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Have We Reached Grutter's "Logical End Point?" The Fight Over State Law Bans on Preferential Treatment Programs and the Future of Affirmative Action in the United States

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HAVE WE REACHED *GRUTTER'S*
"LOGICAL END POINT?"
THE FIGHT OVER STATE LAW BANS
ON PREFERENTIAL TREATMENT
PROGRAMS AND THE FUTURE OF
AFFIRMATIVE ACTION IN THE UNITED
STATES

PETER M. BEAN*

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I. INTRODUCTION

Perhaps Chief Justice Roberts was correct when he remarked that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹ The use of race in admissions decisions to undergraduate and graduate institutions is a subject that has long roiled the Supreme Court.² Most affirmative action challenges have focused on attacking affirmative action programs that are already in place.³ In November 2012, the Sixth Circuit addressed an ironic affirmative action question: whether a state that places a ban on the use of affirmative action programs violates the Equal Protection Clause of the Fourteenth Amendment.⁴ The Sixth Circuit’s decision invalidating Michigan’s ban on affirmative action has split with the Ninth Circuit’s decision in *Coalition for Economic Equity v. Wilson*, which addressed the same question but came to the opposite conclusion.⁵

1. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709-10, 747-48 (2007) (striking down the use of racial classifications to assign students to schools).

2. Compare *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (noting that a narrowly tailored race-based admissions policy must not be a quota system), with *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 271-72 (1978) (holding that the University of California’s race-based “set-aside” program was unconstitutional but that a complete ban on the consideration of race was inappropriate).

3. See, e.g., *Grutter*, 539 U.S. at 311 (challenging the University of Michigan Law School’s use of race in admissions decisions).

4. See *Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. v. Regents of the Univ. of Mich.*, 701 F.3d 466, 474 (6th Cir. 2012) [hereinafter *Coal. to Defend Affirmative Action*] (en banc) (using a political structure approach to invalidate Michigan’s affirmative action ban).

5. See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 711 (9th Cir. 1997)

This Comment argues that the Supreme Court should reverse the Sixth Circuit's decision in *Coalition to Defend Affirmative Action*.⁶ The Court should also hold that the *Hunter-Seattle* doctrine was not triggered under the factual circumstances at issue in the case before the Sixth Circuit where a statewide referendum repealed existing affirmative action programs.⁷ Further, the Court should adopt the Ninth Circuit's reasoning in *Wilson* and analyze the ban at issue in *Coalition to Defend Affirmative Action* using the more expansive traditional approach to equal protection.⁸ Part II examines the nature of permissible affirmative action plans under current Supreme Court doctrine and explains the circuit split.⁹ Part III argues that the Sixth Circuit incorrectly found Michigan's initiative banning affirmative action unconstitutional by applying the *Hunter-Seattle* test.¹⁰ Part IV offers a policy argument for abandonment of the *Hunter-Seattle* test.¹¹ Part V concludes that affirmative action bans are consistent with the Equal Protection Clause and questions the continued relevance of the *Hunter-Seattle* doctrine.¹²

(holding that Proposition 209 banning the use of affirmative action did not violate the Equal Protection Clause under a traditional equal protection analysis).

6. See *infra* Part V (concluding that Supreme Court review of the Sixth Circuit's decision is an ideal opportunity to critically examine the doctrinal underpinnings of that decision). Two developments at the Supreme Court occurred while this Comment was in publication. First, the Supreme Court granted certiorari in *Coalition to Defend Affirmative Action*. See *Schuetz v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013). Oral arguments were held on Tuesday, October 15, 2013, and a decision is expected in 2014. Second, the Supreme Court decided *Fisher v. University of Texas* in June 2013. That case reiterated the continued vitality of *Grutter*, without expressly affirming it, because the issue of *Grutter*'s legitimacy was not squarely before the Court. *Fisher* held that the Fifth Circuit incorrectly applied strict scrutiny to the university's use of race in its admissions policy and vacated the Fifth Circuit's opinion and remanded. See *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2421-22 (2013).

