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MINORITY DISCRIMINATION THROUGH POPULAR VOTE IN THE LAND USE PROCESS

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I. Introduction

Voter participation in the land use process can discriminate against minorities. Assume a city council approves an amendment to the zoning ordinance that authorizes an affordable housing project. The amendment attracts opposition because the project will be open to minorities. Voters who oppose the project place a referendum on the ballot, an election is held, and the amendment is rejected by popular vote.[1] Similar problems arise when voters adopt a constitutional or city charter amendment that bars effective action to prevent minority discrimination. Assume a city adopts an inclusionary housing program that requires developers to provide affordable housing and prohibits minority discrimination. Voters place an initiative on the ballot that would amend the city charter to prohibit inclusionary housing programs, an election is held, and they adopt the charter amendment.

Initiatives and referenda like these are facially neutral but raise minority discrimination problems,[2] which the Supreme Court considered in a series of cases. Its decisions are mixed, and it rejected initiatives that had racially discriminatory impacts in some cases. The constitutional basis for these cases was not always clear, and some preceded the critical holding in *Washington v. Davis*[3] that proof of racial discrimination under the Fourteenth Amendment requires proof of discriminatory intent. The Court changed direction in a recent case, where a plurality upheld an initiative that prohibited affirmative action in higher education.

Commentary suggests that cases holding initiatives unconstitutional applied a political process doctrine based on a famous footnote in *U.S. v. Carolene Products Co.*[4] In that footnote, Justice Stone asked "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[5] The footnote's

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application to the land use process is clear. In the examples at the beginning of this article, a referendum or an initiative rejected a decision made by legislative representatives, and curtailed a political process used to protect minorities. Rezoning for housing available to minority groups was displaced by popular referendum, and an initiative rejected a legislative program that benefited minorities.

The political process doctrine has two prongs.[6] The first prong requires that an issue that raises a political process problem must be minority sensitive "in that it singles out for special treatment issues that are particularly associated with minority interests."[7] The second prong requires a showing that voters removed a decision associated with minority interests to a higher level of government, where it was insulated from change except through change at the higher level.[8] A mere repeal of protective legislative action does not satisfy this prong. There must be repeal plus a modification of the normal political process for making political decisions. An initiative can accomplish this change.

Supreme Court cases that rejected initiatives because they were racially discriminatory did not explicitly embrace or explain a political process theory, but acceptance of this theory is implicit. A recent plurality decision by the Supreme Court, *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary*,[9] damaged these early decisions, damaged judicial protection against racial discrimination by popular vote, and rejected the political process theory. We begin with Supreme Court cases, discussed in *Schuette*, that invalidated racially discriminatory initiatives. We then discuss *Schuette*, and what it means for the future of racial plebiscites[10] as they affect the land use process. We then discuss two Supreme Court cases not discussed in *Schuette* where the Court upheld racially discriminatory initiatives, and what these cases mean for the *Schuette* decision.

II. Cases Holding Initiatives Discriminatory

A. *REITMAN V. MULKEY*

The Supreme Court's protective legacy began with *Reitman v. Mulkey*.[11] *Reitman* considered an amendment to the California state constitution, adopted by initiative, that allowed "absolute discretion" by a property owner in selling or leasing property.[12] The amendment effectively repealed a state statute that prohibited racial discrimination in the sale or leasing of property.[13] The California Supreme Court held the amendment unconstitutional, and the Supreme Court affirmed.

Justice White's majority opinion considered two issues. First, he tracked the California Supreme Court's consideration of the "immediate objective" and "ultimate effect" of the constitutional amendment, and the "historical context and the conditions existing prior to its enactment."[14] The California Supreme Court's opinion deserved "careful consideration," he said, because its line of inquiry was correct and correctly interpreted the questionable provision of the state constitution.[15] The California court held

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the immediate objective of the constitutional amendment was to overturn the relevant background of anti-discrimination statutes and to place these statutes beyond reinstatement through the normal legislative process.[16] The ultimate effect of the constitutional amendment was broader than a mere repeal of the anti-discrimination statutes because it unconstitutionally created a private right to discriminate authorized by the state.[17]

Second, the Court considered whether the California Supreme Court correctly held the constitutional amendment made the state "significantly involved in private discriminations."[18] Justice White reviewed earlier cases and held that none of them were squarely on point, but he reasoned that the amendment "was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State."[19]

Justice White's opinion has shortcomings. For example, he relied on the California Supreme Court's conclusion that the constitutional amendment had an invidiously discriminatory effect and was not a race-neutral statutory repeal, and he did not reexamine this issue.[20] Neither was the opinion clear that this was a case of a political restructuring[21] that implicated the political process doctrine.

