critics of such measures believe that these consequences not only can be foreseen but are *actually intended* by the proponents of the measures—that such measures alter the status quo for race-conscious reasons and intentionally redistribute resources on the basis of race—it would be better to make that argument openly<sup>320</sup> rather than attempting to attack the phenomenon through doctrinal artifice. At the same time, it must be acknowledged that such arguments were more easily made in the days when the Court was more willing to ascertain race-conscious intent "o[n] an intuitive level," as it seemed to in *Reitman*, *Hunter*, and *Seattle*.<sup>321</sup> The basis of evidence and inferences the Court used to find intentional discrimination in those cases reflected an understanding of race that was very different from what is reflected in the Court's current equal protection jurisprudence.

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<sup>318</sup> *Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN) v. Regents of the Univ. of Mich.*, 701 F.3d 466, 485 (6th Cir. 2012) (en banc) (quoting *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 469-70 (1982)).

<sup>319</sup> See Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 271 (1997) (arguing that such measures should receive heightened scrutiny because they benefit whites at the expense of blacks).

<sup>320</sup> For such an argument, see *id.* at 293-96.

<sup>321</sup> *Id.* at 310.

B. Schuette, *Affirmative Action, and the Ideology of a Color-Blind Equal Protection Clause*

In *Reitman* and *Hunter*, voters went to the polls to repeal racial antidiscrimination laws and forbid their reinstatement by elected officials. In *Seattle*, voters went to the polls to repeal and prohibit desegregative busing that had been approved by a local school board. Although all three of these restructurings by their terms targeted *policies* rather than *persons*, the Supreme Court chose to understand them as race-conscious action. It labeled them “racial classifications” and then struck them down with the application of strict scrutiny.

By contrast, in *Schuette*, voters went to the polls to repeal affirmative action policies and forbid their reinstatement by elected officials (i.e., university regents). This restructuring also targeted a policy, rather than persons. But this time, a majority of the Justices chose to understand the matter as merely a good faith, even healthy, debate about public policy. What explains the difference?

As a preliminary matter before answering this question, it should be noted that if there were clear evidence of overt racial animus or other invidious purpose in the campaign to enact Proposal 2, the plaintiffs in *Schuette* did not attempt to build their case on that argument. In the district court, the case was resolved on summary judgment, without a trial, and the plaintiffs apparently made no serious effort to build a record showing that Proposal 2 had been debated and adopted in an atmosphere of racial hostility or stereotypes. The district court specifically found that “[t]he historical background of Proposal 2 and sequence of events that preceded its passage do not suggest discriminatory intent” because “[t]he public arguments made in support of Proposal 2 did not appeal to racism or amount to a call for segregation; rather, they attempted to appeal to the public’s belief in fairness and just treatment.”<sup>322</sup> Although its proponents “knew that Proposal 2 might lead to fewer minority admissions, there is no evidence that they intended this.”<sup>323</sup>

With no argument available that its primary motivation was overtly invidious, this meant that if Proposal 2 was unconstitutional, the basis would need to be that it created a racial classification. As with the policies struck down in *Reitman*,

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<sup>322</sup> Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 539 F. Supp. 2d 924, 952 (E.D. Mich. 2008).

<sup>323</sup> *Id.*

*Hunter*, and *Seattle*, the Court would need to conclude that Michigan's ban on affirmative action had been impelled by race-conscious intent and action on the part of proponents and voters. Even absent racist appeals or animus, the Court would need to see it as a form of racial line drawing—an “official distinction[] based on race”<sup>324</sup> or a law that “was effectively drawn for racial purposes.”<sup>325</sup>

But that was never going to happen. To understand the outcome in *Schuette*, it is helpful to understand the turn the Court's racial equal protection jurisprudence has taken in recent decades—what Reva Siegel has described as the Court's restriction of minority-protective equal protection review and expansion of majority-protective equal protection review.<sup>326</sup> *Reitman* and *Hunter* predated decisions in the 1970s where the Court drew a harder line on the difference between discriminatory purpose and disparate impact or incidental effects.<sup>327</sup> These cases “replaced doctrine that held government to account for the foreseeable racial consequences of its actions with a body of law that defined the constitutionality of government's conduct solely by reference to the purity of its purposes.”<sup>328</sup> Notwithstanding this doctrinal shift, the *Seattle* Court in 1982 found Washington's Initiative 350 to be a racial classification.<sup>329</sup> But in general, after the 1970s, it became “extremely difficult to prove discriminatory purpose and nearly always possible to find some reason for a government policy with a racial disparate impact other than a purpose to harm the group.”<sup>330</sup>

For the *Schuette* plurality, Proposal 2 represented nothing more suspect than citizens statewide coming together “to seek consensus and adopt a policy on a difficult subject.”<sup>331</sup> Justice Kennedy, who in other contexts has acknowledged that disparate treatment can in fact arise from “unconscious prejudices and disguised animus,”<sup>332</sup> apparently saw no possibility that implicit racial bias among white voters might have helped drive the outcome on Proposal 2 (or, if he did,

<sup>324</sup> *Hunter v. Erickson*, 393 U.S. 385, 391 (1969).

