Schuette v. Coalition to Defend Affirmative Action & the Death of the Political Process Doctrine

Margaux Poueymirou*

Introduction 167
II. The Birth of a Doctrine 169
A. Applications of the Hunter Principle 172
B. Rearticulating the Hunter Principle 174
III. *Schuette* and the Death of the Political Process Doctrine 180
IV. *Schuette*'s Afterlife: The Same-Sex Marriage Cases 186
V. A Case for Entrenchment 191
Conclusion 193

INTRODUCTION

"[O]ur system of democracy teaches that the will of the people, important as it is, does not reign absolute but must be kept in harmony with our Constitution."
—Judge Thelton Henderson[1]

Imagine the voters of South Dakota—the first state to adopt initiative and referendum[2] on a statewide level—mounted a successful campaign to amend the state constitution as follows: *Any law regarding the spending of state funds in public education for noncitizens shall require a supermajority in both Houses for enactment*. Prior

* Margaux Poueymirou is a 2015 graduate of the University of California, Irvine School of Law. She would like to thank Erwin Chemerinsky, Mario Barnes, Mark Rosenbaum, and Nicholas Hartmann who each contributed to this Note in their own great ways. Thanks as well to the *Law Review* for their attentive and thorough assistance.

1. Coal. for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1490 (N.D. Cal. 1996), *vacated*, 110 F.3d 1431 (9th Cir. 1997).

2. An initiative enables a prescribed number of voters in a state or local community to place an amendment or proposal on the ballot for acceptance by the voters in that locality. A referendum is a device that requires voters of a state or community to approve of specified legislative enactments before they become law. *See* Priscilla F. Gunn, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 URB. L. ANN. 135, 135 nn.1–2 (1981) (citing GEORGE S. BLAIR, AMERICAN LEGISLATURES: STRUCTURE AND PROCESS 392 (1967)).

to this amendment, laws affecting the rights of noncitizens, like all other laws in the state, required your standard simple majority for enactment. By facially singling out a suspect class (noncitizens) for unique and unfair treatment, this initiative would expressly violate the Equal Protection Clause of the Fourteenth Amendment.

The question this Note explores, however, is whether an additional equal protection claim could be raised in relation to the way the initiative restructures the political process. This restructuring occurs in two ways: first, by embedding the initiative's repeal in the state constitution; second, by requiring a supermajority for the enactment of any future spending laws regarding a particular class of individuals. In so doing, the initiative creates comparative structural burdens within the political process for individuals seeking to advance legislation that might be to their benefit or to the benefit of noncitizens living in the state. In order to do away with the supermajority requirement, the state constitution would have to be reamended; in order to pass a law that altered state spending on public education in relation to noncitizens, a supermajority would have to succeed.

Although it is true that if citizens can amend state constitutions, they can reamend them as well, there is still something acutely troubling about voters adopting laws that are procedurally more difficult for future voters to amend, repeal, or modify. This is particularly the case when such laws affect the rights of minority groups that have been historically disenfranchised within the political system. When these laws are couched in facially neutral language, they will inevitably escape heightened judicial review so long as strict scrutiny requires evidence of discriminatory intent—a nearly impossible threshold to meet in relation to citizen-driven referenda and ballot initiatives.

This Note focuses on a series of cases comprising the "'political process' doctrine,"[3] in which the Supreme Court developed a unique or unconventional form of equal protection analysis to respond to various forms of "political restructuring" that affected minority rights.[4] All of the cases involved citizen-driven initiatives that altered sources and avenues of decision-making power in relation to certain social policy issues, ranging from fair housing to affirmative action. In each instance, the alteration of decision-making power made it more difficult for certain individuals to adopt future legislation, change social policy, or engage in successful advocacy in relation to particular issues.

Part II of this Note traces the history of the political process doctrine. Beginning with the seminal Supreme Court cases from which this mode of analysis emerged, this section examines the ways that courts developed an equal protection

3. Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1632 (2014). Courts have invariably used different terms for the same idea, ranging from the "political restructuring doctrine," *e.g.*, Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 701 F.3d 466, 495 (6th Cir. 2012), to the "Hunter Principle" in reference to *Hunter v. Erickson*, from which this approach to equal protection jurisprudence first emerged, *see* Hunter v. Erickson, 393 U.S. 385 (1969).

4. *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); *Hunter*, 393 U.S. at 392–93; *Wilson*, 110 F.3d 1431.

framework to respond to a unique equal protection concern regarding minority groups and their access to and strength within the political process. Part III examines the controversy surrounding Proposition 2, Michigan's Civil Rights Initiative and the Supreme Court's decision in *Schuette v. Coalition to Defend Affirmative Action*.[5] Part IV examines *Schuette*'s afterlife in the same-sex marriage cases and the tension between direct democracy and judicial review. Finally, Part V proposes a new framework for honoring the doctrine's central objectives without succumbing to the same legal vulnerabilities.

II. THE BIRTH OF A DOCTRINE

The political process doctrine originates with the 1969 Supreme Court case *Hunter v. Erickson*.[6] But it is also rooted in, or foreshadowed by, the "most celebrated footnote in constitutional law,"[7] *United States v. Carolene Products*' footnote four, from which our tiers of scrutiny emerged.[8] Indeed, as Justice Sotomayor stated in her dissent in *Schuette*: "The values identified in *Carolene Products* lie at the heart of the political-process doctrine."[9]

Writing for the Court in *Carolene Products*, Justice Harlan Fiske Stone alluded to laws or conditions that did not enjoy "a presumption of constitutionality"[10] such that the government must bear the burden of defending the law. This included "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[11] The Court stated that such legislation should be "subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."[12] Additionally, the Court singled out "prejudice against discrete and insular minorities" as 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."[13] The Court's recognition of the need for heightened judicial review coalesced, then, with a unique concern for protecting the integrity of the political process and minority voices within it. In essence, *Carolene Products* reinforced a belief in "the need for courts to check defects in pluralist democracy, by monitoring both its processes and the products—by clearing direct obstacles to participation

5. *Schuette*, 134 S. Ct. 1623.
6. *Hunter*, 393 U.S. at 391.
7. Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV 1087, 1087 (1982).
8. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
9. *Schuette*, 134 S. Ct. at 1668.
10. *Carolene Prods.*, 304 U.S. at 148.
11. *Id.* at 152 n.4.
12. *Id.*
13. *Id.*

and by paying close attention to laws that target groups most likely to be excluded from ordinary pluralistic bargaining."[14]

If *Carolene Products* foreshadowed the political process doctrine, the Supreme Court's decision in *Hunter* is credited with its true creation. Indeed, later cases, when analyzing comparable equal protection political process claims, employed the phrase "Hunter principle"[15] or "Hunter doctrine"[16] to situate their analyses within appropriate case law.[17]

The central issue in *Hunter* was whether the City of Akron, Ohio, violated the Equal Protection Clause of the Fourteenth Amendment when it amended its city charter to prevent the city council from implementing any housing ordinance that dealt with racial, religious, or ancestral discrimination without the approval of the majority of Akron's voters. Nellie Hunter brought the action after a real estate agent informed her that he was under orders not to show any homes to African Americans.[18] She reported this to the Commission on Equal Housing, which had been set up to enforce a recently enacted fair housing ordinance, and was told that the ordinance was no longer viable due to Section 137. Adopted in the wake of the city council's enactment of fair housing legislation to address the gross disparities in the housing market that disproportionately affected the City's African American community, Section 137 amended the city charter to ensure that voters played watchdog whenever housing legislation that contemplated racial integration was under consideration.[19]

In an 8–1 decision, the Supreme Court held that the charter amendment violated equal protection.[20] Prior to Section 137, no other ordinance required majority approval before going into effect. Therefore, the amendment not only repealed existing antidiscrimination housing legislation, it also altered the existent political process by "[drawing] a distinction between those groups who sought the law's protection against racial, religious or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in

14. 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); *see also* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 802–03 (2006) (arguing that *Carolene Products* underscores the "notion that courts should police the political process for improperly motivated legislation" and that this "has become a prominent justification for judicial application of heightened review").

15. *See, e.g.*, Lee v. Nyquist, 318 F. Supp. 710, 719 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971), *aff'd sub nom.*, Chropowicki v. Lee, 402 U.S. 935 (1971).

16. *See, e.g.*, Assoc. Gen. Contractors of Cal. v. S.F. Unified Sch. Dist., 616 F.2d 1381, 1390 n.15 (9th Cir. 1980) ("We need not decide whether a statute explicitly singling out and prohibiting affirmative action programs would be facially neutral or would fall under the doctrine of *Hunter v. Erickson*.") (citation omitted).

17. *See, e.g.*, *Seattle*, 458 U.S. at 469, 473.

18. *Hunter*, 393 U.S. at 387.