Justice White provided some guidance on these issues. First, he accepted the California court's reasoning by holding that the Court's cases demonstrated the "necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations."[22] This inquiry examines the amendment's " 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.' "[23] This is impact analysis. Second, he hints at political restructuring when he states: "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."[24]

B. *HUNTER V. ERICKSON*

Reitman was a constitutional amendment that authorized discrimination. *Hunter v. Erickson*[25] came next and considered a city charter amendment. A plaintiff brought suit under an ordinance that required equal opportunity in housing, based on a complaint that she suffered housing discrimination.[26] Voters adopted a city charter amendment by initiative that prohibited any ordinance regulating the use or disposal of property based on "race, color, religion, national origin or ancestry," unless a majority of the city's voters approved the ordinance.[27]

The Ohio Supreme Court upheld the city charter amendment but the Supreme Court reversed. In an opinion again written by Justice White, it applied strict scrutiny because the charter amendment adopted what the Court called a racial "classification,"[28] and because the city's justifications were not compelling.[29]

Justice White began by noting the charter amendment[30] was more than a repeal of an ordinance because it required a successful referendum in the future on any similar ordinance.[31] The Court found it "obvious[]" that the charter amendment made adopting fair housing ordinances more difficult.[32] Using a series of examples, it held there is impermissible classification when those who seek to prohibit "other discriminations or who would otherwise regulate" the relevant "market in their favor" face a restrictive burden in attempting to pass protective legislation.[33]

Next, the Court explained the "reality" that the "majority needs no protection against discrimination" and would not face meaningful obstacles in complying with the charter amendment; the burden of the amendment necessarily fell on minorities.[34] This "special burden[] on racial minorities within the governmental process" was no more permissible than "denying them the vote."[35] Justice White quoted from the preamble to the housing ordinance to explain its historical background, that minorities in the city lived in substandard housing because of discrimination in the marketplace.[36]

C. *WASHINGTON V. SEATTLE SCHOOL DIST. NO. 1*

Both of these cases considered housing discrimination that occurred because initiatives adopted by popular vote rejected affirmative legislative action. *Washington v. Seattle School Dist. No. 1*[37] differed. In that case voters adopted a constitutional amendment by initiative that prohibited busing for desegregation purposes to schools further away than the second closest school to a student.[38] Busing for all other purposes was allowed through numerous exceptions.[39] The initiative prohibited programs adopted by school districts that required school desegregation through busing. Three school districts sued to defend their busing programs.[40] The court of appeals held the constitutional amendment violated the Equal Protection Clause because it created a racial classification by prohibiting only busing for desegregation.[41] The Supreme Court affirmed in an opinion by Justice Blackmun.

The *Seattle* opinion addressed the political restructuring[42] issue more explicitly than either *Reitman* or *Hunter*. As the Court explained in *Seattle*, *Hunter* created a "simple but central principle" that where a decision-making process places obstacles in the path of racial minorities that does not bar others seeking similar decisions, the Equal Protection Clause is violated.[43] Though not explicitly applying political process doctrine, the *Seattle* decision endorsed it by holding that removal of decision-making to a "new and remote level" of government violates the Fourteenth Amendment.[44]

First, the Court held it was "beyond reasonable dispute" that "the initiative was enacted because of, not merely in spite of, its adverse effects upon busing for integration"[45] as it affected only busing for integration. The Court acknowledged that at least some members of the minority community likely supported both sides of the initiative, but the amendment had a racial impact because integrative busing benefited and was designed to benefit the minority.[46] Second, the Court held the amendment's reallocation of decision-making authority unconstitutional even though the state had and maintained plenary control over education. Quoting *Hunter*, the Court then held that: "[I]nsisting that a State may distribute legislative power as it desires . . . [furnishes] no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it."[47] Third, the Court held the constitutional amendment was more than a mere repeal of "desegregation or antidiscrimination laws"[48] because it placed "decision-making authority over the question at a new and remote level of government."[49]

Finally, the Court explained that the teachings of *Hunter* survived the end of disparate impact analysis under the Fourteenth Amendment as required by *Washington v. Davis*.[50] The Court compared political restructuring based on a racial classifications with other racial classifications that are inherently suspect despite their motive.[51] As the Court noted, "when the political process or the decision-making mechanism used to address racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly 'rests on "distinctions based on race."' "[52] This statement indicates it is still necessary, even after *Washington v. Davis* and as *Reitman* held, to investigate the "potential impact of official action"[53] because there is no other way to decide when the legislation in question is racially conscious. As the Court pointed out, the statewide electorate reallocated decision-making authority that made it more difficult for minorities to achieve legislation their interest.[54]