7. See *infra* Part III (discussing why the *Hunter-Seattle* test was not triggered).

8. See *infra* Part III (arguing that the Ninth Circuit was correct in finding the *Hunter-Seattle* test inapplicable).

9. See *infra* Part II (outlining two approaches to equal protection doctrine).

10. See *infra* Part III (arguing that the Sixth Circuit applied a strained reading of the *Hunter-Seattle* test).

11. See *infra* Part IV (discussing the potential harm of the *Hunter-Seattle* test).

12. See *infra* Part V (concluding that the *Hunter-Seattle* test could be overruled by the Supreme Court).

II. BACKGROUND

A. Permissible Use of Race in Affirmative Action Programs Under Bakke, Grutter, and Gratz

In the education context, affirmative action programs provide an advantage to minority applicants in the admissions process.¹³ Affirmative action programs are recognized racial classifications that presumptively violate the Equal Protection Clause.¹⁴ Under the Equal Protection Clause, racial classifications are subject to strict scrutiny and must be narrowly tailored to advance a compelling state interest.¹⁵ Despite the invalidity of affirmative action programs, the Supreme Court permits them as a remedy for past discrimination.¹⁶ Consequently, affirmative action programs are an exception to the general rule of equality required by the Equal Protection Clause.¹⁷

Though the Supreme Court allows affirmative action programs, there are well-defined limitations on how such programs may operate.¹⁸ First, race may only be considered as a “plus” in conjunction with other characteristics in a student’s file.¹⁹ This means that race cannot be the sole factor determining admission.²⁰ This requirement ensures that all applicants receive comprehensive review.²¹ In defining the contours of permissible affirmative action programs, the Court prohibits procedures

13. *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319 (1978) (noting that affirmative action programs create “preferred groups”).

14. *See id.* at 289 (characterizing the school’s program as “undeniably” a racial classification).

15. *See, e.g., id.* at 291 (reiterating that race is a suspect class); *see also Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2421 (2013) (holding that a school’s alleged good faith in using racial classifications in school admissions cannot be accepted as fact by a court because strict scrutiny requires the court to analyze actively an asserted use of race).

16. *See Bakke*, 438 U.S. at 324-35 (Brennan, J., concurring) (emphasizing that the State may use race for remedial purposes).

17. *See id.* at 289 n.27 (majority opinion) (explaining that affirmative action is a facially explicit use of race).

18. *See Coal. to Defend Affirmative Action*, 701 F.3d 466, 498 (6th Cir. 2012) (en banc) (Gibbons, J., dissenting) (noting that racial classifications are acceptable only in certain circumstances).

19. *See, e.g., Bakke*, 438 U.S. at 317-19 (emphasizing that using race as a plus does not exclude non-minority applicants from seats set aside only for minority applicants).

20. *See id.* at 317 (noting that the objective of such a plus is to evaluate all candidates fairly).

21. *See Grutter v. Bollinger*, 539 U.S. 306, 337 (2003) (holding that candidate review must be extremely individualized).

that create quotas for minority applicants.²²

One of the more important limitations on affirmative action programs is that they must be limited in time.²³ In *Grutter v. Bollinger*, the Court approved the law school's use of race but stressed that the Fourteenth Amendment requires elimination of policies, like affirmative action, that embody racial classifications.²⁴ This is because all racial classifications are presumptively invalid.²⁵ The Court noted that California, Florida, and Washington have banned affirmative action in the same way that Michigan did with Proposal 2 in *Coalition to Defend Affirmative Action*.²⁶ The Court's approval of state-level affirmative action bans in *Grutter* suggests consistency with the Court's policy of eliminating racial classifications and reinforces the necessity of an end to those programs.²⁷

Affirmative action programs take various forms, but a common scheme is one that sets aside a number of seats for minority groups, like the policy at issue in *Regents of the University of California v. Bakke*.²⁸ Other policies, such as the one at issue in *Gratz v. Bollinger*, use a point system under which minority students are awarded a set number of points that places them ahead of their non-minority competitors.²⁹ Such policies prevent a certain number of seats from being filled by non-minority applicants.³⁰ Thus, in some circumstances, an otherwise qualified non-minority applicant will be denied admission notwithstanding the availability of seats.³¹

22. See, e.g., *id.* (finding that the law school's consideration of race without assigning points was not a quota).

23. See *id.* at 341-42 (requiring that affirmative action programs have sunset provisions).

24. See *id.* at 342 (declining to preserve a justification for racial preferences in the Fourteenth Amendment).

25. See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (noting that racial classifications are more suspect than gender classifications).

26. See *Grutter*, 539 U.S. at 343 (expecting the need for affirmative action programs to be gone in twenty-five years).

27. See *id.* at 342 (approving of race-neutral policies to further a compelling interest in diversity).

28. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 275 (1978) (noting that there was a specific number of minority slots in each class).

29. See *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003) (discussing how the University went through several iterations of its point system).