<sup>325</sup> *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982).

<sup>326</sup> Siegel, *supra* note 63, at 9-51.

<sup>327</sup> See *supra* notes 162-66 and accompanying text.

<sup>328</sup> Siegel, *supra* note 63, at 47.

<sup>329</sup> See *supra* notes 172-73 and accompanying text.

<sup>330</sup> Siegel, *supra* note 63, at 47.

<sup>331</sup> *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1637 (2014) (plurality opinion).

<sup>332</sup> *Tex. Dept. of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2512 (2015).

perhaps he viewed the matter as a can of worms that was best not opened). Justice Scalia derided the very idea that Proposal 2 could ever have Fourteenth Amendment implications: “[A]ny law expressly requiring state actors to afford all persons equal protection of the laws . . . does not—cannot—deny ‘to any person . . . equal protection of the laws’ . . . regardless of whatever evidence of seemingly foul purposes plaintiffs may cook up in the trial court.”<sup>333</sup>

Justice Scalia’s point that prohibitions on racial preferences do nothing more than “afford all persons equal protection of the laws” betrays how the Court’s jurisprudence on affirmative action has been at the center of the larger doctrinal shifts that doomed the challenge to Proposal 2. Since 1995, the Court has applied strict scrutiny to all forms of race-conscious decisionmaking, including affirmative action programs that were intended to benefit, not harm, racial minorities.<sup>334</sup> Under this view, a racial preference under affirmative action is presumptively a denial of “equal protection of the laws” just as much as the white supremacist schemes the Court struck down in cases like *Anderson* or *Loving*. This understanding of the Equal Protection Clause as requiring strict, “colorblind” neutrality on matters of race did more than sharply restrict the use of affirmative action, however. It also meant the Court would reject the idea that courts should determine whether any given law or policy that discriminates in some way is racially benign or malignant.<sup>335</sup>

In *Schuette*, the Sixth Circuit said, “the language of *Hunter* and *Seattle* encompasses any legislation in the interest of racial minorities” and “works to prevent the placement of special procedural obstacles on minority objectives.”<sup>336</sup> Here, that objective was, of course, support for affirmative action. But according to Justice Kennedy’s plurality opinion, this approach was mistaken, because courts must avoid “announc[ing] what particular issues of public policy should be classified as advantageous to some group defined by race.”<sup>337</sup> A majority of

<sup>333</sup> *Schuette*, 134 S. Ct. at 1648 (Scalia, J., concurring in the judgment) (first alteration in original) (citation omitted) (quoting U.S. CONST. amend. XIV, § 1).

<sup>334</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>335</sup> For criticism of the idea of a “colorblind” Equal Protection Clause, see, for example, Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010), and Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1 (1991).

<sup>336</sup> *Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN) v. Regents of the Univ. of Mich.*, 701 F.3d 466, 486, 487 (6th Cir. 2012) (en banc).

<sup>337</sup> *Schuette*, 134 S. Ct. at 1635 (plurality opinion).



the Justices on the Court at the time *Schuetz* was decided rejected what the plurality opinion called the “demeaning notion that members of . . . defined racial groups ascribe to certain ‘minority views’ that must be different from those of other citizens.”<sup>338</sup> This group of Justices maintained that “[i]t cannot be entertained as a serious proposition that all individuals of the same race think alike” about affirmative action policy or any other issue.<sup>339</sup>

Of course, no one argues that *all* individuals of the same race think alike. Yet it is very hard to explain *Reitman* and *Hunter* without recognizing that the Court took it as a given that fair housing laws, as a matter of public policy, were “advantageous” to racial minorities and that most members of racial minority groups supported them (as the city’s white electoral majority obviously did not) for that reason. Likewise, in *Seattle*, the Court recognized that blacks saw desegregative busing as “in their interest.” In the period when *Reitman*, *Hunter*, and *Seattle* were decided, between 1967 and 1982, most of the Justices almost certainly would have thought it a matter of simple common sense, and not a demeaning or constitutionally impermissible stereotype, to assume that the vast majority of blacks and other racial minorities favored laws that were intended to protect their civil rights and advance their social equality. In *Reitman*, *Hunter*, and *Seattle*, the Court seemed to regard it as an unremarkable assumption that blacks as a group supported and benefited from the equality-promoting government policies that voters had repealed and prohibited through political restructurings. Therefore, the Court understood a political attack by an electoral majority on a policy that was beneficial to and favored by a minority to be tantamount to a political attack on that minority *as a group*.