III. The *Schuette* Decision

These were the cases the Court considered when it decided *Schuette*. The Court there dealt with an amendment to the Michigan state Constitution, approved by voter initiative, that prohibited racial preferences for admission to state colleges and universities.[55] Although the

district court upheld the amendment, a Sixth Circuit panel held, relying on the political process doctrine, that it violated the Equal Protection clause of the federal constitution, and the Court of Appeals upheld the panel sitting *en banc*.[56]

Justice Kennedy's plurality opinion reversed. He restricted earlier decisions by narrowing *Reitman*, *Hunter*, and *Seattle*, arguing there was intentional discrimination in these cases that inflicted racial injuries not unconstitutional racial classifications that damaged the political process.[57] He first identified *Reitman* as the "proper beginning point" for a discussion of relevant Supreme Court authority.[58] He lamented that Justice Harlan's dissent in *Reitman* "did not prevail against the majority's conclusion that the state action in question encouraged discrimination, causing real and specific injury."[59] He interpreted *Reitman* as holding the amendment was held unconstitutional it inflicted injuries suffered "on account of race" to the plaintiffs, and was not a change in the political process.[60] This interpretation is not supported by the *Reitman* decision.

Next, Justice Kennedy turned to *Hunter* and described it as relying on the "invidious discrimination" that resulted from the city charter amendment that required an affirmative vote on housing discrimination ordinances. As he did with *Reitman*, Justice Kennedy made *Hunter* a case about the infliction of particularized racial injury,[61] not political process. This interpretation is not supported by the *Hunter* decision.

Justice Kennedy also narrowed *Seattle*. Though he began by quoting language from *Seattle* that "[t]he Court therefore found that the initiative had 'explicitly us[ed] the racial nature of a decision to determine the decision-making process,' " he claimed incorrectly that the decision was really about the initiative's "serious risk, if not purpose, of causing specific injuries on account of race, just as in [*Reitman*] and *Hunter*."[62]

Justice Kennedy then considered the political process doctrine and explained what he thought was a problem with that doctrine as applied by the Sixth Circuit. He argued a court applying political process doctrine must first determine whether a policy is in a racial minority's interest, then define the minority group, and then determine whether the minority group thinks alike about the issue.[63] This judicial inquiry, he stated, would "not only [] be undertaken with no clear legal standards or accepted sources to guide judicial decision but also it would result in, or at least impose a high risk of, inquiries and categories dependent upon demeaning stereotypes, classifications of questionable constitutionality on their own terms."[64] The use of racial considerations by courts, he held, would necessarily encourage racial divisions instead of discouraging them.[65] This holding paints a hypothetical that is not compelled by the political process doctrine.

Justice Kennedy concluded there was no specific injury of the type that occurred in *Reitman*, *Hunter*, and *Seattle*, although race "undoubted[ly]" was a subject of the Michigan initiative.[66] He ended with long dicta extolling the positive attributes of direct democracy.[67] Do these comments mean that initiatives and referenda have a preferred status under the constitution?[68]

Justice Kennedy did not discuss the political process doctrine,[69] but the concurring[70] and dissenting opinions did. Two of the conservatives, Justice Scalia joined by Justice Thomas, rejected it. Justice Scalia agreed with the plurality that the doctrine required unseemly racial classifications to determine whether a policy was in minority interests.[71] He took issue with the second prong of *Hunter* and *Seattle*, arguing that placing decisions at a higher and more onerous level of government is a plenary state power and did not violate the Fourteenth Amendment.[72] Finally, Justice Scalia held the political process doctrine did not allow a policy to be struck simply because it had a disparate impact on a minority group.[73] These concurrences, when joined with the plurality, mean a majority of the Court did

not believe the political process doctrine is a key element in cases where the constitutionality of initiatives is at issue.

Justice Breyer's concurrence took a different view. He acknowledged the political process doctrine as well as its importance, but held it did not apply in this case. Calling the principle represented by *Hunter* and *Seattle* "important," Justice Breyer described it as holding that "an individual's ability to participate meaningfully in the political process should be independent of his race. Although racial minorities, like other political minorities, will not always succeed at the polls, they must have the same opportunity as others to secure through the ballot box policies that reflect their preferences."[74] However, he believed the second prong of the political process doctrine applied only when voters removed a decision from a legislative body.[75] In *Schuette*, Justice Breyer believed this problem did not occur because the affirmative action program was an administrative decision made by unelected university officials, not a legislative decision made by politically accountable officials.[76]

In a lengthy dissent, Justice Sotomayor, joined by Justice Ginsburg, stoutly defended the political process doctrine and explained why it should have decided the case. She began by situating *Hunter* and *Seattle* simply as recent cases in a long line of cases, such as voting rights cases, that protect the ability of racial minorities to participate fully in the political process.[77] She then explained the political process doctrine as expressed in *Hunter* and *Seattle* as a two-pronged test:

> [G]overnmental action deprives minority groups of equal protection when it (1) has a racial focus, targeting a policy or program that "inures primarily to the benefit of the minority" . . . and (2) alters the political process in a manner that uniquely burdens racial minorities' ability to achieve their goals through that process.