30. See *Bakke*, 438 U.S. at 276 (noting that there were four unfilled seats for which Mr. Bakke could not compete).

31. See *id.* (mentioning the strength of Mr. Bakke's scores).

B. Two Approaches to Analyzing the Equal Protection Clause: The Traditional Approach and the Political Structure Approach

Courts have used two approaches to analyze equal protection issues.³² Under the traditional approach, the purpose of the Equal Protection Clause is to prevent racial discrimination and classifications based on race.³³ This view is rooted in the idea that racial distinctions are often made to subjugate certain races and ethnicities.³⁴ Given this purpose, if a law treats an individual unequally on the basis of race, then that individual has a claim for a violation of the Equal Protection Clause.³⁵

The second approach, known as the political structure doctrine, holds that the purpose of the Equal Protection Clause is to prevent the State from inhibiting minority groups from enacting beneficial legislation as compared to other groups seeking the same or similar legislation.³⁶ This view disfavors laws that obstruct the ability of minority groups to advocate for legislation of importance to them by moving the process used to pass such laws from a lower level of government, such as a local school board, to a higher level of government, such as the statewide electorate.³⁷ The political structure approach presumes that such obstructions are racial classifications that violate the Equal Protection Clause.³⁸

1. The Traditional Approach: Elimination of Racial Discrimination

The Equal Protection Clause of the Fourteenth Amendment provides that the states afford all citizens "equal protection of the law."³⁹ Underlying equal protection law is the notion that the political and social institutions of the United States are based on the principle of equality.⁴⁰ When the State

32. See, e.g., *Coal. to Defend Affirmative Action*, 701 F.3d 466, 504 (6th Cir. 2012) (en banc) (Gibbons, J., dissenting) (referring to a traditional "approach" to equal protection).

33. See *id.* (discussing how racial classifications can be invalidated by showing a discriminatory purpose).

34. See, e.g., *id.* at 512 (Griffin, J., dissenting) (finding that all racial classifications are suspect because there is no way to distinguish between benign and discriminatory uses of race).

35. See, e.g., *id.* at 504 (Gibbons, J., dissenting) (noting that a facial racial classification triggers strict scrutiny).

36. See, e.g., *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470 (1982) (discussing the implications of allocating political power on the basis of race).

37. See *id.* (noting that such a restructuring burdens racial minorities).

38. See *id.* at 483 (holding that removing the power to pass or address racial legislation violates equal protection).

39. See U.S. CONST. amend. XIV, § 1 (protecting all citizens from denial of their equal protection rights by the states).

40. See, e.g., *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (noting that

implements a law that treats one group differently than another on the basis of race, the Equal Protection Clause is violated.⁴¹

As equal protection law evolved, the Supreme Court found that certain classifications of citizens affected by legislation were more suspect than others.⁴² The most notable suspect classification is race, because race is an immutable characteristic.⁴³ The suspect nature of race as a means of legislative classification dates as far back as the Court's decision in *Yick Wo v. Hopkins*, which struck down an ordinance preventing the operation of laundries in buildings made of wood.⁴⁴ The Supreme Court found that the law unfairly targeted Chinese-owned laundries because their laundries were often located in buildings made of wood.⁴⁵ The Court held that equal protection must apply regardless of race, thus signaling, at this early stage, a judicial suspicion of laws implicating race.⁴⁶

The Court's later opinions dealing with race firmly establish that race is a suspect classification.⁴⁷ The Court holds that race is suspect since racial distinctions stigmatize minorities solely because they belong to a certain race, a decision over which they have no control.⁴⁸ In *Shaw v. Reno*, a case not dealing with affirmative action, the Court found that the North Carolina legislature adopted a reapportionment plan that was meant to segregate voters on the basis of race to disenfranchise minority voters.⁴⁹ The Court denounced all racial classifications because they condone inequality.⁵⁰

The culmination of years of equal protection litigation led to the

racial distinctions are "odious" to equality).

41. See, e.g., *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) (discussing why preferring one group disadvantages those not belonging to that group).

42. See *id.* at 701 (noting the Supreme Court's long-standing belief in the suspect nature of race).

43. See *id.* (suggesting that individuals have no control over their ancestral origins, meaning that ancestry is immutable).

44. See *Yick Wo v. Hopkins*, 118 U.S. 356, 362 (1886) (noting that laundry licenses were only granted to Caucasians such that Chinese-owned laundries would be forced to operate without licenses in derogation of the law).

45. See *id.* (discussing how the ordinance operated in reality).

46. See *id.* at 363 (citing race, color, and nationality).

47. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (characterizing racial classifications as "especially suspect").

48. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (suggesting that racial hostility follows from race-based laws).