19. *Id.*

20. *Id.* at 393.

the pursuit of other ends."[21] In essence, Section 137 forced the former group to run a "gantlet."[22]

The Court made several significant observations that later cases have employed when articulating and applying the political process doctrine. First, it stated that "treating racial housing matters differently from other racial and housing matters" created an "explicitly racial classification" and thus must be evaluated under the "most rigid scrutiny."[23]

Second, the Court emphasized the law's disproportionate impact on minority groups and the "special burden" it placed on "racial minorities within the governmental process."[24] Tellingly, these burdens were analogized to voting rights cases including *Anderson v. Martin*[25] where the Court had held that a law requiring candidates to specify their race on the ballot was unconstitutional.[26] The *Hunter* Court also likened the impact of Section 137 to efforts to deny individuals a right to vote on an equal basis with others.[27] As the Court stated, "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."[28] In so doing, the Court developed a vocabulary for an equal protection analysis that positioned itself within contemporaneous voting rights and legislative apportionment cases.

Third, the Court addressed the potential significance that Section 137 was enacted via the ballot process: although the "State may distribute legislative power as it desires," the State cannot adopt a legislative structure that violates the Fourteenth Amendment, and the implementation of legislative change through popular referendum does not immunize the State from judicial review.[29] As the Court stressed, the sovereignty of the people remains subject to constitutional limitations. Because the City failed to justify this classification, Section 137 was held to be unconstitutional.[30]

In Justice Harlan's concurrence, he argued that laws defining "the powers of political institutions fall into two classes" for equal protection purposes: laws seeking to make it more difficult for racial and religious minorities to further their political aims, and laws "designed with the aim of providing a just framework within which the diverse political groups in our society may fairly compete and [which] are not enacted with the purpose of assisting one particular group in its struggle with

21. *Id.* at 390.
22. *Id.*
23. *Id.* at 392 (citing Korematsu v. United States, 323 U.S. 214, 216 (1944)).
24. *Id.* at 391.
25. Anderson v. Martin, 375 U.S. 399, 404 (1964).
26. *Id.*
27. *Id.*
28. *Id.* at 392–93.
29. *Id.* at 392.
30. *Id.* at 393.

its political opponents."[31] Justice Harlan's central critique of Section 137 was that it had been adopted not on "the basis of any general principle" but, instead, had the "clear purpose" of making it more onerous for certain racial and religious groups to participate in the political process.[32]

The lone dissenter, Justice Black, argued that the Court had grossly overreached its authority by refusing to allow a state to repeal laws deemed unwise. The Justice analogized the Court's application "of the Equal Protection Clause to bar States from repealing laws that the Court wants the States to retain" with the Court's development of what he considered equally problematic: substantive due process.[33] Additionally, the Justice found the Majority's reliance on voting cases to be terribly misguided. Instead of disenfranchising African American voters, Section 137 did the opposite in his opinion: it gave the voters an opportunity to have a say in fair housing legislation. Thus, rather than undermining voter interests, Section 137 protected them.[34]

A central theme underscoring *Hunter*, which appeared in each opinion to varying degrees, was the relationship between direct democracy and judicial review. Additionally, the Justices grappled with different modes of defining what constituted a racial classification. As Professor Sunstein suggested in his analysis of *Hunter*, "[t]he true lesson of *Hunter* is that there is a category of classifications that qualify neither as facially neutral nor as facially discriminatory and that, while not as suspicious as the latter, ought not to receive the deference due to the former."[35]

A. Applications of the Hunter Principle

In the fourteen-year period following *Hunter* and preceding *Washington v. Seattle School District No. 1*,[36] the next major case to develop the doctrine, several federal and state courts relied upon *Hunter* to address and frame a variety of equal protection challenges.[37] Courts frequently cited the case for the proposition that

31. *Id.* at 393 (Harlan, J., concurring).

32. *Id.* at 395.

33. *Id.* at 396–97 (Black, J., dissenting).

34. *Id.* at 397.

35. Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 150 (1982).

36. *Seattle*, 458 U.S. 457.

37. *See, e.g.*, Flores v. Pierce, 617 F.2d 1386, 1391 (9th Cir. 1980) (pointing to *Hunter* to articulate that "[i]f the rigors of the governmental or administrative process are imposed upon certain persons with an intent to burden, hinder, or punish them by reason of their race or national origin, then this imposition constitutes a denial of equal protection, notwithstanding the right of the affected persons to secure the benefits they seek by pursuing further legal procedures") (citation omitted); Jones v. Diamond, 594 F.2d 997, 1012 (5th Cir. 1979) (footnote omitted) (citing *Hunter* for the proposition that "[i]n the inherently coercive setting of a jail, it is evident to us that the withdrawal of decision-making by the public officials for only part of the jail amounts to impermissible racial segregation of prisoners."), *aff'd in part, rev'd in part on reh'g*, 636 F.2d 1364 (5th Cir. 1981), *overruled by* Int'l Woodworkers of Am., AFL-CIO & its Local No. 5-376 v. Champion Int'l Corp., 790 F.2d 1174 (5th Cir. 1986); Bulluck v. Washington, 468 F.2d 1096, 1115 (D.C. Cir. 1972) ("The principle of *Hunter* is that the statute creates an 'explicitly racial classification' whenever it differentiates between the treatment of

when a neutral law adversely impacts a minority group, this is sufficient for sustaining an equal protection claim. For example, in the 1971 Supreme Court case *Whitcomb v. Chavis*—which involved an equal protection challenge to a state statute that diluted black voting strength by establishing Marion County, Indiana, as a multi-member district—the dissent drew analogies to *Hunter*, describing it as a case decided by the "basic principle" that "invidious effects" and not simply "racial motivat[ion]" are enough to establish an equal protection violation.[38]

However, if certain courts interpreted *Hunter* as a discriminatory impact case, others treated it as facilitating a new framework for determining the existence of a racial classification. This is evident in *Lee v. Nyquist*, where a three-judge panel struck down a newly amended section of the N.Y. Education Code that forbade assigning students to different school districts in order to achieve racial balance "except with the approval of a local elected board or upon parental consent . . . ."[39] Prior to passage of the amendment, the Commissioner, state education officials, and school boards retained plenary authority over the decision making pertaining to the schools, including issues of attendance, maintenance of districts, and student assignments in all matters. Drawing upon *Hunter* to frame the substance of the equal protection violation at issue, the panel explained that "[the amendment] create[d] *a single exception* to the broad supervisory powers the state Commissioner of Education exercises over local public education"[40] and that whenever a law "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area," the law's restructuring of the political process creates a racial classification.[41]

Hunter was interpreted more as a case about race than a case about the integrity of the political process. This is evident in *James v. Valtierra*, a decision authored by Justice Black, the lone dissenter in *Hunter*.[42] *Valtierra* involved an equal protection challenge to a state constitutional amendment that brought low-income public housing decisions within the referendum process.[43] The amendment was adopted in the wake of a California Supreme Court decision that held "local authorities' decisions on seeking federal aid for public housing projects were 'executive' and 'administrative,' not 'legislative,' and therefore the state constitution's referendum provisions did not apply to these actions."[44] In response to this determination, California voters amended the state constitution to ensure any decision to build a

problems involving racial matters and that afforded other problems in the same area."); Westbrook v. Mihaly, 2 Cal. 3d 765, 773 (1970) (relying upon *Hunter* to strike down ballot initiatives that "require[d] a two-thirds rather than a simple mathematical majority to approve the incurring of bonded indebtedness . . . .").

38. Whitcomb v. Chavis, 403 U.S. 124, 178 (1971).
39. *Lee*, 402 U.S. 935.
40. *Id.* (emphasis added).
41. *Id.* (footnote omitted).
42. James v. Valtierra, 402 U.S. 137, 138 (1971).
43. *Id.* at 138–39.
44. *Id.* at 138 (footnote omitted).

low-rent housing project received approval by a majority of those living in the community. Low-rent housing was singled out for mandatory referendums, while all other kinds of publicly assisted housing required no such approval. In upholding the state constitutional amendment and thus reversing the district court, Justice Black rejected the lower court's reliance on *Hunter*.[45] Because the state constitutional amendment in *Valtierra* involved no racial classification, *Hunter* was inapposite. Justice Black's rejection of *Hunter*, therefore, suggests that the political process doctrine only applied when racial classifications were at issue. Comparative structural burdens within the political process that did not involve race, or a suspect class, were unable, standing alone, to sustain an equal protection challenge.[46]

B. Rearticulating the Hunter Principle

The first significant case to expand on the *Hunter* principle, however, was *Washington v. Seattle School District No. 1*.[47] It involved an initiative that had been adopted to defeat a desegregation program implemented in the 1978–79 academic year in Seattle after community groups threatened to sue the mayor for failing to facilitate meaningful desegregation efforts in the schools.[48] Known as Initiative 350, it provided that no school board could directly or indirectly require students to attend schools that were not geographically closest to the students' places of residence: thus, on its face, the initiative employed racially neutral language despite pertaining wholly to racial matters.[49]

In a 5–4 decision, the Supreme Court struck down the Initiative on equal protection grounds, holding that it curtailed the ability of minorities to fully participate in the political life of their communities.[50] Acknowledging that equal protection extends to those instances where the political structure "subtly distorts governmental processes in such a way as to place special burdens on the ability of

45. *Id.* at 140.