She further held that this case neatly satisfied the two prongs of the doctrine.[78] First, she claimed the constitutional amendment had a racial focus and compared the Michigan affirmative action programs to desegregation efforts that benefit minorities, noting that affirmative action programs "are designed to increase minority access to institutions of higher learning."[79] Second, the Michigan amendment altered the political process and burdened minorities by removing admission decisions from politically accountable boards at Michigan's universities, and by requiring a change in admissions through constitutional amendment.[80]

It is difficult to determine what *Schuette* means for political process doctrine because it was a plurality opinion, and the composition of the Court has changed. Justices Gorsuch and Kavanaugh replaced Justices Scalia and Kennedy, and they would probably agree with Justice Kennedy.[81] Justice Kagan, who recused herself from *Schuette*, would likely accept the political process doctrine. Chief Justice Robert's earlier comments on racial discrimination[82] and his concurrence in *Schuette* may indicate rejection of the political process doctrine but the plurality opinion did not explicitly consider it, and he may be willing to apply it in a different case.

IV. Initiative Cases the *Schuette* Court Ignored

The *Schuette* plurality suffers from a fatal flaw because it did not consider two earlier Supreme Court cases that upheld constitutional initiatives against racial discrimination claims. The first case is *Crawford v. Board of Education*.[83] In *Crawford*, a California state court interpreted the state constitution to uphold mandatory desegregation efforts adopted by the Los Angeles school district to correct de facto segregation. This holding was inconsistent with Supreme Court doctrine.[84] In response, voters adopted a constitutional amendment that prohibited courts from remedying de facto segregation with mandatory school reassignment of pupils.[85] A state district court held the amendment was ineffective because the segregation covered by that order met the federal constitutional requirement for de jure segregation.[86] The state Court of Appeals reversed because there was no violation of

the federal constitution through intentional segregation, the state was not obligated to retain a greater remedy in state law than was provided by the federal constitution, and the amendment was not adopted for a discriminatory purpose.[87] After the California Supreme Court declined to hear the case,[88] the Supreme Court upheld the constitutional amendment.

A. *CRAWFORD V. BOARD OF EDUCATION*

The *Crawford* Court, an 8-1 decision in an opinion by Justice Powell, was concerned primarily with the ability of states to backtrack from protections they put in place in addition to those required by the federal constitution.[89] It held the constitutional amendment was merely a permissible repeal of policy, and did not remove a political issue to a new level of governmental decision-making, as in *Reitman* and *Hunter*.[90] Justice Powell also held the amendment did not distort the political process because it merely removed the ability to grant a particular type of remedy from the courts.[91]

Nor were there other reasons to strike the amendment. The Court explicitly stated the amendment did not create or use a racial classification.[92] No one was treated differently according to his or her race, and the benefits of neighborhood schooling—the claimed purpose of the amendment—accrued regardless of race.[93] The Court also held there was no impermissible invidious motive for the amendment because voters may have been motivated by the benefits of neighborhood schooling.[94] The amendment was constitutional absent a racial classification, something more than a mere repeal, or evidence of an invidious motive.[95]

Crawford is the same case as *Seattle*,[96] so how did the Court reach a different result? There are two reasons. First, the Court held the amendment was not a racial classification,[97] while the *Seattle* Court held the amendment classified racially.[98] The decision in *Seattle* may have been influenced by the numerous exceptions to the ban on busing that made it clear that only busing for racial purposes was prohibited in the Seattle amendment.[99] Second, the amendment in *Crawford* was political control over the judiciary rather than political control over another political entity. It is hard to see why these distinctions mattered.