49. See *id.* at 658 (holding that the appellants had an equal protection claim based on disenfranchisement).

50. See *id.* at 657 (emphasizing the "lasting harm" created by racial classifications).

traditional approach to the Equal Protection Clause.⁵¹ Given the suspect nature of race, the Court has held that the purpose of the Equal Protection Clause is to prevent government-sanctioned discrimination based on race.⁵² Given this purpose, whenever the State uses race to distinguish between individuals, those harmed by the racial classification suffer an equal protection violation.⁵³

The traditional approach to the Equal Protection Clause is broad and flexible because states have wide latitude to determine the best method to eradicate racial classifications.⁵⁴ This approach evaluates the substance of a law and determines whether or not it achieves the directive of eliminating racial discrimination or whether it uses an impermissible racial classification.⁵⁵ Under this approach, a law that prevents discrimination based on race arguably complies with the constitutional directive to eliminate racial classifications because it does exactly that by prohibiting racial distinctions.⁵⁶

Under the traditional approach, the repeal of legislation touching in some way on race does not create an invalid racial classification that violates equal protection.⁵⁷ This rule comes from *Crawford v. Board of Education*, where the Supreme Court held that the "mere repeal" of legislation dealing with race that was not required by the Constitution in the first place, without more, did not violate the Equal Protection Clause.⁵⁸ In *Crawford*, California voters halted desegregation by amending the state constitution to prevent the State from using busing or school reassignments.⁵⁹ The Court found that the legislation did not trigger strict scrutiny because it did not

51. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976) (referring to the "central purpose" of equal protection).

52. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (noting that racial classifications reflect racial prejudice).

53. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 230 (1995) (holding that race automatically implicates the Equal Protection Clause).

54. Cf. *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) (suggesting that the rational basis standard allows most laws to stand).

55. See *id.* (contrasting traditional equal protection with political structure equal protection and suggesting that the traditional approach is broader).

56. See *id.* (suggesting that a ban on racial preferences is not a suspect racial classification because the state cannot create preferences based on race).

57. See generally *Coal. to Defend Affirmative Action*, 701 F.3d 466, 488 (6th Cir. 2012) (en banc) (illuminating the difference between a repeal and political restructuring).

58. See *Crawford v. Bd. of Educ.*, 458 U.S. 527, 538-39 (1982) (noting that some racial policies are not constitutionally required).

59. See *id.* at 532 (discussing how the legislation attempted to align the power of state courts with those of the federal courts).

embody a racial classification and upheld the law under rational basis.⁶⁰ The Court emphasized that when a repeal leaves intact the ability of the State or its voters to reinstate the repealed law, the repeal does not fall below constitutional standards.⁶¹ Thus, under *Crawford*, legislation that solely repeals existing laws that address race and were not constitutionally required in the first place, without removing the power of the State to reinstate those laws, triggers rational basis and will likely be upheld under that standard of review.⁶²

2. Obstructions to Achieving Beneficial Legislation Through the Political Process: The Hunter-Seattle Doctrine

Another approach to equal protection law known as the political structure doctrine emerged from the Supreme Court's decisions in *Washington v. Seattle School District No. 1* and *Hunter v. Erickson*.⁶³ The political structure approach focuses on the right of all citizens to petition the state for legislation that is beneficial to them.⁶⁴ Under this approach, the purpose of the Equal Protection Clause is to ensure that an electoral majority does not alter the political channels to make it more difficult for minority groups to achieve legislation of importance to them.⁶⁵ An oft-used metaphor for conceptualizing this view of equal protection posits that if two competitors run the same race, it is unfair to make one competitor run farther than the other.⁶⁶ Thus, the political structure approach safeguards equality in the political process.⁶⁷

A two-pronged test emerged from *Hunter* and *Seattle*: a law denies equal

60. See *id.* at 536-37 (recognizing that the challenged law did not have to support a compelling state interest because only rational basis applied).

61. See *id.* at 541 (noting that some legislative actions are more than repeals and others are less than repeals).

62. See *id.* at 538 (referring to the repeal as "simple").

63. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 460, 462-64, 487 (1982) (holding unconstitutional a voter initiative enjoining the school district's use of busing and school reassignments to foster desegregation); *Hunter v. Erickson*, 393 U.S. 385, 387, 393 (1969) (concluding that an amendment to Akron, Ohio's charter repealing a fair housing ordinance violated the Equal Protection Clause).

64. See *Hunter*, 393 U.S. at 393 (equating vote dilution with schemes obstructing processes to achieve favorable legislation).

65. See, e.g., *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 652 F.3d 607, 614 (6th Cir. 2011) (noting the importance of ensuring a fair political process).