Today, anyone who can read a poll knows that affirmative action is supported by an overwhelming number of blacks<sup>340</sup> and is regarded, at least by most blacks themselves, as beneficial to

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<sup>338</sup> *Id.* at 1634 (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting)); see also *id.* at 1643-44 (Scalia, J., concurring in the judgment) (arguing that the Sixth Circuit’s approach would “promote[] the noxious fiction that, knowing only a person’s color or ethnicity, we can be sure that he has a predetermined set of policy ‘interests,’ thus reforc[ing] the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, [and] share the same political interests” (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993))).

<sup>339</sup> *Id.* at 1634 (plurality opinion).

<sup>340</sup> See, e.g., Drake, *supra* note 8 (reporting that 84% of blacks believe that “affirmative action programs designed to increase the number of black and minority students on college campuses” are a “good thing,” while 8% think they are a “bad thing”).

them.<sup>341</sup> Indeed, there remains a wide gap in attitudes between whites and blacks toward affirmative action, as well as toward the question of whether antiwhite “reverse discrimination” is displacing antiblack racism as a problem.<sup>342</sup> Michigan’s proposal to prohibit affirmative action was supported by only 14% of blacks, compared to 59% of whites.<sup>343</sup> Moreover, blacks had lobbied for the policies that Proposal 2 nullified.<sup>344</sup> But the current Court’s ideology of a race-neutral, colorblind Equal Protection Clause and its hostility toward affirmative action means that equal protection doctrine is no longer allowed to take such social facts into account. As a matter of law, courts are required to assume that minorities have no policy preferences that could be ascribed to them as a group.

This way of thinking made the outcome in *Schuette* unsurprising because it precludes, by definition, the idea that voters’ action on a policy like affirmative action could ever be characterized as intentional race discrimination. The ideology of a race-neutral, colorblind Equal Protection Clause, which assumes that there is no such thing as “minority views,” requires that we deny as a matter of constitutional law what we know as a matter of empirical fact: most blacks not only favor affirmative action, they do so because they see it as being in the interest of their racial group.

The Court’s jurisprudence on affirmative action also doomed the *Hunter/Seattle* doctrine in another way, although the opinions do not discuss it. Recall that the *Hunter/Seattle* analysis set forth by both the Sixth Circuit and Justice Sotomayor incorporated the premise that minority groups are entitled to political-process protections that protect them from extra burdens when they seek “to achieve legislation in their interest.” But the Court’s doctrine precludes the idea that affirmative action is constitutional if its goal is to improve the welfare and social equality of racial minorities in a generalized way. The courts in *Reitman*, *Hunter*, and *Seattle* easily made such assumptions about fair housing laws and desegregative busing. The *Seattle*

<sup>341</sup> *Id.*

<sup>342</sup> Michael I. Norton & Samuel R. Sommers, *Jockeying for Stigma*, N.Y. TIMES (May 23, 2011, 12:12 PM), <http://www.nytimes.com/roomfordebate/2011/05/22/is-anti-white-bias-a-problem/jockeying-for-stigma> [<http://perma.cc/2BNW-8S2S>] (reporting that while blacks see the problem of racism as continuing, “whites tend to see it as a problem that has been more or less ‘solved,’” and that “[i]f anything, many whites now believe that it’s anti-white bias that’s on an upswing, to the point where it’s even more prevalent than anti-black bias—a sentiment not shared by blacks”).

<sup>343</sup> Jaschik, *supra* note 216.

<sup>344</sup> Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN) v. Regents of the Univ. of Mich., 701 F.3d 466, 478 (6th Cir. 2012) (en banc).

Court nodded to Footnote Four in explaining that courts must pay special attention when electoral majorities attack “legislation specifically designed to overcome the ‘special condition’ of prejudice.”<sup>345</sup> The Court was willing to understand restructurings that wiped out fair housing laws and desegregative busing as efforts to undermine racial equality. But in more recent years, the Court has prohibited the use of affirmative action for such goals as remedying general societal discrimination<sup>346</sup> or providing role models for minority students.<sup>347</sup> In public higher education, the promotion of “educational diversity” remains a permissible governmental interest, and the Court has approved the narrowly tailored use of race in admissions decisions.<sup>348</sup> But as a matter of law, this interest belongs to the university and the government that sponsors it, not to blacks or any other racial minority as a group. The Court’s denial that blacks have a protectable legal interest in maintaining affirmative action programs undercuts a premise of the *Hunter/Seattle* doctrine as applied to Proposal 2 by the Sixth Circuit and Justice Sotomayor: that the Equal Protection Clause requires procedural protections that allow blacks to pursue this interest through the political process.

And so, in summary, *Schuette* is best understood as a logical extension of the Court’s racial equal protection jurisprudence, and specifically its established thinking about affirmative action, rather than as an effort to grapple with the constitutional status of political restructurings generally.