Justice Blackmun concurred in *Crawford*. He recognized that "[t]he Court always has recognized that distortions of the political process have special implications for attempts to achieve equal protection of the laws."[100] But he explained that political control over the judiciary is significantly different from political control over another political entity.[101] State courts do not create the rights they enforce, he said. Justice Marshall dissented in a long and emphatic opinion. For him, the *Seattle* decision controlled this case, because "the rules of the game have been significantly changed for those attempting to vindicate this state constitutional right."[102]

B. *JAMES V. VALTIERRA*

The Court upheld another racially discriminatory initiative adopted by popular vote in *James v. Valtierra*.[103] There the Court upheld a California state constitutional provision, adopted by initiative, that required a majority vote by referendum before any low-income housing project could be "developed, constructed, or acquired in any manner by a state public body."[104] The racial impact is clear. Low-income housing includes public housing, which is open to minorities, and minorities were a substantial if not a majority population in public housing in California. A three-judge panel held the amendment unconstitutional based on *Hunter*, but the Supreme Court reversed.[105]

In a comparatively brief opinion by Justice Black, the Court held the constitutional provision in *Valtierra*, unlike in *Hunter*, did not use a racial classification. First, the charter amendment in *Hunter* applied to ordinances regulating housing based on race, making the racial classification much clearer.[106] Second, though Justice Black did not go deeply into the history of low-

income housing in California, he noted the record "would not support any claim that a law seemingly neutral on its face [was] in fact aimed at a racial minority."[107]

Justice Black's opinion included a strong endorsement of referenda. He noted the long and established history of referenda in California, and in a much-quoted phrase held that "[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."[108] No group was singled out to face roadblocks to achieving political gains, he stated, because mandatory referenda were required on other issues unrelated to fair housing.[109] This holding did not apply the disparate impact analysis required in earlier cases. Justice Marshall, joined by Justices Blackmun and Brennan, dissented and would have found that the initiative discriminated on the basis of poverty.

C. *ROMER V. EVANS*

This story cannot end without a discussion of *Romer v. Evans*,[110] where the Court struck down a Colorado constitutional amendment that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination. *Schuette* ignored this case, perhaps because sexual orientation at that time was not a clearly protected constitutional class like minority status, so the Court may have considered the case irrelevant. It is certainly relevant today.

Justice Kennedy wrote the opinion in *Romer*. It is short on explanation and did not discuss the political process doctrine, but one objection he made applies to the amendments in *Crawford* and *Valtierra*. He stated the Colorado constitutional amendment "operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government."[111] In *Crawford* the constitutional amendment prohibited affirmative action at every level of higher education. In *Valtierra*, the constitutional amendment adopted a barrier to low-income housing. The Court got it right in an earlier decision: "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."[112]

V. Conclusion: The Political Process Doctrine Moving Forward

The political process doctrine protects minorities against majority oppression, which can occur when a constitutional amendment adopted by initiative blocks minority recourse to protective action. The early trio of cases beginning with *Reitman* did not explicitly adopt the political process doctrine and were short on analysis, but reached correct results. The Court's decision in *Schuette* and its earlier decisions in *Valtierra* and *Crawford* approved constitutional change that crippled minority political participation.

Justice Sotomayor correctly held that the political process doctrine prohibits governmental change that "alters the political process in a manner that uniquely burdens racial minorities' ability to achieve their goals through that process." Much of the *Seattle* case turns on this idea. The idea that minorities must suffer a "burden" in order to be protected was invented in *Schuette*, is unsupported in concept and is contrary to precedent. A majority of the Court rejected the political process doctrine in *Schuette,* but it is available for revival when change in the political process opens minorities to majority oppression.

ENDNOTES:

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[1]*See U.S. v. City of Birmingham, Mich.*, 538 F. Supp. 819, 822-827 (E.D. Mich. 1982), aff'd as modified, 727 F.2d 560 (6th Cir. 1984) (finding violation of federal Fair Housing Act where city's

actions, including an advisory referendum, interfered with a senior housing project that would also be open to low-income and minority residents); *see also* Louis Hansen, *Fierce 7-year NIMBY Battle in Palo Alto Reaches a Conclusion*, The Mercury News (June 23, 2020 6:30 a.m.), https://www.mercurynews.com/2020/06/23/fierce-7-year-nimby-battle-in-palo-alto-reaches-a-luxury-conclusion/ (demonstrating the lasting power of referenda over the political environment, with the mayor indicating "city staff and leaders became more conservative in approving projects" following the referendum).

[2]Joseph Z. Traub, *Discrimination in Plebiscites: Discursive Irrationality*, 6 Temple Political & Civil Rights L. Rev. 99, 114 (Fall 1996-Spring 1997) (critiquing referenda and initiatives because they "produce illegitimate outcomes not just because they fail to protect the rights of minorities, but because the discursive process wherein plebiscite proposals are deliberated on is almost completely devoid of any assurance of rationality or fairness"); Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 Wash. L. Rev. 1 (1978) (explaining the racial impact of initiatives and referenda, and arguing that courts should closely scrutinize these plebiscites because they limit participation in the political process by minorities and the socioeconomically disadvantaged).