66. See *id.* (emphasizing that a voting minority has a disadvantage in the political process).

67. See *id.* (noting that everyone must have equal opportunity to advocate for change in educational policies).

protection if it (1) has a racial focus, and (2) reorders a political process to significantly burden minority interests by impeding them from being able to achieve legislation that is beneficial to them.⁶⁸ Under the first prong of the *Hunter-Seattle* test, the legislation must have a racial focus.⁶⁹ A policy, political, educational, or otherwise, that “inures primarily to the benefit of the minority and is designed for that purpose” has a racial focus.⁷⁰ Affirmative action programs increase the presence of racial minorities.⁷¹ Minorities are therefore given a benefit by the use of affirmative action programs.⁷² Accordingly, because affirmative action is designed to increase minority enrollment, thereby conferring a benefit on racial minorities, such policies can likely be characterized as having a racial focus under the *Hunter-Seattle* test.⁷³

The second prong of the *Hunter-Seattle* test requires a reordering of a political process to impose significant burdens on the interests of a minority group.⁷⁴ When a law makes it more difficult for racial minorities to advocate for their interests compared to other groups seeking similar legislation, political power has been realigned along racial lines.⁷⁵ The burdens accompanying this realignment need only be more significant than burdens faced by other groups attempting to produce similar changes through identical political channels.⁷⁶

In considering whether a law reallocates political power to burden minorities, *Hunter* and *Seattle* apply where the ability of a minority to pass legislation is moved from a local legislative body to the general electorate

68. See *Coal. to Defend Affirmative Action*, 701 F.3d 466, 477 n.2 (6th Cir. 2012) (en banc) (defining a burden as an obstruction to minority use of a political process to achieve legislation).

69. See *id.* at 471 (noting that the policy must be drawn for racial purposes).

70. See *id.* at 472 (noting that desegregation has a racial focus).

71. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (explaining the law school's goal of having a “critical mass” of minority students).

72. See *id.* at 330 (discussing the benefits of classroom diversity for both minority and non-minority students).

73. See, e.g., *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 652 F.3d 607, 618 (6th Cir. 2011) (suggesting that minorities are the primary targets of affirmative action).

74. See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 706 (9th Cir. 1997) (noting that only a discriminatory reordering triggers the test).

75. See, e.g., *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474 (1982) (finding that the voter initiative halting desegregation took power from groups favoring desegregation).

76. See *id.* (finding that citizens in favor of desegregation could only achieve that by voter approval whereas those advocating for other educational reforms had a lesser burden).

of the state.⁷⁷ For example, in *Seattle* the initiative preventing local school boards from using busing and school reassignments moved the authority to address desegregation from the local school boards to the state level.⁷⁸ Where political power remains at the level of government where it has traditionally been, there has been no reallocation of power within the meaning of *Hunter* and *Seattle*.⁷⁹

Hunter addressed a situation in which a voter initiative repealed an antidiscrimination law requiring equal treatment.⁸⁰ An amendment to Akron, Ohio's charter overturned a fair housing ordinance.⁸¹ In order to invoke the protections of the ordinance, the amendment required that it first be approved by a majority of Akron's voters.⁸² A majority of voter approval was only necessary to put into effect housing ordinances that regulated real estate based on race, not real estate regulation ordinances based on other factors, which troubled the Court.⁸³

In *Hunter*, the amendment burdened African-Americans who wanted to invoke the fair housing ordinance.⁸⁴ Because the amendment only targeted ordinances regulating property on the basis of race, it disadvantaged the African-American minority by allowing the City of Akron to discriminate against them by denying them equality in housing.⁸⁵ The Court held that the amendment made it more difficult for minorities to enact antidiscrimination ordinances based on race because such legislation now required a majority vote.⁸⁶ Citizens wishing to enact antidiscrimination ordinances based on some other metric, such as political affiliation or sex, did not require a majority vote.⁸⁷

77. See *id.* at 477 (concluding that such an upward transfer of power imposes burdens on the minority).

78. See *id.* (noting that school boards usually had the power to make decisions about education policy).

79. See *id.* (finding that the use of a "complex government structure" improperly reallocates legislative power).

80. See *Hunter v. Erickson*, 393 U.S. 385, 386 (1969) (suggesting that the purpose of the ordinance was to provide equal housing opportunity).

81. See *id.* at 387 (noting that Ms. Hunter was unable to view homes for sale because she was African-American).

82. See *id.* (mentioning that the amendment passed by a majority vote).

83. See *id.* at 389, 391 (finding that the amendment treated racial housing concerns differently than other housing concerns, thereby disproportionately affecting minority groups).