46. In a Ninth Circuit case, *Valeria v. Davis*, the court interpreted what it termed "political structure" equal protection as only applicable to "reallocation[s] of political decision making . . . when there is evidence of purposeful racial discrimination." 307 F.3d 1036, 1040 (9th Cir. 2002). The court stated that conventional equal protection analysis and political restructure analysis both required "demonstrable evidence of purposeful racial discrimination." *Id.* (citation omitted).

47. 458 U.S. 457.

48. *Id.* at 462.

49. *Id.* The Initiative made an exception for those with special education needs or who could demonstrate health and safety hazards between their place of residence and the nearest school. *Id.* It was held to be unconstitutional by both the district court and the Ninth Circuit, with both courts relying upon *Hunter* and *Nyquist* to support their reasoning. *Id.* at 466. The Ninth Circuit stated that subjecting desegregative student assignments to unique treatment—that is, by permitting busing for nonracial reasons but forbidding it for racial reasons—the Initiative "create[d] a constitutionally-suspect racial classification and radically restructure[d] the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies." Seattle Sch. Dist. No. 1 v. State of Wash., 633 F.2d 1338, 1344 (9th Cir. 1980). To this extent, the Ninth Circuit adopted *Hunter*'s articulation of what constituted an explicit racial classification sufficient to compel strict scrutiny. But it also went further with its emphasis on the impermissible restructuring of local political processes, a point that later cases would seize on when advancing the doctrine.

50. *See Seattle*, 458 U.S. at 467.

minority groups to achieve beneficial legislation,"[51] the Court spoke approvingly of *Hunter* where this principle had "received its clearest expression"[52]:

> [T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process.[53]

The *Hunter* principle was described, then, as a different analytical approach to an equal protection challenge, rather than merely a different substantive posture. The Court juxtaposed this formulation of nonneutrality with Justice Harlan's example of the executive veto in *Hunter*, which applied to all and which could, in certain instances, disproportionately impact a minority group. Nonneutrality, on the other hand, required a different and more heightened analysis, because when "the racial nature of an issue [is used] to define the governmental decisionmaking structure . . . [that] impos[es] substantial and unique burdens on racial minorities."[54] *Seattle*'s articulation of the dangers of political restructuring rested less so on a discriminatory impact theory and more on the role that race played in restructuring a decision making process: under *Seattle*, the *Hunter* doctrine was catalyzed when the "racial nature" of a decision fixed the terms for changing the existent political process.[55]

The second major case to expand the *Hunter* principle[56] and, in many respects, the true predecessor of *Schuette*, was *Coalition for Economic Equity v. Wilson*,[57] which, like *Schuette*, addressed the constitutionality of a state constitutional amendment banning affirmative action or the granting of "preferential treatment" to "any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[58] Judge Thelton Henderson's opinion represents

---

51. *Id.*

52. *Id.*

53. *Id.* at 470 (emphasis in original).

54. *Id.*

55. *See* Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1029 (1996).

56. The U.S. Supreme Court also addressed the political process doctrine in *Crawford v. Bd. of Educ. of L.A.*, 458 U.S. 527, 540–41 (1982), where it rejected the plaintiffs' reliance upon *Hunter* because the state constitutional amendment in *Crawford* conformed the state's desegregation busing policy to the federal standard.

57. *Wilson*, 946 F. Supp. at 1493, *vacated*, 110 F.3d 1431. Judge Henderson later characterized his opinion in this case as "probably as careful a decision as I've ever drawn up." Howard Mintz, *Federal Judge Thelton Henderson: Bay Area Legal Legend Takes on Oakland Police Case*, SAN JOSE MERCURY NEWS (Dec. 11, 2012), http://www.mercurynews.com/ci_22169178/federal-judge-thelton-henderson-bay-area-legal-legend [https://perma.cc/C9AQ-8CP9].

58. *Wilson*, 946 F. Supp. at 1488 (addressing CAL. CONST. art. I, § 31(a)). The amendment contains three exceptions to prohibitions on race- and sex-conscious affirmative action programs: sex-based bona fide occupational qualifications, the preservation of existing consent decrees, and race- and sex-conscious actions required as a condition of eligibility for federal funding. CAL. CONST. art. I, § 31 (c)–(e).

the incarnation of the "political restructuring doctrine" or what he referred to as the *Seattle-Hunter* doctrine.[59] This new description of the doctrine reflects an understanding that *Seattle* did not simply appropriate *Hunter*; it expanded on it.

Underscoring the Supreme Court's decision in *Seattle*, Judge Henderson described the new doctrine as standing for the "simple but central principle" that "[t]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. [But] the State [may not] allocate governmental power nonneutrally by explicitly using the racial nature of a decision to determine the decisionmaking process."[60] Deriving a framework from *Hunter* and *Seattle* which he, in turn, applied to Proposition 209, Judge Henderson pushed what he identified as a "principle" closer toward the status of a legal doctrine, "designed to determine whether facially neutral enactments single out race and gender issues for unique political burdens, and thus are suspect classifications."[61]

Coalition for Economic Equity was filed on November 6, 1996, a day after California voters passed Proposition 209. Prior to Election Day, registered voters received a California Ballot Pamphlet created by a nonpartisan California Legislative Analyst's Office charged with analyzing each statewide initiative on the ballot that year. The Pamphlet included information underscoring how Proposition 209 would effectively eliminate state and local government race- and sex-conscious affirmative action programs, which aimed "to increase opportunities for various groups—including women and racial and ethnic minority groups."[62] Furthermore, the Pamphlet included "partisan arguments submitted by proponents and opponents of the initiative" aimed at educating the electorate.[63] Proponents of the Proposition spoke of ending "REVERSE DISCRIMINATION" in order to avoid a parade of horribles, and framed the Proposition as a modern day incarnation of the 1960s Civil Rights Movement.[64] Opponents, on the other hand, explained how the Proposition would "put[] the brakes on expanding opportunities for people in need" by eliminating programs that had helped minorities and women on their path toward equality.[65] This debate attracted national attention. At the time, Bill Clinton was running for his second term of office against Senator Bob Dole. Both

59. *Id.* at 1499–1510.

60. *Id.* at 1500 (citing *Seattle*, 458 U.S. at 470).

61. *Id.* at 1503.

62. *Id.* at 1493. For example, the Pamphlet addressed the potential impact of Proposition 209 on admissions to state public universities and the possibility of "fundamental changes to[] *voluntary* desegregation programs run by school districts . . . includ[ing] the special funding given to (1) 'magnet' schools (in those cases where race or ethnicity are preferential factors in the admission of students to the schools), and (2) designated 'racially isolated minority schools' that are located in areas with high proportions of racial or ethnic minorities . . . ." *Id.* at 1493–94.

63. *Id.* at 1494.

64. *Id.*

65. *Id.* at 1494–95.

candidates included their position on Proposition 209 as a part of their party platforms that year.[66]

Had the Proposition mentioned nothing of preferential treatment, it would have been uncontroversial and unnecessary, merely mimicking the language of the Fourteenth Amendment and its guarantee of equal protection. However, as the district court stated: "[T]he people of California meant to do something more than simply restate existing law when they adopted Proposition 209."[67] By prohibiting state government entities from adopting race-conscious policies designed to address past and present discrimination—policies that had already passed the most exacting form of judicial review—Judge Henderson interpreted the Proposition as a cunning attempt to strip minorities and women of political leverage.

In order to demonstrate how the Proposition restructured the political process along impermissible racial lines, the court derived a framework from *Hunter* and *Seattle* for evaluating when the removal of authority to address a racial problem created a racial classification in itself.[68] This framework dispensed with the intent requirement inaugurated in *Washington v. Davis*[69] and affirmed in *Arlington Heights*.[70] These cases established that "[p]roof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause . . . ."[71] However, in *Adarand Constructors, Inc. v. Pena,* the Supreme Court held that the existence of a racial classification, irrespective of proof of animus, compelled strict scrutiny under equal protection analysis.[72] Given the intrinsic problems with proving discriminatory animus in the context of a voter initiative, the district court focused on the ability of facially neutral language to operate as a racial classification.[73] Borrowing from *Seattle*, the court stated that one must look to whether an initiative singled out an issue that was of special concern for minorities and "imposed special political burdens on those who supported the issue."[74] Proof of animus was therefore replaced with a species of disparate impact analysis, specifically tailored to claims concerning equal access to the political process.