[3]*Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597, 12 Fair Empl. Prac. Cas. (BNA) 1415, 11 Empl. Prac. Dec. (CCH) P 10958 (1976).

[4]*U.S. v. Carolene Products Co.*, 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938) (upholding federal statute prohibiting shipment of skimmed milk imitation).

[5]*U.S. v. Carolene Products Co.*, 304 U.S. 144, 153 n.4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938). John Hart Ely provided the most elegant defense of the political process doctrine in his book, Democracy and Distrust 76-77, 100-102 (1980).

[6]Vikram D. Amar and Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 Hastings Const. L.Q., 1019, 1026 (1996) ("Throughout this trilogy, the Court has applied (with varying degrees of clarity) a two-pronged test.").

[7]Amar and Caminker, *supra* note 6, at 1026.

[8]Amar and Caminker, *supra* note 6, at 1026.

[9]*Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)*, 572 U.S. 291, 134 S. Ct. 1623, 188 L. Ed. 2d 613, 303 Ed. Law Rep. 30, 97 Empl. Prac. Dec. (CCH) P 45054 (2014).

[10]Plebiscites are votes by the public, including initiatives and referenda. An initiative places a new legislative action on the ballot for a popular vote, while a referendum is used to reconsider by popular vote a legislative act that was previously passed by a legislative body.

[11]*Reitman v. Mulkey*, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967).

[12]*Reitman,* 387 U.S. at 369, 371.

[13]*Reitman*, 387 U.S. at 376.

[14]*Reitman*, 387 U.S. at 373.

[15]*Reitman*, 387 U.S. at 374.

[16]*Reitman*, 387 U.S. at 374.

[17]*Reitman*, 387 U.S. at 376.

[18]*Reitman*, 387 U.S. at 378.

[19]*Reitman*, 387 U.S. at 381.

[20]*See* Steve Sanders, *Race, Restructurings, and Equal Protection Doctrine through the Lens of* Schuette v. BAMN, 81 Brooklyn L. Rev. 1393, 1410 (Summer 2016) ("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. . . . 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.").

[21]*See* Sanders, *supra* note 20, at 1406 ("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.").

[22]*Reitman*, 387 U.S. at 380.

[23]*Reitman*, 387 U.S. at 373.

[24]*Reitman*, 387 U.S. at 377.

[25]*Hunter v. Erickson*, 393 U.S. 385, 89 S. Ct. 557, 21 L. Ed. 2d 616 (1969).

[26]*Hunter*, 393 U.S. at 386-87.

[27]*Hunter*, 393 U.S. at 386.

[28]*Hunter*, 393 U.S. at 389.

[29]*Hunter*, 393 U.S. at 392 ("We are unimpressed with any of Akron's justifications for its discrimination.").

[30]*See* Sanders, *supra* note 20, at 1411 ("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. But they chose to go further by forbidding any such future legislation.").

[31]*Hunter*, 393 U.S. at 389-90.

[32]*Hunter*, 393 U.S. at 390.

[33]*Hunter*, 393 U.S. at 391.

[34]*Hunter*, 393 U.S. at 391.

[35]*Hunter*, 393 U.S. at 391.

[36]*Hunter*, 393 U.S. at 391.

[37]*Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 102 S. Ct. 3187, 73 L. Ed. 2d 896, 5 Ed. Law Rep. 58 (1982).

[38]*Seattle*, 458 U.S. at 462-63.

[39]*Seattle*, 458 U.S. at 462-63.

[40]*Seattle*, 458 U.S. at 464.

[41]*Seattle*, 458 U.S. at 466.

[42]*See* Sanders, *supra* note 20, at 1415 ("In Washington v. Seattle School Dist. No. 1, 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.' 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.' The restructuring was more than a '"mere repeal" of a desegregation law by the political entity that created it.' Instead, Initiative 350 made substantially more difficult 'all future attempts to integrate Washington schools in districts throughout the State, by lodging decision-making authority over the question at a new and remote level of government'—the classic definition of a political restructuring.").

[43]*Seattle*, 458 U.S. at 469-70.

[44]*Seattle*, 458 U.S. at 483.

[45]*Seattle*, 458 U.S. at 471 (internal quotations omitted). It was no excuse that the amendment had no racial overtones.

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

[47]*Seattle*, 458 U.S. at 476 (quoting *Hunter v. Erickson*, 393 U.S. 385, 392, 89 S. Ct. 557, 21 L. Ed. 2d 616 (1969)) (alterations in original).

[48]*Seattle*, 458 U.S. at 483.

[49]*Seattle*, 458 U.S. at 483.

[50]*Seattle*, 458 U.S. at 484-86.