## V. THE FUTURE OF POLITICAL RESTRUCTURINGS

### A. *Meaningful Review of Restructurings Should Survive Schuette*

The Supreme Court’s judgment in *Schuette* should not prevent courts from giving meaningful scrutiny to future political restructurings in order to determine whether they were impelled by invidious intent toward a minority or other disadvantaged group. As demonstrated in Section II.B, political restructurings have been used to single out minority groups for special disadvantages. In *Reitman*, *Hunter*, *Seattle*, and *Romer*, the Court stepped in to thwart what it recognized as efforts by electoral majorities to rig the processes of government

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<sup>345</sup> *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

<sup>346</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>347</sup> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

<sup>348</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

decisionmaking—that is, to selectively move the decisionmaking process on a question of public policy to a higher, more remote level of government—in ways that were intended to disadvantage or harm minority groups. It did so in a two-step process. First, it took note of the restructuring itself and the ways in which it altered the ordinary lawmaking process. Second, it examined the operation and effects of the restructuring to determine whether the restructuring violated the Equal Protection Clause by imposing a racial classification (*Hunter* and *Seattle*), creating racially discriminatory state action (*Reitman*), or imposing a legal disadvantage based on animus (*Romer*).

Proposal 2 was also a political restructuring. It took authority over race-conscious admissions policies away from its normal locus in Michigan government and placed it in the state constitution. A majority of the Justices agreed that Proposal 2 did not violate the Equal Protection Clause, because they did not view Proposal 2 as manifesting subjective invidious purpose by voters or creating the kind of objective racial classification the Court had found in *Seattle*.

But *Schuette's* guidance is less clear on the constitutional implications of restructurings generally. Justices Scalia and Sotomayor devoted most of their opinions to either celebrating or lamenting (respectively) the demise of the *Hunter/Seattle* doctrine. The plurality opinion says nothing about political restructurings as such. It reaffirms that government “may not alter the procedures of government to target racial minorities.”<sup>349</sup> But it provides almost no guidance for lower courts and future litigants on how to identify when such “targeting” occurs or whether restructurings are different from other forms of lawmaking. Because it did not see *Hunter* and *Seattle* as incompatible with traditional equal protection doctrine, the plurality refused to join Justice Scalia in seeking to overrule those decisions. But the plurality failed to provide any coherent, unifying explanation of the restructuring precedents, which include *Reitman* and (this article has argued) *Romer*. It made no effort to link the cases together as part of a larger doctrine or to extract common principles from them. It declined to engage with Justice Sotomayor’s discussion of the harms that restructurings of the political process can inflict on minority groups. Indeed, it did not use the term “political process” (or even the word “process”) at all, and it

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<sup>349</sup> *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1632 (2014) (plurality opinion).

used the word “restructuring” only once, in reference to the events in *Hunter*.<sup>350</sup>

This article began in Part I by situating political restructurings within the concerns of political-process theory. Those concerns should continue to inform judicial analysis of restructurings. The judgment in *Schuette* did not diminish the principle that is evident in the earlier restructuring cases that courts should approach restructurings with care to determine whether the intent is to impose a disadvantage on some group or to pursue an illegitimate government purpose: whether the restructuring is, in fact, the product of “the ingenuity of those who would seek to conceal [unconstitutional discrimination] by subtleties and claims of neutrality.”<sup>351</sup> *Reitman*, *Hunter*, *Seattle*, and *Romer* all reflected an analysis that was calibrated and informed by the fact that a policy question involving a minority group had been taken away from the ordinary lawmaking process and committed to a higher, more remote level of government. The Court in these cases was sensitive to the unusual, “sophisticated” form of discrimination that restructurings can produce. Accordingly, it carefully scrutinized the restructurings to understand their actual purposes and effects. Careful examination at the outset helped to identify forms of invidious discrimination that were built into the design or enforcement of the laws, though not necessarily apparent on their face. Even in cases where it has denied equal protection claims that arose from political restructurings, the Supreme Court still examined whether the record supported a claim that a seemingly neutral law had actually been aimed at a racial minority<sup>352</sup> or whether the challenged action burdened an “independently identifiable group or category.”<sup>353</sup>

Nor did the judgment in *Schuette* affect the Court’s guidance in other cases that the disparate impact of a policy change or departures from ordinary decisionmaking procedures remain relevant to a court’s task of assessing the possible presence of invidious discrimination.<sup>354</sup> Thus, courts reviewing

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<sup>350</sup> *Id.*

<sup>351</sup> *Mulkey v. Reitman*, 413 P.2d 825, 834 (Cal. 1966), *aff’d sub nom. Reitman v. Mulkey*, 387 U.S. 369 (1967).

<sup>352</sup> *See James v. Valtierra*, 402 U.S. 137, 141-43 (1971) (holding that the Equal Protection Clause was not violated by a California state constitutional amendment that required any new low-income housing project to be subject to a community vote).

<sup>353</sup> *See Gordon v. Lance*, 403 U.S. 1, 5, 7-8 (1971) (holding that the Equal Protection Clause was not violated by a rule requiring a supermajority referendum vote for local tax increases or bonded indebtedness).