---

66. 1996 Democratic Party Platform, THE AM. PRESIDENCY PROJECT, www.presidency.ucsb.edu/ws/?pid=29611 [https://perma.cc/QU8R-4AVU] (last visited Nov. 11, 2016); 1996 Republican Party Platform, THE AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=25848 [https://perma.cc/5RCB-KQLR] (last visited Nov. 11, 2016).

67. *Wilson*, 946 F. Supp. at 1489. Two central legal issues were raised in the case: first, a claim about the integrity of the political process and the rights of women and minorities to participate in the political process; and second, a claim brought under the Supremacy Clause that the Proposition frustrated the State's ability to comply with Title VI and VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972. *Id.* at 1489–90.

68. *Id.* at 1499–1504.

69. Washington v. Davis, 426 U.S. 229, 239 (1976).

70. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

71. *Id.*

72. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995).

73. *Wilson,* 946 F. Supp. at 1500–01.

74. *Id.* at 1500 (citing *Seattle*, 458 U.S. at 485).

In *Seattle*, the Supreme Court had described the racial nature of Initiative 350 through three central factors: first, the political campaign surrounding enactment of Initiative 350; second, "the perceptions of Washington voters," and whether these voters subjectively believed that the Initiative singled out racial busing for unique treatment; third, the "practical effect" of the Initiative.[75] This analysis informed the district court's description of the "racial nature" of Proposition 209 in *Coalition for Economic Equity*.[76]

For example, the district court considered how proponents of the Proposition had characterized the initiative for voters and how these characterizations shaped voters' motivations for voting. The court also emphasized that the Proposition was of "special interest" to minorities and women because it obfuscated a political avenue for obtaining legislation that "inures primarily to the benefit of the minority, and is designed for that purpose."[77] In terms of "practical effect," the court focused on how the Proposition would materially alter state practices that determine government allocation of benefits and burdens but only in regard to race and gender (other forms of preferential treatment would remain undisturbed).[78] For all of these reasons, the court concluded that Proposition 209 was enacted "because of" not merely "in spite of" its adverse affects of affirmative action thereby satisfying the threshold established in *Washington v. Davis* for proving discriminatory purpose.[79]

The second stage of the court's analysis attended to the actual restructuring of the political process and employed "the same comparative approach used in *Seattle*."[80] Before Proposition 209, women and minorities could directly petition and lobby specific representatives or policymakers with authority to adopt such programs and these programs could be approved by a simple majority vote or executive decision.[81] Further significant, these channels were circumscribed within a more localized sphere: for example, in local subdivisions of the government, such as school districts, city councils, or county governments. Such channels provided an opportunity for citizens to voice their discontent and potentially shape law and policy in a more grassroots way. Moreover, this "localized" framework was more accessible and more affordable than the path a citizen must tread for securing a constitutional amendment through initiative:

> [Proposition 209] required the collection of 693,230 valid signatures. Since many signatures are disqualified, in order to ensure the requisite number of valid signatures, approximately 50% more "raw" signatures must be collected. Because these signatures must be collected within a 150–day time limit, a campaign must typically collect up to 7,000 signatures during each of the 150 days. Given these requirements, and the size of California,

75. *Id.* at 1504 (citing *Seattle*, 458 U.S at 474–75).
76. *Id.* at 1500 (citing *Seattle*, 458 U.S. at 470).
77. *Id.* at 1505 (quoting *Seattle*, 458 U.S. at 472).
78. *Id.* at 1504 (citing *Seattle*, 458 U.S. at 474).
79. *Id.* at 1506 (quoting *Seattle*, 458 U.S. at 471).
80. *Id.*
81. *Id.* at 1498.

> hiring paid signature gatherers is a virtual necessity. The cost of obtaining signatures runs from $0.70 to $1.50 per signature. Thus, even where volunteers gather some portion of the required signatures, the cost of securing sufficient signatures, and minimally staffing a few offices, can run from $500,000 to $1.5 million. Once the initiative has qualified, it must gain majority approval by the voters.[82]

The cost and effort required to enact a constitutional amendment through the initiative process underscored the nature of the unique political hurdles that Proposition 209 introduced to this process for those seeking affirmative action legislation.

Proposition 209 was therefore similar to the initiatives in *Hunter* and *Seattle* because all three were couched in facially neutral language that masked a racial or gender classification, grew out of controversial efforts to undermine remedial legislation, and, most importantly, resulted in historically disenfranchised groups no longer being able to "use the same political mechanisms that had been available prior to the passage of the enactments."[83] Of course states remained free to restructure the political process in neutral manners and in ways that indirectly burdened the political participation of women and minorities. What a state could not do was "single out an issue of special interest to minorities and women and require that such legislation run a unique political gauntlet."[84] The perniciousness of such legislation was measured in relation to present and future voters, for future voters would have to reamend the state constitution to reauthorize the adoption of programs that voters of the past had been able to adopt through far less cumbersome modes.

The Ninth Circuit, however, disagreed. Significantly, it divided equal protection analysis into two camps: "'conventional' equal protection analysis, which looks to the substance of the law at issue . . . [and] 'political structure' equal protection analysis, which looks to the level of government at which the law was enacted."[85] Under conventional equal protection analysis, the Ninth Circuit stated that Proposition 209 was clearly constitutional.[86] Rather than classifying individuals on the basis of race or gender, the Proposition *prohibited* the State from classifying on either basis and "[a] law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender."[87] To this extent, the court cast the Proposition as a race- and gender-neutral initiative that sought to create a race- and gender-neutral world.

The court then turned to plaintiffs' challenge that the level of government at which the State had decided to prohibited race and gender classifications imposed

82. *Id.* (citations omitted).
83. *Id.* at 1501.
84. *Id.* at 1510.
85. Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 701 (9th Cir. 1997).
86. *Id.*
87. *Id.* at 702.

an "unequal 'political structure.'"[88] Acknowledging that *Hunter* and *Seattle* supplied the foundation of "political structure" equal protection analysis, the State argued that unlike the initiatives in either case, Proposition 209 did not allocate political authority in a discriminatory manner.[89] Because minorities and women together comprise a voting majority, the court adopted CAPD's argument that "a majority of the electorate cannot restructure the political process to discriminate against itself."[90] This articulation of what constitutes a "minority" and a "majority" was thus based on crude numbers or quantitative rather than qualitative factors.[91] Unlike the *Hunter* and *Seattle* initiatives, which focused on racial minorities, or Colorado's Amendment 2 in *Romer v. Evans* that targeted gays and lesbians,[92] Proposition 209 neither targeted nor impacted a minority of the population such that political structure equal protection analysis was an inappropriate framework for analyzing the Proposition's constitutionality. Ultimately, the Ninth Circuit's holding and reasoning foreshadows the Supreme Court's decision in *Schuette*.

III. *SCHUETTE* AND THE DEATH OF THE POLITICAL PROCESS DOCTRINE

Schuette's path to the Supreme Court was long and arduous. In 2006, Proposal 2 was adopted during Michigan's November general election. Conceived and sponsored by Ward Connerly, former University of California Regent who had previously successfully led the Proposition 209 campaign in California, and Jennifer Gratz, the leading plaintiff in *Gratz v. Bollinger*,[93] the Proposal aimed to ban affirmative action in Michigan via a citizen-initiated state constitutional amendment. It engendered legal controversy even prior to its adoption.[94] A suit was filed seeking to enjoin its placement on the general election ballot, alleging that its sponsors had "used racially targeted voter fraud in contravention of the Voting Rights Act to obtain signatures in support of [the] Proposal."[95] The suit proved unsuccessful but only because the Proposal's passage had rendered the case moot. Substantial evidence demonstrated that the signature-gathering phase had indeed been "rife with fraud and deception."[96]

A week after the Proposal's adoption, the Coalition to Defend Affirmative Action (the "Coalition" plaintiffs)—a student and youth-based organization

88. *Id.* at 703.
89. *Id.* at 704-05.
90. *Id.* at 704.
91. *Id. See* William M.K. Trochim, *Qualitative vs. Quantitative Debate*, LOYOLA MARYMOUNT UNIV. L.A. RESEARCH ADVANCEMENT AND COMPLIANCE, http://academics.lmu.edu/irb/qualitativeresearchandapproaches/qualitativevsquantitative/ [https://perma.cc/W22K-KNYM] (last visited Nov. 11, 2016).
92. Romer v. Evans, 517 U.S. 620, 624 (1996).
93. 539 U.S. 244 (2003).
94. Operation King's Dream v. Connerly, 501 F.3d 584, 586 (6th Cir. 2007).
95. *Id.*
96. *Id.* at 591.