84. See *id.* at 391 (holding that the amendment was facially neutral as to race).

85. See *id.* (finding that the amendment placed "special burdens" on minorities).

86. See *id.* at 390 (noting that approval of the City Council sufficed to enact ordinances not based on race).

87. See *id.* at 391 (listing other types of ordinances that could be passed without a

Similar circumstances were at issue in *Seattle*.⁸⁸ In *Seattle*, the school district used busing and school reassignments to accelerate desegregation.⁸⁹ Residents opposed to desegregation passed an initiative preventing school boards from requiring students to attend schools other than those that were closest to them.⁹⁰ The Court found it impermissible that with passage of the initiative, decisions about desegregation now had to be made by appealing to the voters of the state to overturn the initiative while decisions about other educational interests remained with local school boards, where desegregation policies had typically been.⁹¹

The initiative in *Seattle* reallocated political power so as to burden the African-American minority by removing from local school boards the power to adopt desegregation policies.⁹² Individuals favoring integration had to overturn the initiative by appealing to the Washington electorate.⁹³ Comparatively, individuals desiring other educational policies unrelated to integration need only petition the local school boards.⁹⁴

3. Triggering Levels of Scrutiny Under the Traditional Approach and the Hunter-Seattle Approach

The first step in determining the appropriate level of scrutiny to apply to a challenged law is to identify the legislative classification at issue.⁹⁵ Laws that either use impermissible racial classifications under the traditional approach or that obstruct minority access to the political processes under the political structure approach trigger the application of strict scrutiny.⁹⁶ Strict scrutiny mandates that laws must be narrowly tailored to achieve a compelling state interest.⁹⁷ The application of strict scrutiny does not

vote to illustrate why the amendment was discriminatory).

88. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 461 (1982) (suggesting that the state's goal was to equalize racially imbalanced schools).

89. See *id.* at 459-60, 60 n.2 (noting the anger over the slow pace of desegregation).

90. See *id.* at 463 (noting that the initiative passed with sixty-six percent of the vote).

91. See *id.* at 479 (characterizing the change in the decision-making process as "major").

92. See *id.* at 474 (noting that school boards had power over policies except desegregation).

93. See *id.* (noting that desegregation is a racial issue).

94. See *id.* at 474 n.17 (referring to a comparative burden).

95. See *Romer v. Evans*, 517 U.S. 620, 635 (1996) (noting that the State may not make one class of people unequal before the law).

96. See *Coal. to Defend Affirmative Action*, 701 F.3d 466, 489 (6th Cir. 2012) (en banc) (using the *Hunter-Seattle* test to trigger strict scrutiny).

97. See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (reiterating that strict

automatically invalidate a law.⁹⁸ As long as the government shows that its use of race is necessary to advance a compelling interest and is narrowly tailored to do so, the law does not violate the Constitution.⁹⁹

By contrast, laws that use neither a suspect racial classification nor restructure political power trigger rational basis review.¹⁰⁰ Under rational basis, a legislative classification is valid as long as it is rationally related to a legitimate government interest.¹⁰¹ Thus, unless a law uses a suspect classification like race or alters the channels of political change, the law will not trigger strict scrutiny and rational basis will apply.¹⁰²

Rational basis is a highly deferential standard.¹⁰³ However, courts always require a showing of the link between the classification in the law and the state interest at which that law is aimed.¹⁰⁴ The link between the classification and objective need only be average, not strong or compelling as under strict scrutiny.¹⁰⁵ If a court finds the requisite linkage between the classification and objective, the law will be upheld as long as the state interest is legitimate.¹⁰⁶ The state interest need not be the best or most efficient but need only be important in the eyes of the state.¹⁰⁷

C. The Circuit Split: The Battle over Affirmative Action Bans

I. Coalition to Defend Affirmative Action v. Regents: Michigan's Ban on Affirmative Action Violates the Equal Protection Clause Under the Hunter-Seattle Doctrine

In *Coalition to Defend Affirmative Action*, the Sixth Circuit struck down

scrutiny applies to all racial classifications).

98. *See id.* at 327 (suggesting that applications of strict scrutiny could differ by court).

99. *See, e.g., id.* (finding that strict scrutiny discerns the sincerity of the government's use of race).

100. *See, e.g., Romer*, 517 U.S. at 631 (noting that rational basis is consistent with legislative reality).

101. *See id.* at 632 (noting that the government interest could have a weak rationale).

102. *See id.* at 634 (noting that a desire to harm a group is not a legitimate state interest under rational basis).

103. *See id.* at 632 (calling rational basis the "most deferential of standards").

104. *See id.* (highlighting that an imprudent law could be upheld under rational basis).

105. *See id.* (noting that the fit requirement delineates judicial authority and discretion to strike down laws).