<sup>354</sup> *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Washington v. Davis*, 426 U.S. 229, 242 (1976).

challenges to restructurings should be alert to facts and circumstances that might indicate that the restructuring was undertaken with the intent to harm a minority or other disadvantaged group. A close look is required if a court is to understand an enactment's "immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.'"<sup>355</sup>

Expecting a court to scrutinize a restructuring for possible animus is not inconsistent with the ordinary principles of equal protection review. Traditional rational basis review is highly deferential because it assumes a properly functioning process of routine and ordinary legislative lawmaking. For example, in *FCC v. Beach Communications, Inc.*<sup>356</sup>—which extolled rational basis review as a "paradigm of judicial restraint"<sup>357</sup>—the Rehnquist Court explained that equal protection as applied to "areas of social and economic policy" is "not a license for courts to judge the wisdom, fairness, or logic of legislative choices."<sup>358</sup> Plaintiffs "attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'"<sup>359</sup> Judicial review should be limited and deferential, the Court said, "where the legislature must necessarily engage in a process of line-drawing," because "the legislature must be allowed leeway to approach a perceived problem incrementally."<sup>360</sup>

By contrast, restructurings do not involve a careful process of line drawing or incremental approaches to everyday social and economic problems. Rather, they represent deliberate decisions to selectively remove a specific issue from the ordinary legislative process at the level where that question customarily has been addressed. The ordinary assumption under rational basis review is that "even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."<sup>361</sup> But the whole point of a restructuring is to turn that presumption on its ear and ensure that the matter settled through the restructuring *cannot* be revisited by a political branch. Moreover, "[t]he presumption of constitutionality and the

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<sup>355</sup> *Reitman*, 387 U.S. at 373 (quoting *Reitman*, 413 P.2d 825).

<sup>356</sup> *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993).

<sup>357</sup> *Id.* at 314.

<sup>358</sup> *Id.* at 313 (emphasis added).

<sup>359</sup> *Id.* at 314-15 (emphasis added) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

<sup>360</sup> *Id.* at 315, 316 (emphasis added).

<sup>361</sup> *Id.* at 314 (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

approval given ‘rational’ classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people.”<sup>362</sup> But “when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.”<sup>363</sup>

To be clear, the kind of judicial review this article suggests would apply only to political restructurings that affect minority or other disadvantaged groups, and its purpose should be to help a court understand whether the restructuring was motivated by animus toward such a group.<sup>364</sup> It should not be used to involve courts in second guessing legislative decisions or state constitutional amendments that preempt local government decisionmaking on quotidian business and economic matters. And so, for example, only ordinary rational basis review should apply if a state moves to prevent its local governments from banning plastic grocery bags. But more careful review for possible animus should apply if a state, without any apparent legitimate or neutral reason, suddenly acts to selectively withdraw authority from local governments over a civil rights question, such as their ability to maintain antidiscrimination laws protecting gays, lesbians, or transgender persons.<sup>365</sup>

This proposal is consistent with principles from the restructuring precedents that were unaffected by *Schuette*. It is also consistent with Footnote Four of *Carolene Products*,<sup>366</sup> the wellspring for political-process theory. According to Footnote Four, an enactment should receive closer judicial examination when it “tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>367</sup> Experience shows that the problem that this part of Footnote Four warned against often is exactly what restructurings are intended to do. By moving a policy matter to a higher, more remote level of government, restructurings provide

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<sup>362</sup> *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628 (1969) (footnote omitted).

<sup>363</sup> *Id.*

<sup>364</sup> For a discussion of how animus is identified and analyzed, see Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 243-48 (2013).

<sup>365</sup> See Richard Socarides, *North Carolina and the Gay-Rights Backlash*, NEW YORKER (Mar. 28, 2016), <http://www.newyorker.com/news/news-desk/north-carolina-and-the-gay-rights-backlash> [<http://perma.cc/C3D5-8Q9C>] (discussing a “sweeping anti-gay and anti-transgender law” in North Carolina “that eliminates all local L.G.B.T. anti-discrimination measures,” and comparing the law to the measure that was struck down in *Romer*).

<sup>366</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>367</sup> *Id.*

insurance against the possibility that a policy question can be revisited and reconsidered in the normal course of the ordinary political process. Such tampering with the political process potentially acquires constitutional implications when its intent is to impose a disadvantage on a minority group.

There is no reason to believe that majorities will tire of attempting to alter the ordinary political lawmaking process to increase their chances of winning battles over policy or to insulate earlier victories from possible future changes of fortune. It is plausible to imagine that activist groups that have become restive or dissatisfied with the way elected legislators have handled questions involving voting regulations, undocumented aliens, LGBT rights, and other issues may decide to take things into their own hands by drafting measures aimed at enacting more restrictive requirements for voting. Such requirements would affect racial and ethnic minorities, the poor, and the elderly,<sup>368</sup> making life more difficult for those who have immigrated here without following the rules,<sup>369</sup> or setting back progress that has been made against discrimination on the basis of sexual orientation.