"committed to making real the promises of American democracy and equality"[97]—brought an additional legal challenge to what had become Article I, section 26 of the Michigan constitution. A month later, a group of students, faculty, and prospective applicants to Michigan's public universities (the "Cantrell" plaintiffs) brought another challenge.[98] Both groups argued that the Proposal violated the Equal Protection Clause of the Fourteenth Amendment. The Coalition drew upon traditional equal protection principles and the less traditional political process doctrine;[99] the Cantrell plaintiffs challenged the Proposal solely in relation to the doctrine first developed in *Hunter* and *Seattle*.[100]

In one of the most highly publicized Supreme Court opinions of the 2014 term, Justice Kennedy, writing for the plurality, reversed the Sixth Circuit, which had struck down the Proposition in a highly partisan *en banc* decision. Although Justice Kennedy signaled that *Schuette* was "not about the constitutionality, or the merits, of race-conscious admissions policies in higher education . . . but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions,"[101] the wisdom of affirmative action policies played a prominent role in the concurrences and dissents. However, and as more fully elaborated below, *Schuette*'s most memorable passages concern the merits of initiative and referenda democracy and the role of the courts in policing these political processes. Indeed, *Schuette* demonstrates the extent to which debates over the merits of affirmative action have become embroiled in discourses pertaining to federalism, states' rights, and the virtues of direct democracy.

Rejecting the Sixth Circuit's reliance on *Seattle* and its supporting case law, specifically *Reitman v. Mulkey*[102]—which Justice Kennedy characterized as the "proper beginning point for discussing the controlling decisions,"[103]—and *Hunter*, Justice Kennedy stated that *Schuette* was factually and legally distinct for a few significant reasons. First, Justice Kennedy's analysis of both *Mulkey* and *Hunter* focused on the way that internal state political processes were conscripted to promote private discrimination.[104] The cases were thus treated as analogous to

97. The group's full name is "Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary" (BAMN). *See About BAMN*, BAMN: COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRATION RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, http://www.bamn.com/about-bamn [https://perma.cc/7G4Q-RM6E] (last visited Nov. 11, 2016).

98. Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 539 F. Supp. 2d 960 (E.D. Michigan 2008).

99. *See id.* at 964.

100. *See id.*

101. Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1630 (2014).

102. 387 U.S. 369 (1967).

103. *Id.* at 1631.

104. *Id.* at 1631–32. In *Mulkey*, the U.S. Supreme Court struck down an amendment to the California constitution—adopted via ballot initiative—that forbade the state from interfering in an individual's decision not to rent or sell residential property. The Proposition had been adopted in the wake of legislation that aimed to regulate private discrimination in residential housing. The Court held

Shelley v. Kraemer where the Court held that states could not enforce racial covenants in real estate pursuant to the Fourteenth Amendment.[105]

Second, Justice Kennedy repeatedly emphasized that widespread racial discrimination underscored the legal rationale upon which the earlier political process cases were based.[106] That is, in *Mulkey*, *Hunter*, and *Seattle* to an extent, evidence existed of de jure discrimination.[107] In regard to *Seattle*, Justice Kennedy pointed to Justice Breyer's dissent in *Parents Involved* where he suggested that the school busing policies at issue in *Seattle* were remnants of policies from the 1940s and 1950s when de jure segregation was still prevalent.[108] Thus, as Justice Kennedy stated, "*Seattle* is best understood 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 *Mulkey* and *Hunter*."[109] What distinguished these cases from *Schuette*, then, was that "the political restriction in question [in all three cases] was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race."[110] On the other hand, in *Schuette*, the Court claimed, the law at issue aimed to promote antidiscrimination policies rather than target minorities.[111]

Third, Justice Kennedy suggested that "[t]he broad language used in *Seattle* . . . went well beyond the analysis needed to resolve the case."[112] Justice Kennedy found the *Seattle* Court's interpretation of *Hunter* particularly troubling for establishing "a new and far-reaching rationale" that whenever a government policy inured to the benefit of minorities and altered the pathways of decision-making power, the policy must be evaluated under strict scrutiny.[113] The central problem with this rationale was that it reinforced the notion that racial groups think and vote alike. Moreover, the rule was ultimately unenforceable because it lacked any limiting principle and also required courts "to determine the policy realms in which certain groups—groups defined by race—have a political interest."[114] Thus, while not overturning *Seattle*, the plurality explicitly rebuked *Seattle*'s doctrinal extension of *Hunter*.

Justice Kennedy concluded by turning his focus to direct democracy and the importance of allowing voters to determine their own destinies. The "privilege to enact laws" was described as "a basic exercise of . . . democratic power."[115] Michigan's voters had used this privilege to "bypass public officials who were

---

that amendment violated equal protection because it "involve[d] the state in private racial discriminations to an unconstitutional degree." 387 U.S. at 378.

105. Shelley v. Kraemer, 334 U.S. 1, 20 (1948).
106. *See Schuette*, 134 S. Ct. at 1632.
107. *Id.* at 1633.
108. *Id.*
109. *Id.*
110. *Id.* at 1638.
111. *Id.*
112. *Id.* at 1634.
113. *Id.*
114. *Id.* at 1635.
115. *Id.* at 1636.

deemed not responsive to the concerns of a majority of the voters."[116] As Justice Kennedy stated:

> 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 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.[117]

However, Respondents were not arguing that certain difficult policy questions should be removed from the voters and from public discussion.[118] Rather, they were arguing that the removal of decision-making power from the Board of Regents, but only with respect to its race-conscious admissions policies, restructured the existent political process by creating comparative structural burdens that directly corresponded to racial issues.[119] Respondents recognized and indeed stressed the fact that the Regents could have abolished race-conscious admission policies, which would have had the same immediate substantive effect as a state constitutional amendment outlawing affirmative action.[120] The only difference was procedural: if the Board of Regents decided to change its policy, students and individuals could try to change the Regents' mind through the same means employed by other students hoping to influence admission policies. By removing the Regents' authority to shape its admission policies with respect to race only, however, this created two separate political processes for students, and the distinction between these processes was contingent upon race.

Chief Justice Roberts, who joined Justice Kennedy's plurality opinion, wrote a short, curt concurrence in which he chastised the dissent for considering it "'out of touch with reality' to conclude that racial preferences may themselves [be] debilitating effect[s] of reinforcing precisely that doubt."[121] Meanwhile, Justice Scalia joined by Justice Thomas (neither of whom joined Justice Kennedy's plurality opinion) wrote a long concurrence in which he argued that *Hunter* and *Seattle* should be overturned for being "[p]atently atextual, unadministrable, and contrary to our traditional equal-protection jurisprudence."[122] As to the latter point, Justice Scalia

116. *Id.*

117. *Id.* at 1637.

118. *See* Coal. Respondents' Brief on the Merits at 36–38, *Schuette*, 134 S. Ct. 1623 (No. 12-682), 2013 WL 4761325.

119. *Regents of Univ. of Mich.*, 539 F. Supp. 2d at 933.

120. *Id.* at 941.

121. *Schuette*, 134 S. Ct. at 1638–39 (Roberts, C.J., concurring) (citing Sotomayor, J., dissenting at 1675).

122. *Id.* at 1643 (Scalia, J., concurring).

interpreted the political process doctrine as a species of equal protection still utilizing a disparate impact framework. Accordingly, he suggested that the plurality had not gone far enough in repudiating the doctrine; rather, Justice Kennedy had "reinterpret[ed] [*Hunter* and *Seattle*] beyond recognition."[123]

Unlike the plurality, Justice Scalia found *Schuette* to factually mirror *Hunter* and *Seattle*: "The relentless logic of *Hunter* and *Seattle* would point to a similar conclusion in this case. In those cases, one level of government exercised borrowed authority over an apparently 'racial issue,' until a higher level of government called the loan. So too here."[124] The plurality's revisionist reading of the case law thus ensured that a narrow window of opportunity remained open for striking down a law based on its disparate impact in instances when state action posed a heightened risk of causing specific injuries on account of race.[125] Justice Scalia found this to undercut "'ordinary principles of our law [and] of our democratic heritage' [which] require 'plaintiffs alleging equal protection violations' stemming from facially neutral acts to 'prove intent and causation and not merely the existence of racial disparity.'"[126] For Justice Scalia, the doctrine was a relic of a bygone era in equal protection jurisprudence, which *Washington v. Davis* and its progeny had "squarely and soundly" replaced.[127]

Justice Scalia agreed with the plurality that the doctrine's triggering prong, or "the task of determining whether a law that reallocates policymaking authority concerns a 'racial issue,'"[128] was highly troubling. What did it mean for something to be a racial issue? And who was the correct party to decide this? Such "judicial musing" required judges to divide the nation into "racial blocs," a division that necessarily assumed minorities shared certain policy interests.[129] Justice Scalia found the "racial issue" prong further problematic because it "misread" and recast the equal protection clause as only protecting particular groups, in this case, the minority and not the majority.[130] This led the Justice to challenge the dissent's reliance on *Carolene Products*: What did it mean for a minority to be discrete and insular, and why should this be presumptively interpreted as a political liability rather than advantage?[131]

In addition to the doctrine's triggering prong, Justice Scalia found the doctrine and its supporting case law further problematic for "nearly swallow[ing] the rule of structural state sovereignty"[132]:

---

123. *Id.* at 1642.
124. *Id.* at 1641.
125. *See id.* at 1640.
126. *Id.* (quoting Freeman v. Pitts, 503 U.S. 467, 506 (1992) (Scalia, J., concurring)).
127. *Id.* at 1647.
128. *Id.* at 1643 (quoting *Seattle*, 458 U.S. at 473).
129. *Id.* at 1643–44 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 603, 610 (1990) (O'Connor, J., dissenting)).
130. *Id.* at 1644.
131. *Id.* at 1644–45.
132. *Id.* at 1646.