106. *See id.* (holding that the interest need not be compelling).

107. *See id.* (noting that states must know what laws they can pass).

Proposal 2, which banned the use of affirmative action.¹⁰⁸ Various constituencies challenged Proposal 2 as an equal protection violation because it made it more difficult for racial minorities to have their ethnic origins taken into account.¹⁰⁹ The district court concluded that Proposal 2 was constitutional because the state and its voters were free to ban programs that advantage racial minorities without violating constitutional requirements.¹¹⁰ A panel of the Sixth Circuit reversed the decision of the district court because Proposal 2 improperly modified the admissions processes at Michigan's universities.¹¹¹

Sitting *en banc*, the Sixth Circuit affirmed.¹¹² Applying the *Hunter-Seattle* test, the court found that affirmative action programs have a racial focus.¹¹³ The court held that affirmative action is a policy that makes up part of the process of admissions, which the court called a political process under the *Hunter-Seattle* test.¹¹⁴ The court then found that Proposal 2 reordered the admissions process to impose burdens on individuals advocating for affirmative action programs compared to individuals who wished to change other aspects of school admissions policies unrelated to race, such as consideration of legacy or alumni connections.¹¹⁵

The majority found that the *Hunter-Seattle* test was met, thereby triggering strict scrutiny.¹¹⁶ It reasoned that the laws repealed in *Hunter* and *Seattle* were preferential just like the affirmative action programs

108. See *Coal. to Defend Affirmative Action*, 701 F.3d 466, 470-71 (6th Cir. 2012) (en banc) (noting Michigan's long history with affirmative action litigation).

109. See *id.* at 472 (explaining that the litigation only applied to affirmative action in education).

110. See *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924, 957, 960 (E.D. Mich. 2008) (holding that neither the traditional view nor the *Hunter-Seattle* doctrine of equal protection invalidate Proposal 2).

111. See *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 652 F.3d 607, 619, 626 (6th Cir. 2011) (applying the *Hunter-Seattle* test to hold Proposal 2 unconstitutional).

112. See *Coal. to Defend Affirmative Action*, 701 F.3d at 489 (explaining that the court need not consider the Plaintiffs' claims under traditional equal protection analysis).

113. See *id.* at 478 (equating affirmative action to busing and school reassignment programs to satisfy the racial focus prong).

114. See *id.* at 481 (finding the sharp disagreement about whether admissions policies are part of a "political process," as that term was used in *Hunter* and *Seattle*).

115. See *id.* at 483-84 (noting that the only way to enact affirmative action programs after Proposal 2 is to amend the Michigan Constitution).

116. See *id.* at 473 (framing the issue in terms of the political structure doctrine and not in terms of *Grutter*'s holdings).

repealed by Proposal 2.¹¹⁷ The many dissents argued that the *Hunter-Seattle* test was inapplicable because that doctrine only applies where the laws repealed require equality, not policies like affirmative action, that create inequality.¹¹⁸ The dissents focused on the distinction between the repeal of laws that make it more difficult for minorities to gain protection from discrimination and those that make it more difficult for minorities to obtain preferential treatment.¹¹⁹ The dissents read *Hunter* and *Seattle* narrowly not to apply to the latter situation.¹²⁰ Because Proposal 2 makes it more difficult for minorities to obtain preferential treatment, the *Hunter-Seattle* test was irrelevant.¹²¹

Given that Proposal 2 satisfied the *Hunter-Seattle* test, the majority applied strict scrutiny.¹²² The Michigan Attorney General failed to argue that Proposal 2 was supported by a compelling state interest.¹²³ Thus, Proposal 2 failed strict scrutiny and was found unconstitutional.¹²⁴

2. Coalition for Economic Equity v. Wilson: *State Affirmative Action Bans Do Not Violate the Equal Protection Clause*

In *Coalition for Economic Equity v. Wilson*, the Ninth Circuit upheld California's Proposition 209 barring the use of affirmative action.¹²⁵ The court concluded that Proposition 209 was constitutional using the traditional approach to equal protection.¹²⁶ The court reasoned that if the purpose of the Equal Protection Clause is to prohibit racial discrimination then Proposition 209 achieves this goal by prohibiting all racial classifications.¹²⁷

117. See *id.* at 486 (calling the dissents' characterizations "strained").

118. See *id.* (viewing the repealed law in *Seattle* as preferential).

119. See *id.* at 496 (Gibbons, J., dissenting) (noting that these two concepts are profoundly different).

120. See *id.* at 498 (finding that affirmative action cannot be analyzed using the *Hunter-Seattle* test).

121. See *id.* (noting that elimination of racial classifications is not barred by *Hunter* and *Seattle*).

122. See *id.* at 489 (majority opinion) (noting that the *Seattle* Court did not apply strict scrutiny).

123. See *id.* (declining to consider a compelling state interest).

124. See *id.* (noting that a compelling state interest may exist).

125. See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 696-97, 709 (9th Cir. 1997) (highlighting that Proposition 209 passed by a margin of fifty-four to forty-six percent).