Giving meaningful scrutiny to restructurings for animus does not require identifying new classes for suspect or quasi-suspect status. It does not put a thumb on the scales of judicial review for any particular group. And it need not subject governments to a higher burden of justification for restructurings that do not affect minority or other disadvantaged groups. It simply recognizes that restructurings are a deviation from the ordinary processes by which public policy is made, with its safeguards for participation and representation, and that restructurings have a sufficient association with the oppression of political minorities that they should be examined with special care. In *Romer*, the Court characterized its review as “rational basis,” while recognizing that “[d]iscriminations of an unusual character especially suggest careful consideration.”<sup>370</sup>

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<sup>368</sup> See, e.g., *Voting Laws Roundup 2014*, BRENNAN CTR. FOR JUST. (Dec. 18, 2014), <https://www.brennancenter.org/analysis/voting-laws-roundup-2014> [<http://perma.cc/DGP4-RXG5>] (observing that “[v]oting rights continues to be a highly contentious issue in America” and that “scores of laws to make it harder to vote” have been considered in “dozens of states”).

<sup>369</sup> See, e.g., E.J. Dionne Jr., *Culture Wars, Old and New*, WASH. POST (Jan. 25, 2015), [http://www.washingtonpost.com/opinions/ej-dionne-culture-wars-old-and-new/2015/01/25/a3e40e56-a33e-11e4-9f89-561284a573f8\\_story.html](http://www.washingtonpost.com/opinions/ej-dionne-culture-wars-old-and-new/2015/01/25/a3e40e56-a33e-11e4-9f89-561284a573f8_story.html) [<http://perma.cc/B4FX-4HR3>] (arguing that “the new culture war . . . is about national identity rather than religion . . . . It focuses on which groups the United States will formally admit to residence and citizenship”).

<sup>370</sup> *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)) (alteration in original).



That sound guidance remains good law for analyzing political restructurings going forward

*B. Direct Democracy: Aspiration and Reality*

Finally, it is worth considering whether, after *Schuette*, courts must give special deference to laws, including restructurings, that are enacted through direct democracy. The answer should be no.

The definition of a restructuring used in this article—moving the place where a specific policy question is determined to a higher, more remote level of government—typically involves amending a state constitution or city charter. And since such amendments typically must be approved by voters at the ballot box either as initiatives or referenda, restructurings almost always implicate direct democracy.<sup>371</sup> All the restructurings discussed in this article were accomplished through voter approval at the ballot box.

Justice Kennedy's plurality opinion in *Schuette* includes a long passage of dictum that sings the praises of direct democracy in prose so purple that it would make the most earnest civics teacher blush.<sup>372</sup> Justice Kennedy postulated that “[o]ur constitutional system embraces . . . the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.”<sup>373</sup> With Proposal 2, he said, “Michigan voters [had] acted in concert and statewide to seek consensus and adopt a policy on a difficult subject against a historical background of race in America that has been a source of tragedy and persisting injustice.”<sup>374</sup> He continued,

Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate; or that the policies at issue remain too delicate to be resolved save by university officials or faculties, acting at some remove from immediate public scrutiny and control; or that these matters are so arcane that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate, that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all

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<sup>371</sup> Cf. Murray, *supra* note 25, at 475 (suggesting that the *Hunter/Seattle* doctrine should be confined to enactments arising out of direct democracy).

<sup>372</sup> *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1636-37 (2014) (plurality opinion).

<sup>373</sup> *Id.*

<sup>374</sup> *Id.* at 1637.

in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process.<sup>375</sup>

One of the ways that society rises above “its past mistakes” and “persisting biases,” Justice Kennedy said, is through “respectful, rational deliberation.”<sup>376</sup> Such a “process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues.”<sup>377</sup> Not only that, but

[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds. The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage. An informed public can, and must, rise above this. The idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people.<sup>378</sup>

What to make of this portion of the plurality opinion? It is properly categorized as dictum, because it did not bear on the ultimate question in *Schuette*: Did Proposal 2 violate the Equal Protection Clause? Justice Kennedy pointed to no evidence that anyone argued that the constitutionality of Proposal 2 should be decided by the courts because affirmative action was “too sensitive or too complex” to be left to voters.<sup>379</sup> Nor was Justice Kennedy apparently making a doctrinal argument or giving guidance to lower courts about their responsibilities under judicial review, since he cited no cases that would support the notion that the Court has tread more lightly in its analysis when a law results from direct democracy rather than a legislature.