> If indeed the Fourteenth Amendment forbids States to "place effective decisionmaking authority over" racial issues at "different level[s] of government," then it must be true that the Amendment's ratification in 1868 worked a partial ossification of each State's governing structure, rendering basically irrevocable the power of any subordinate state official who, the day before the Fourteenth Amendment's passage, happened to enjoy legislatively conferred authority over a "racial issue." Under the Fourteenth Amendment, that subordinate entity (suppose it is a city council) could itself take action on the issue, action either favorable or unfavorable to minorities. It could even reverse itself later. What it could not do, however, is redelegate its power to an even lower level of state government (such as a city-council committee) without forfeiting it, since the necessary effect of wresting it back would be to put an additional obstacle in the path of minorities. . . . The mere existence of a subordinate's discretion over the matter would work a kind of reverse pre-emption. It is "a strange notion—alien to our system—that local governmental bodies can forever pre-empt the ability of a State—the sovereign power—to address a matter of compelling concern to the State." But that is precisely what the political-process doctrine contemplates.[133]

Moreover, to the extent that citizen-initiated constitutional amendments are an aspect of Michigan's internal political process, Justice Scalia considered it inappropriate to even characterize the adoption of Proposal 2 as a political restructuring rather than "working through the 'existing political process.'"[134] After all, Michigan citizens who supported race-conscious admissions policies could simply reamend the state constitution through the exact same process that the opponents of race-conscious admission policies had used to successfully ban affirmative action: the ballot initiative. Therefore, no restructuring existed. The rules of the game remained in place.

Justice Breyer, in his concurring opinion, also challenged the characterization of Proposal 2 as working a political restructuring, but for reasons different than Justice Scalia. Instead, he focused on how the Proposal did not shift decision-making authority from one political level to another, because the Regents delegated its admission-related decision-making authority to unelected faculty members and administrators.[135] Therefore, decision-making authority shifted from an administrative process to an electoral process, a shift that ultimately did not diminish the ability of minorities "to participate meaningfully in the *political* process."[136] For Justice Breyer, the facts of *Schuette* substantially deviated from *Hunter* and *Seattle*, and to apply either case "to the administrative process would, by tending to hinder

133. *Id.* (internal citations omitted).
134. *Id.* at 1647.
135. *Id.* at 1650 (Breyer, J., concurring).
136. *Id.* at 1651.

change, risk discouraging experimentation, interfering with efforts to see when and how race-conscious policies work."[137]

The sole dissent, authored by Justice Sotomayor and joined by Justice Ginsburg, framed the plurality's position as a "logic embrac[ing] majority rule without an important constitutional limit."[138] Justice Sotomayor painted a portrait of American history as one defined by persistent attempts to disenfranchise minority voices through political restructurings. First, the majority acted with an "open, invidious purpose," then through "outright bans on voting with literacy tests, good character requirements, poll taxes, and gerrymandering," and finally through direct democracy initiatives like Proposition 2, which changed "the ground rules of the process so as to make it more difficult for the minority, and the minority alone, to obtain policies designed to foster racial integration."[139] The political process doctrine, Justice Sotomayor argued, had operated as "a central check on majority rule" that was grounded in, and justified by, the Fourteenth Amendment.[140] Without it, minority groups in this country, historically disenfranchised and vulnerable, were further alienated from the protections of federal courts and the Fourteenth Amendment.

All in all, then, four of the Justices considered *Hunter* and *Seattle* factually analogous to *Schuette*, the other four not. Some of the Justices believed that the political process doctrine, and the cases upon which it relied, should be overruled because the doctrine was inconsistent with equal protection jurisprudence in its current form. Other Justices found the doctrine to be salvageable but only applicable in the rarest of occasions. And still others found the doctrine constitutionally viable despite the direction that equal protection jurisprudence had taken.

IV. *SCHUETTE*'S AFTERLIFE: THE SAME-SEX MARRIAGE CASES

It is unclear what (if anything) of the political process doctrine survives Justice Kennedy's plurality decision in *Schuette*. As Justice Scalia and Justice Sotomayor noted, the decision reinterpreted the seminal political process cases beyond recognition, infusing even greater doctrinal confusion into an already complicated body of case law.[141] Perhaps this is because the cases appeared to provide an alternative avenue for triggering heightened judicial review that did not require proof of intent to discriminate. Thus, the doctrine appeared out-of-sync with the direction the Court's equal protection jurisprudence has taken since *Washington v. Davis*. Yet, rather than overturning *Hunter* and *Seattle*, Justice Kennedy reinterpreted the cases, and the doctrine they developed, to stand for the proposition that when the reapportionment of political power triggers the "infliction of a specific

137. *Id.*
138. *Id.* at 1654 (Sotomayor, J., dissenting).
139. *Id.* at 1652.
140. *Id.* at 1667.
141. *Id.* at 1640, 1662–64.

injury,"[142] this *may* provide a sufficient basis for bringing an equal protection challenge.[143] It remains to be seen how this rule will be used going forward.

However, if *Schuette*'s immediate afterlife is any indication of its longer-lasting contribution to the legal landscape, it is possible that the case will be remembered and cited more for both its triumphant avowal of direct democracy and deft weaving together of core federalist principles with voter initiatives into one cohesive narrative. Within months of the Court's decision in *Schuette*, it had been invoked by several lower courts, almost entirely within the context of the same-sex marriage cases, and usually because state officials tasked with defending voter-initiated same-sex marriage bans have turned to *Schuette* for support.[144] Defenders of same-sex marriage bans have cited the case as an example of the Supreme Court's implicit approval of direct democracy and the importance of allowing the will of the voters to shape their destinies without court interference.[145]

In *Latta v. Otter*, for example—a recent Idaho district court decision overturning the state's same-sex marriage ban—Governor Otter defended the state's position in part by analogizing the ban on same-sex marriage to Proposal 2's prohibition of affirmative action.[146] Defendants interpreted *Schuette* to signify that "'a state's voters *can* ban preferences' and that courts should 'let[] the people make difficult policy choices through democratic means.'"[147] The district court rejected this analogy, suggesting that *Schuette* "stands for the unremarkable proposition that voters can and should be allowed to end their state's discriminatory policies."[148]

Meanwhile, in *Bostic v. Schaefer,* the Fourth Circuit rejected Virginia's argument that a "federalism-based interest in defining marriage" was a sufficient justification for Virginia's prohibition against same-sex marriage.[149] In a section of the opinion entitled "Federalism," the court found proponents' reliance on *Schuette* unavailing.[150] Proponents had argued that like Proposal 2, the Marshall/Newman Amendment outlawing same-sex marriage constituted "the codification of Virginians' policy choice in a legal arena that is fraught with intense social and

142. *Id.* at 1636 (majority opinion).

143. In one recent state appellate court case, the court interpreted the political process doctrine post-*Schuette* as "stand[ing] for the proposition that the reapportionment of legislative power may be challenged only where a serious risk of 'specific injuries from hostile discrimination [are] at issue.'" Howe v. Haslam, No. M2013-01790-COA-R3CV, 2014 WL 5698877, at *23 (Tenn. Ct. App. Nov. 4, 2014).

144. Robicheaux v. Caldwell, No. CIV.A. 13-5090, 2014 WL 4347099, at *927 n.20 (E.D. La. Sept. 3, 2014) ("This case shares striking similarities with *Schuette*."); Wolf v. Walker, 986 F. Supp. 2d 982, 996 (W.D. Wis. 2014) (rejecting Defendants' and amici's reliance on *Schuette* because the case dealt with a law prohibiting rather than requiring discrimination); Latta v. Otter, 19 F. Supp. 3d 1054, 1085 (D. Idaho 2014).