[51]*Seattle*, 458 U.S. at 485.

[52]*Seattle*, 458 U.S. at 485 (quoting *James v. Valtierra*, 402 U.S. 137, 141, 91 S. Ct. 1331, 28 L. Ed. 2d 678 (1971) (quoting *Hunter*, 393 U.S. at 391)).

[53]*Reitman*, 387 U.S. at 369, 380.

[54]*Seattle*, 458 U.S. at 470.

[55]*Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)*, 572 U.S. 291, 298-99, 134 S. Ct. 1623, 188 L. Ed. 2d 613, 303 Ed. Law Rep. 30, 97 Empl. Prac. Dec. (CCH) P 45054 (2014). Racial preferences in admission are an example of affirmative action.

[56]*Schuette*, 572 U.S. at 300.

[57]*Schuette*, 572 U.S. at 302-306; *see also Schuette*, 572 U.S. at 357-58 (Sotomayor, J., dissenting) ("According to the plurality, the *Hunter* and *Seattle* Courts were not concerned with efforts to reconfigure the political process to the detriment of racial minorities; rather, those cases invalidated governmental actions merely because they reflected an invidious purpose to discriminate. This is not a tenable reading of those cases."); Sanders, *supra* note 20, at 1429-32 ("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."); Kristen Barnes, *Breaking the Cycle: Countering Voter Initiatives and the Underrepresentation of Racial Minorities in the Political Process*, 12 DUKE J. CONST. L. & PUB. POLICY 123, 145 (Spring 2017) ("*Schuette* grouped together *Reitman*, *Hunter*, and *Seattle* in support of the proposition that only where the state can be viewed as engaging in the constitutionally impermissible discriminatory action of 'inflicting injury by reason of race' (e.g. such as enacting or enforcing laws that prohibit certain races from being served in public restaurants) can the Court strike down the challenged legal measure under the Fourteenth Amendment.").

[58]*Schuette*, 572 U.S. at 302.

[59]*Schuette*, 572 U.S. at 303.

[60]*Schuette*, 572 U.S. at 302-03.

[61]*Schuette*, 572 U.S. at 304.

[62]*Schuette*, 572 U.S. at 305.

[63]*Schuette*, 572 U.S. at 308.

[64]*Schuette*, 572 U.S. at 308.

[65]*Schuette*, 572 U.S. at 309.

[66]*Schuette*, 572 U.S. at 310.

[67]*Schuette*, 572 U.S. at 311-14; *see* Sanders, *supra* note 20, at 1456-57 ("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.")

[68]*See* Sanders, *supra* note 20, at 1457-59 ("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.").

[69]*See* Sanders, *supra* note 20, at 1451-52 ("Indeed, [the *Schuette* plurality opinion] did not use the term 'political process' (or even the word 'process') at all, and it used the word 'restructuring' only once, in reference to the events in *Hunter*.").

[70]Chief Justice Roberts's briefly concurred in an opinion not relevant to this discussion.

[71]*Schuette*, 572 U.S. at 322-23 (Scalia, J., concurring in the judgement).

[72]*Schuette*, 572 U.S. at 327-29 (Scalia, J., concurring in the judgement).

[73]*Schuette*, 572 U.S. at 330-32 (Scalia, J., concurring in the judgment); *see* Amar and Caminker, *supra* note 6, at 1034-35 (discussing the "Court's articulated *Hunter* framework—with its concern for effect rather than intent"); *cf.* Sanders, *supra* note 20, at 1452 (describing the political process doctrine inquiry as carefully searching for unstated invidious intent).

[74]*Schuette*, 572 U.S. at 334-35 (Breyer, J., concurring in the judgment).

[75]*Schuette*, 572 U.S. at 335 (Breyer, J., concurring in the judgment).

[76]*Schuette*, 572 U.S. at 335-36 (Breyer, J., concurring in the judgment).

[77]*Schuette*, 572 U.S. at 342-46 (Sotomayor, J., dissenting).

[78]*Schuette*, 572 U.S. at 346-57 (Sotomayor, J., dissenting). After responding to the plurality's and Justice Breyer's opposition to that outcome of the case, the dissent explains why the case should be resolved for respondents as a matter of "first principles." The dissent then responds to criticisms of the political process doctrine from the plurality and Justice Scalia's concurrence. Finally, the dissent concludes with an analysis of affirmative action programs.

[79]*Schuette*, 572 U.S. at 351-52 (Sotomayor, J., dissenting).

[80]*Schuette*, 572 U.S. at 353-57 (Sotomayor, J., dissenting).