None of the political restructuring cases before *Schuette* reflect such faith in direct democracy in either their rhetoric or their results. As demonstrated in Section II.B, the Court took special note that the enactments in those cases were restructurings, and this caused the Court to examine them carefully. None of the three race cases in the restructuring line—*Reitman*, *Hunter*, or *Seattle*—involved facial classifications of persons. The Court had no warrant to apply strict scrutiny until it had first considered the history, purpose, and effects of the

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<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

enactments in each case. Without careful attention to the design of the laws and the circumstances under which they were enacted, the Court plausibly could have dismissed the equal protection claims in all three cases as involving merely policy changes that had a disproportionate impact on blacks. It was only after careful examination that the Court concluded that in each of these cases the enactments at issue had been adopted with an intent to create a racial classification or to give the government's blessing to private race discrimination. In *Reitman*, the Court affirmed an opinion of the California Supreme Court that observed that "[w]hen the electorate assumes to exercise the law-making function, then the electorate is as much a state agency as any of its elected officials."<sup>380</sup> The *Hunter* Court noted that "insisting . . . that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment," and added, "Nor does the implementation of this change through popular referendum immunize it. The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed."<sup>381</sup> *Seattle* underscored that, where a political restructuring is imposed that would violate the Fourteenth Amendment, the restructuring is not "immunize[d]" by "the implementation of this change through popular referendum."<sup>382</sup> And of course *Romer*, authored by none other than Justice Kennedy, noted that the "unusual character" of Amendment 2 as a restructuring caused the Court to examine it with special care, and the Court did not shrink from concluding that an antigay state constitutional amendment approved by the voters of Colorado not only "lack[ed] a rational relationship to legitimate state interests" but "seem[ed] inexplicable by anything but animus."<sup>383</sup>

The encomium to faith in citizens' abilities to decide "sensitive" issues on "decent and rational grounds" without judicial interference seems especially hollow given that Justice Kennedy would lead a Court majority one year later in a decision, *Obergefell v. Hodges*,<sup>384</sup> that struck down bans on same-sex marriage in 13 states—all of which had been approved by voters, in the same manner as Michigan's Proposal 2, as amendments to their state constitutions. (Indeed, one of

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<sup>380</sup> *Mulkey v. Reitman*, 413 P.2d 825, 834 (Cal. 1966).

<sup>381</sup> *Hunter v. Erickson*, 393 U.S. 385, 392 (1969) (citation omitted).

<sup>382</sup> *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 476 (1982) (quoting *Hunter*, 393 U.S. at 392).

<sup>383</sup> *Romer v. Evans*, 517 U.S. 620, 632 (1996).

<sup>384</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

the cases before the Court in *Obergefell* came from Michigan.) Lower federal courts had previously struck down numerous other voter-approved state marriage-equality bans in decisions the Supreme Court let stand. Taking note of his own words about direct democracy in *Schuette*, Justice Kennedy said simply that “when the rights of persons are violated, ‘the Constitution requires redress by the courts,’ notwithstanding the more general value of democratic decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.”<sup>385</sup>

And so the *Schuette* plurality’s valentine to direct democracy should be understood to have no doctrinal significance. It boils down to a teaching that citizens debating and voting on public issues is a nice thing, unless in doing so they violate the Constitution. There is nothing new in that teaching. It remains true that the Court “has failed to provide a coherent or even internally consistent analysis of how courts ought to go about reviewing direct democracy measures affecting minority interests and rights.”<sup>386</sup> A substantial literature on direct democracy documents that it is frequently harmful to minority rights.<sup>387</sup> What we actually know about direct democracy should only deepen concern about its potential to run roughshod over the rights of minority groups.

For example, Justice Kennedy postulated an “informed public.” But research shows that most voters participating in initiatives or referenda lack the necessary knowledge to make an informed decision. As Ilya Somin writes in a recent book on democracy and political ignorance, “Extensive evidence suggests that most Americans have little political knowledge. That ignorance covers knowledge of specific issues, knowledge of political leaders and parties, and knowledge of political institutions.”<sup>388</sup> Indeed, Somin suggests that the “sheer depth” of Americans’ political ignorance, as well as “the pervasiveness of ignorance about

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<sup>385</sup> *Id.* at 2605 (quoting *Schuette*, 134 S. Ct. at 1637).

<sup>386</sup> Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities’ Democratic Citizenship*, 60 OHIO ST. L.J. 399, 405 (1999).

<sup>387</sup> See, e.g., *id.*; Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 257 (1997); Hans A. Linde, *When Initiative Lawmaking Is Not “Republican Government”*: *The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993); Eule, *supra* note 47; Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978).