145. *See, e.g.*, *Wolf*, 986 F. Supp. 2d at 996; *Latta*, 19 F. Supp. 3d at 1085.

146. *Latta*, 19 F. Supp. 3d at 1085.

147. *Id.*

148. *Id.*

149. Bostic v. Schaefer, 760 F.3d 352, 379–80 (4th Cir. 2014).

150. *Id.* at 378–80.

political debate."[151] The Fourth Circuit disagreed with the notion that voters could determine the outcome on this issue. Although it acknowledged that voting was "essential to our democracy," the court stressed that "the people's will is not an independent compelling interest that warrants depriving same-sex couples of their fundamental right to marry."[152]

However, in *DeBoer v. Snyder*, the Sixth Circuit upheld same-sex marriage bans in Michigan, Kentucky, and Tennessee, as well as Ohio's refusal to recognize out-of-state same-sex marriages.[153] Judge Sutton, writing for a 2–1 majority, suggested that the rationale underscoring *Schuette* "appl[ied] with equal vigor"[154] to the central question in *DeBoer*, namely, "Who decides? Is this a matter that the National Constitution commits to resolution by the federal courts or leaves to the less expedient, but usually reliable, work of the state democratic processes?"[155]

Borrowing greatly from Justice Kennedy's language in *Schuette*, Judge Sutton's decision was centrally underscored by that "key insight[] of federalism," which permits states to serve as laboratories for experimenting with vastly different public policies.[156] And, indeed, throughout the decision there is palpable tension between what Judge Sutton describes as "the democracy-versus-litigation path to same-sex marriage"[157] or the creation of laws and policies that emerge from political processes shaped by voters as opposed to judges and courts. To invalidate same-sex marriage bans passed by a majority of the voters would enable the federal courts to deny "the people suffrage over an issue long thought to be within their power."[158] Allowing voters to adopt laws or constitutional amendments through an initiative process was thus characterized as an incisive expression of federalism and democracy at work.

Central to Judge Sutton's decision to uphold the bans is an ironic perception of ballot initiatives as a "purer" and more transparent form of democracy—ironic, because our very system of representative democracy was founded out of concern for protecting minority interests from a tyrannizing majority.[159] Consider Justice Black's dissent in *Hunter* where he expressed incredulousness over the Court's decision to overturn a voter referendum: "In this Government, which we boast is 'of the people, by the people, and for the people,' conditioning the enactment of a law on a majority vote of the people condemns that law as unconstitutional in the eyes of the Court!"[160] In *James v. Valtierra*, Justice Black, writing for the majority, continued this line of defense when he argued that "[p]rovisions for referendums

151. *Id.* at 379.
152. *Id.*
153. DeBoer v. Snyder, 772 F.3d 388, 421 (6th Cir. 2014).
154. *Id.* at 395–96, 409.
155. *Id.* at 396.
156. *Id.* at 406.
157. *Id.* at 402.
158. *Id.*
159. See, for example, Madison's *Federalist No. 51* where he suggested that "[i]f a majority be united by a common interest, the rights of the minority will be insecure." THE FEDERALIST NO. 51 (James Madison).
160. *Hunter*, 393 U.S. at 397 (Black, J., dissenting).

demonstrate devotion to democracy, not to bias, discrimination, or prejudice."[161] Meanwhile, Justice Scalia, in his dissent from the grant of certiorari in *Equal Foundation of Greater Cincinnati*, suggested that when the Court overturns a voter referendum, it signals that "nowhere in the country may the people decide, in democratic fashion, not to accord special protection to homosexuals,"[162] as if to suggest that the initiative form itself immunized its substance from constitutional scrutiny.

More recently, this faith in the purity of the referenda process found life in Justice Kennedy's dissenting opinion in *Hollingsworth v. Perry*.[163] Disagreeing with the majority's analysis of the plaintiffs' alleged lack of standing, Justice Kennedy stated:

> The essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around. Freedom resides first in the people without need of a grant from government. The California initiative process embodies these principles and has done so for over a century.[164]

For Justice Kennedy, the plaintiffs had standing to challenge an adverse Ninth Circuit ruling when the state refused to do so itself, because they were able to demonstrate a sincere and personally felt injury in not having their vote counted.[165] For the dissent, failing to recognize this as an injury was a direct affront to the whole enterprise of direct democracy.[166] It is hard not to read certain passages concerning the scope of popular sovereignty in a constitutional system in Justice Kennedy's plurality decision in *Schuette* as vindicating his position in *Perry*.

Although direct democracy is superficially appealing, many scholars have argued that ballot initiatives are antithetical to the structure and spirit of our Constitution and the architecture of democracy that our Founders created.[167] Direct

---

161. *Valtierra*, 402 U.S. at 141. Professor Eule recounts the following exchange during oral argument in *Reitman v. Mulkey*:

> [T]hen Solicitor General Thurgood Marshall called attention to the fact that California's authorization of discrimination in the private housing market had been enacted by voter initiative. "Wouldn't you have exactly the same argument," he was asked, if the provision "had been enacted by the California legislature?" "It's the same argument," Marshall replied, "I just have more force with this." "No," interjected Justice Black, "It seems to me you would have less. Because here, it's moving in the direction of letting the people of the State—the voters of the State—establish their policy, which is as near to a democracy as you can get."

Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1506 (1990).

162. Equal. Found. of Greater Cincinnati, Inc. v. Cincinnati, 518 U.S. 1001, 1001 (1996) (Scalia, J., dissenting) (arguing that certiorari should have been denied, and that *Equality Foundation of Greater Cincinnati* is distinguishable from *Romer v. Evans*).

163. Hollingsworth v. Perry, 133 S. Ct. 2652, 2675 (2013) (Kennedy, J., dissenting).

164. *Id.*

165. *Id.* at 2669–70.

166. *Id.* at 2671.

167. For critiques of direct democracy, see generally Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293 (2007); Robin Charow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527 (1994); Gunn, *supra* note 2; Eule, *supra* note 161, at 1555 ("The legislative process . . . affords minority groups a role that they lack in the

democracy fails to vet unconscious bias and in so doing, facilitates the majorities' tyranny over the minority. Direct democracy initiatives enable voters to develop and adopt laws that legislators would likely have a far more onerous time enacting due to their need to please their varied constituents.[168] James Madison articulated a similar point when discussing the virtues of a democratic republic. In *Federalist Paper No. 10*, Madison disparaged what he termed "pure democracy" precisely because it undermined minority interests.[169] Madison argued:

> A scheme of representation . . . open[ed] a different prospect . . . refin[ing] and enlarg[ing] the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.[170]

If we return to that imagined South Dakota initiative at the start of this Note—which required a supermajority in both Houses for the enactment of any law pertaining to the spending of state funds in public education for noncitizens—it is unlikely that noncitizens in South Dakota (assuming they constituted a small minority and that they were interested in defeating this initiative[171]) would ever be able to successfully defeat this law unless others in the community joined their cause. Due to sheer numbers, as well as political access, literacy and education, and other factors, certain groups will be uniquely disadvantaged within the referendum and initiative process while other groups will be at an advantage. The resultant political process will, in turn, construct a majority that will further retrench minority interests.[172] Thus, while "statewide initiative[s] may be a legitimate process for enacting a gross receipts tax," courts should be wary

---

substitutive plebiscite."); Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 1 (1978) ("[T]he experience of black [voters] with the referendum has proved ironically that the more direct democracy becomes, the more threatening it is.").

168. *See* KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS 101–25 (2009) (tracing courts' evolving analyses of direct democracy initiatives).

169. THE FEDERALIST NO. 10 (James Madison).

170. *Id.*

171. Justice Kennedy devotes a considerable amount of time in his plurality decision to critiquing the notion of racial voting blocs or the idea that minorities think alike and would vote according to common interests. Although it is always problematic to assume that certain races or genders favor certain social policies—e.g., that all woman favor enhanced protection from pregnancy discrimination or that all immigrants are more favorably invested in immigration reform—it is also naïve to discredit the fact that groups often do share common values and interests, which in turn affects their voting patterns, particularly when they are disenfranchised within the political system. One need only look at the voting patterns in Michigan when Proposal 2 was adopted: 59% of white voters supported the Proposal compared with 14% of black voters. *See* Scott Jaschik, *Michigan Votes Down Affirmative Action*, INSIDE HIGHER ED (Nov. 8, 2006), https://www.insidehighered.com/news/2006/11/08/michigan [https://perma.cc/5YCD-K3W4]. These racial differences cannot be chalked up to statistical error; rather, they suggest that groups that considered themselves to be disadvantaged by a particular policy were disinclined to vote favorably for that policy.