[81]*See* Alexis M. Johnson, *Intersectionality Squared: Intrastate Minimum Wage Preemption & Schuette's Second-Class Citizens*, 37 COLUM. J. GENDER & L. 36, 63 n.155 (2018) (describing Justice Gorsuch as Scalia-like); Jeremy Kidd, *New Metrics and the Politics of Judicial Selection*, 70 ALA. L. REV. 785, 803 (2019) (ranking Justice Kavanaugh just below Justice Gorsuch for similarity to Justice Scalia).

[82]*See Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748, 127 S. Ct. 2738, 168 L. Ed. 2d 508, 220 Ed. Law Rep. 84 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race").

[83]*Crawford v. Board of Educ. of City of Los Angeles*, 458 U.S. 527, 102 S. Ct. 3211, 73 L. Ed. 2d 948, 5 Ed. Law Rep. 82 (1982). *See* Arval A. Morris, *Whither the Neighborhood School?-Comments on Washington v. Seattle School District and Crawford v. Board of Education*, 6 ED. LAW REP. 429 (1983) (discussing *Seattle* and *Crawford* cases).

[84]*Crawford*, 458 U.S. at 530-31.

[85]*Crawford*, 458 U.S. at 532.

[86]*Crawford*, 458 U.S. at 533.

[87]*Crawford*, 458 U.S. at 533-34.

[88]*Crawford*, 458 U.S. at 534.

[89]*Crawford*, 458 U.S. at 535.

[90]*See Crawford*, 458 U.S. at 538-39.The Court explains that the amendment was actually less than a full repeal in that it leaves much of the California Equal Protection Clause in place. *Id.* at 541. This explanation is somewhat unsatisfying given that the problem with something more than a repeal is not whether it fully repeals the provision in question, but rather it puts the provision beyond reinstatement at the same level of government. The fact that the California Equal Protection Clause was not fully repealed fails to address the question whether it was placed beyond reinstatement at the same level of government.

[91]*Crawford*, 458 U.S. at 541-42.

[92]*Crawford*, 458 U.S. at 537.

[93]*Crawford*, 458 U.S. at 537.

[94]*Crawford*, 458 U.S. at 543.

[95]*Crawford*, 458 U.S. at 537-39.

[96]In fact, there may be a crossover majority that believed the cases should be treated the same. *See* Maxwell L. Stearns, *Grains of Sand or Butterfly Effect: Standing, the Legitimacy of Precedent, and Reflections on Hollingsworth and Windsor*, 65 ALA. L. REV. 349, 364 (2013) ("Although a majority favored each result, a crossover majority found the cases indistinguishable."). Justice Marshall dissented in *Crawford* and his dissent does include language that indicates the two cases should have been treated the same. Justice Powell dissented in *Seattle*, with Chief Justice Burger, Justice Rehnquist, and Justice O'Connor joining. This would seem to create a majority of five justices that agree that the cases are indistinguishable (although for very different reasons). However, there does not seem to be any language in Justice Powell's dissent in *Seattle* that indicates the cases should be treated the same.

[97]*Crawford*, 458 U.S. at 537.

[98]*See Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 485-86, 102 S. Ct. 3187, 73 L. Ed. 2d 896, 5 Ed. Law Rep. 58 (1982).

[99]*Seattle,* 458 U.S. at 462.

[100]*Crawford*, 458 U.S. at 546.

[101]*Crawford*, 458 U.S. at 545-547. ("Something significantly different is involved in this case. State courts do not create the rights they enforce."). Note that this concurrence is remarkably similar to Justice Breyer's concurrence in *Schuette* because it also indicates that the political process doctrine is only available when the original decision was made by a politically accountable entity.

[102]*Crawford*, 458 U.S. at 555-556.

[103]*James v. Valtierra*, 402 U.S. 137, 91 S. Ct. 1331, 28 L. Ed. 2d 678 (1971).

[104]*Valtierra,* 402 U.S. at 139.

[105]*Valtierra,* 402 U.S. at 140.

[106]*Valtierra,* 402 U.S. at 140.

[107]*Valtierra*, 402 U.S. at 141. The Court distinguished a case where a state legislature deannexed the minority population of a city by establishing irregular city boundaries. *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960).

[108]*Valtierra,* 402 U.S. at 141.

[109]*Valtierra,* 402 U.S. at 142.

[110]*Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855, 109 Ed. Law Rep. 539, 70 Fair Empl. Prac. Cas. (BNA) 1180, 68 Empl. Prac. Dec. (CCH) P 44013 (1996).

[111]*Romer,* 517 U.S. at 629.

[112]*Lucas v. Forty-Fourth General Assembly of State of Colo.*, 377 U.S. 713, 736-37, 84 S. Ct. 1459, 12 L. Ed. 2d 632 (1964).