<sup>388</sup> ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* 36 (2013).

a wide range of political issues,” would be “shocking” to anyone who has not bothered to look at the research.<sup>389</sup>

If voters lack necessary information to make informed, intelligent decisions on questions of government policy, they become easy targets for the demagogues and message-manipulators who have become features of modern American direct democracy. As Julian Eule observed, “[p]roponents and opponents of . . . ballot measures do little to assist voter understanding. Indeed, quite to the contrary, the motivating factor behind their efforts often seems to be to confuse the voter about the significance of a ‘yes’ or ‘no’ vote. Illustrations of deceptive advertising and sloganeering abound.”<sup>390</sup>

In initiative campaigns, there is seldom any serious, structured examination of a law’s potential consequences. As the authors of a study of Colorado’s Amendment 2 (the state constitutional provision struck down in *Romer*) observed, voters “are more frequently swayed by emotional rhetoric and sound bites.”<sup>391</sup> Thus, the proponents of Amendment 2 “could reasonably expect that voters going into the booth . . . would make their decisions based not on Amendment 2’s text but rather on the questions made popular during the campaign, such as whether one is ‘for or against’ homosexuality or whether one opposes ‘special rights.’”<sup>392</sup>

Indeed, the proponents of political restructurings understand that direct democracy tends to entrench existing majority positions on matters of public policy and thus places political minorities at an even greater disadvantage. The proponents of restructurings understand that such dynamics work to their advantage; indeed, exploiting such dynamics is typically a motivating rationale behind a restructuring. The proponents of Amendment 2 forthrightly acknowledged in state court proceedings that they chose to use the initiative process because it would amplify the power of the political majority that they believed was opposed to gay/lesbian civil rights in Colorado, with the aim of depriving gays and lesbians of the gains they had made up until that point by working through the normal legislative lawmaking process. As described by the

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<sup>389</sup> *Id.* at 17; see also Paul Krugman, *Hating Good Government*, N.Y. TIMES (Jan. 18, 2015), <http://www.nytimes.com/2015/01/19/opinion/paul-krugman-hating-good-government.html> [<http://perma.cc/57LZ-AKMA>] (observing that “[o]n issues that range from monetary policy to the control of infectious disease, a big chunk of America’s body politic holds views that are completely at odds with, and completely unmovable by, actual experience. . . . [T]he fact is that we’re living in a political era in which facts don’t matter”).

<sup>390</sup> Eule, *supra* note 47, at 1517.

<sup>391</sup> KEEN & GOLDBERG, *supra* note 207, at 107.

<sup>392</sup> *Id.*

authors of a study of Amendment 2's history, the amendment's proponents "calculated that, by seeking out voters directly, they had a greater likelihood of success than if they went to elected legislators who they believed were subject to the influence of gay civil rights leaders."<sup>393</sup> The proponents of Amendment 2 regarded the lobbying of gay/lesbian leaders at the legislature—the quintessential stuff of the ordinary democratic lawmaking process—as illegitimate "aggression" by "gay militants."<sup>394</sup> As Will Perkins, the cofounder of Colorado for Family Values, the organization that was the primary proponent of Amendment 2, testified at trial,

[W]e wanted to use the initiative process instead of trying to go through the legislature [because] we were very aware of the fact of the very strong political influence that the homosexual proponents had. And it's much easier for them to influence a small group of legislators as opposed to having everyone have an opportunity to express their opinion on the issue.<sup>395</sup>

The bans on same-sex marriage that had been written into state constitutions between 1998 and 2012 are another example of restructurings that were driven by invidious purposes.<sup>396</sup> These measures were not intended simply to enact marriage discrimination, but rather to freeze it in place indefinitely, to permanently disadvantage the group seeking to marry, to effectively shut down the legislative and legal debate over marriage equality just as it was getting off the ground, and to insulate the question from future legislative reconsideration or state judicial review.

Policing the excesses of direct democracy does not require that courts ascertain the subjective motives—what was actually going on in the hearts and minds—of individual voters who voted yes or no on a particular ballot issue. In *Reitman*, *Hunter*, *Seattle*, and *Romer*, the Court did not purport to read the minds of thousands or millions of individual voters. What it *did* do was attempt to make sense of the action those voters had taken collectively. In *Rietman*, *Hunter*, and *Seattle*, the Court was persuaded that the challenged measures all drew lines in a way that objectively made them racial classifications. And in *Romer*, the Court concluded that Amendment 2 had been motivated by "animus"—that is, it had the purpose of

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<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at 109.

<sup>395</sup> *Id.* at 107 (second alteration in original) (quoting Will Perkins, CFV cofounder).

<sup>396</sup> See Sanders, *supra* note 46 (arguing that state constitutional amendments banning same-sex marriage are restructurings that should receive heightened scrutiny).

willfully inflicting an injury on gays and lesbians—because of the incoherence between the amendment’s purported justifications and its actual operation and effects. The amendment imposed sweeping and unusual legal disabilities on gays and lesbians that simply could not be justified by what the state claimed as its legitimate interests.

## CONCLUSION

Political restructurings can appear benign and neutral on the surface, but experience shows that they are sometimes motivated by constitutionally improper purposes or intentions. When a majority uses a restructuring to flex its political muscles and permanently take away a minority group’s rights or impose a meaningful legal or political disadvantage, the matter calls for alert and sensitive judicial scrutiny. Although it effectively announced the demise of the *Hunter/Seattle* doctrine, *Schuette* did not alter this principle. Although invidious discrimination may not, in the end, be found, courts should not abdicate their responsibility to be certain.