172. *See* Stephen M. Rich, *Ruling by Political Numbers: Political Restructuring and the Reconsideration of Democratic Commitments After* Romer v. Evans, 109 YALE L.J. 587, 625–26 (1999).

when they have the effect of "raising social barriers between groups of citizens."[173] Judicial review therefore, plays a particularly important role when direct democracy initiatives affect, directly or indirectly, minority rights.[174]

V. A CASE FOR ENTRENCHMENT

But perhaps all is not lost. A different strategy for litigation may rest with an entirely different line of case law that is nonetheless similarly preoccupied with protecting the political process: entrenchment.

Entrenchment refers to "statutes or internal legislative rules that are binding against subsequent legislative action in the same form."[175] Laws that are "binding" are laws that include provisions that cannot be ignored or waived.[176] Professors Chemerinsky and Roberts identify two types of entrenchment: "substantive" entrenchment, which constitutes "the legal (as opposed to political, social, or economic) requirements which would completely prevent a future legislature from amending or repealing an Act of Congress," and "procedural" entrenchment, which refers to legislative provisions that must be followed by future legislatures attempting to repeal or amend the law.[177] The imagined South Dakota initiative at the start of this Note would be an example of procedural entrenchment. It does not completely prevent future voters from modifying or repealing the initiative; rather, it makes it exceedingly more onerous for future voters to do so.

In 1853, the Supreme Court first addressed the constitutionality of legislative entrenchment in *Ohio Life Insurance & Trust Co. v. Debolt*.[178] The case concerned whether Ohio had relinquished its right of taxation in its charter to a bank. The Court held that this form of entrenchment was unconstitutional because "no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body."[179] Therefore, no state could form a contract that "deprive[d] a future legislature of the power of imposing any tax it may deem necessary for the public service—or of exercising any other act

173. Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 31 (1993).

174. The Sixth Circuit emphasized this point in *Equal Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993). Noting that "an essential principal of our system of government is that fundamental constitutional rights are not subject to popular vote," the court stated that among its most important functions as a judiciary was "to ensure that the constitutional rights of the few or the powerless are not infringed because their views are unpopular with the majority." *Id.* at 1236. "Without these principals," the court remarked, "and without the independence of the federal courts to preserve them, ours would not be a democracy at all but rather a tyranny at the whim of the majority." *Id.*

175. Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1667 (2002).

176. John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1778 (2003).

177. *Id.* at 1779.

178. 57 U.S. 416 (1853).

179. *Id.* at 431.

of sovereignty confided to the legislative body" unless the constitution expressly provided a state with this power.[180]

Twenty-six years later, in *Newton v. Mahoney County Commissioners*, the Court acknowledged that states could enter into certain kinds of contractual obligations that circumscribed their sovereignty.[181] The Court reconfirmed the *Dartmouth College Case*,[182] which bolstered the Contract Clause by precluding the ability of states to interfere with private contracts. However, Justice Swayne, writing for the majority, drew a distinction between private contracts and contracts "involv[ing] *public* interest" or which operated as "*public laws*."[183] The Court stated that "[e]very succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality."[184]

The Court's description of the problems with legislative entrenchment were anchored in the Court's acknowledgement that values change and that it was "vital to the public welfare that each [legislature] should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require."[185] Entrenchment undermined the states' abilities to repeal and modify legislation in order to appropriately address these changing societal needs. To enshrine the values of one set of voters and impose these values upon future voters is not only counter-progressive but also undemocratic. No one today would want to be bound to the views held by the majority of our country in 1896.

Numerous scholars have argued that legislative and constitutional entrenchment is inconsistent with foundational principles of democracy.[186] Current legislatures should not be allowed to bind future legislatures. Nor should a majority of voters today be able to bind all future voters by adopting laws that cannot be overturned or which are uniquely cumbersome to repeal or modify. In this respect, the idea of entrenchment provides a useful frame for understanding the issues at stake in the political process cases including *Schuette*. Indeed, these cases merge the constitutional issues surrounding entrenchment with the constitutional issues underscoring equal protection. Although the cases articulated the equal protection violation in relation to changing the locus of decision-making power, reallocations of governmental decision making could also be interpreted as a species of entrenchment.

---

180. *Id.*

181. Newton v. Mahoning Cty. Comm'rs, 100 U.S. 548, 556–57 (1879).

182. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819).

183. *Newton*, 100 U.S. at 559.

184. *Id.* at 559.

185. *Id.*

186. *See, e.g.*, Roberts, *supra* note 176, at 1775–76 ("Entrenchment is 'inconsistent with the democratic principle that present majorities rule themselves.'") (quoting Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 509 (1997).

Indeed, the political process doctrine is simultaneously a doctrine about entrenchment. In *Wilson I*, for example, the district court's concerns about Proposition 209's restructuring of the political process parallel concerns over the constitutionality of legislative and constitutional forms of entrenchment.[187] The way that the Proposition subverted the ability of a particular class of voters to participate in the political process by undermining their access to local channels of advocacy is a version of procedural entrenchment. The issue for Judge Henderson was not just that the Proposition repealed all existing state and local affirmative action programs, but also that it made the adoption of such programs in the future far more difficult to effectuate.[188] Perhaps, then, as we move forward, the language and jurisprudence of entrenchment will supply a new approach for advancing an old challenge.

CONCLUSION

Facially neutral ballot initiatives are completely ill-suited to present day heightened judicial review for the sole reason that courts require an examination of intent in order to sustain a finding of discrimination. The effect of this new intent threshold has been the focus of considerable scholarly work, much of which has been critical.[189] Many laws that disparately impact minority groups have been upheld because plaintiffs have been unable to satisfy the Court's discriminatory purpose requirement, leading some scholars to argue that the goals of the Fourteenth Amendment have been lost inside the Court's application of it.[190] Moreover, in certain contexts, discriminatory purpose is inherently more difficult if not impossible to prove. In terms of facially neutral ballot initiatives that allegedly disadvantage minorities, the discriminatory purpose requirement erects an obstacle unlikely to be overcome because determining the secret motivations of voters is nearly impossible.

An active federal judiciary is thus needed to keep direct democracy initiatives in line with the Constitution. In *Democracy and Distrust*, Professor Ely suggested that because "[t]he Constitution has . . . proceeded from the quite sensible assumption that an effective majority will not inordinately threaten its own rights, and has sought to assure that such a majority not systematically treat others less well than it treats itself,"[191] judges should intervene when democracy malfunctions. In order to ensure a healthy, functioning democracy rather than any particular fundamental values, Ely stressed the importance of protecting the procedures that sustain democratic values.[192]

---

187. *Wilson*, 946 F. Supp. at 1506–08.

188. *Wilson*, 946 F. Supp. at 1506–07.

189. *See, e.g.*, Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569 (2002).

190. *See, e.g.*, Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 502–05 (2003).

191. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 100–01 (1980).

192. *Id.* at 100.

This notion was expanded in Professor Eule's essay *Judicial Review of Direct Democracy* in which he argued "the gap between the will of the majority and the voice of the legislature is there by constitutional design,"[193] but is also, ultimately, desirable. The government has an obligation to *all* of its citizens. The Constitution honors this obligation by investing plenary lawmaking authority in representatives rather than "the people," dividing power between different branches of government so that each acts as a check on the other, while "placing certain principles beyond the reach of ordinary majorities."[194] Because "direct democracy bypasses internal safeguards designed to filter out or negate factionalism, prejudice, tyranny, and self-interest," judges must take "a harder look"[195] at these initiatives in order to protect "the Constitution's representational values."[196] Eule recognized the failure of strict scrutiny: so long as courts maintained the burden of proving discriminatory intent, strict scrutiny would almost assuredly never apply to a ballot initiative.[197] He suggested that either this burden should be relaxed, enabling more creative ways for satisfying it, or, in the context of plebiscitary settings, the requirements should be abandoned altogether.[198]

The political process doctrine has, since its inception with *Hunter*, encapsulated the tension that exists between direct democracy and judicial review when minority rights are at stake. Direct democracy implicates unique issues concerning the ability of voters to decide their own fate, determine their own procedures, and be active participants in a scheme of self-government. But as our Founders recognized, leaving the protection of minority interests to purely majoritarian processes is contrary to our democratic values.[199] If the political process doctrine died with *Schuette*, the spirit of the doctrine did not, and perhaps the jurisprudence of entrenchment provides a new avenue for ensuring that the will of the people, important as it is, does not reign supreme.

193. Eule, *supra* note 161, at 1514.
194. *Id.* at 1549.
195. *Id.*
196. *Id.* at 1559.
197. *Id.* at 1561–62.
198. *Id.* at 1562.
199. THE FEDERALIST NO. 10, *supra* note 169.