126. See *id.* at 701 (finding Proposition 209 consistent with the equal protection guarantee to end racial discrimination).

127. See *id.* at 702 (emphasizing that the language of Proposition 209 clearly prohibits racial classifications).

The court found *Hunter* and *Seattle* inapplicable.¹²⁸ Relying on *Crawford*, the court held that Proposition 209 functioned as a repeal of racial legislation that was not required by the Constitution to begin with.¹²⁹ Because such a repeal does not deny equal protection, Proposition 209 was constitutional.¹³⁰

III. ANALYSIS

A. In Coalition to Defend Affirmative Action v. Regents, the Court Erred in Applying the Hunter-Seattle Test to Strike Down Michigan's Proposal 2 Because the Hunter-Seattle Test Was Not Satisfied.

The Sixth Circuit used the *Hunter-Seattle* political structure doctrine to invalidate Proposal 2.¹³¹ However, the *Hunter-Seattle* test was not triggered, and consequently strict scrutiny analysis should not have been applied.¹³² First, Proposal 2 does not remove political power from the local level of government to a higher level of government as required by *Hunter* and *Seattle*.¹³³ Second, Proposal 2 does not burden the interests of a racial minority.¹³⁴ Finally, because Proposal 2 does not condone discrimination against minorities, the *Hunter-Seattle* test should not have been triggered, and strict scrutiny should not have been applied.¹³⁵ Thus, because Proposal 2 failed to satisfy the *Hunter-Seattle* test, strict scrutiny did not apply and the Sixth Circuit's invalidation of Proposal 2 under that level of scrutiny was incorrect.¹³⁶

128. *See id.* at 706 (distinguishing *Hunter* and *Seattle* from the current case by reading them narrowly).

129. *See id.* at 709 (concluding that *Crawford* controls because the *Hunter-Seattle* test was not triggered).

130. *See id.* (holding that Proposition 209 addresses racial issues neutrally).

131. *See Coal. to Defend Affirmative Action*, 701 F.3d 466, 488-89 (6th Cir. 2012) (en banc) (holding that because Proposal 2 fails the *Hunter-Seattle* test it must pass strict scrutiny).

132. *See id.* at 493 (Gibbons, J., dissenting) (noting that the political structure approach does not invalidate Proposal 2).

133. *See id.* at 498-99 (noting that Proposal 2 has not restricted the lawmaking process).

134. *See id.* at 506 (Sutton, J., dissenting) (finding no burden on any group).

135. *See id.* at 501 (noting that Proposal 2 repeals a racial preference program).

136. *But see id.* at 489 (majority opinion) (finding that Proposal 2 fails strict scrutiny and is therefore unconstitutional).

1. Because Proposal 2 Does Not Reallocate Political Power from a Local Legislative Body to a Higher Level of Government, the Hunter-Seattle Test Was Not Satisfied.

The *Hunter-Seattle* test is implicated when political power is deliberately shifted upward from a local legislative body to a higher level of government.¹³⁷ The test does not apply in circumstances where political power remains where it has traditionally been.¹³⁸ With regard to Proposal 2, the question is whether the power over university admissions policies was moved to a higher level of government so as to trigger the application of the *Hunter-Seattle* test.¹³⁹

Proposal 2 has not removed decision-making authority over admissions policies to a higher level of government because the power over Michigan's public universities has always been at the state level.¹⁴⁰ This is because the Michigan Constitution only confers authority on the boards of Michigan's public universities to run the schools.¹⁴¹ Thus, even though the State has delegated authority to the boards, the ultimate power over Michigan's public universities still rests with the state whether in the electorate or the legislature.¹⁴²

The passage of Proposal 2 took the issues of state university admissions policies, which have traditionally been lodged at the state level, and placed them in the hands of the statewide electorate, which represents the entire state.¹⁴³ Given that authority over Michigan's public universities and their governance has always been at the state level, whether the state level is defined as the legislature or the electorate, political power over admissions decisions has not been shifted upward.¹⁴⁴ Rather, the power over university admissions policies remains exactly where it has always been: at the state level.¹⁴⁵ Thus, Proposal 2 did not trigger the *Hunter-Seattle* doctrine

137. See, e.g., *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 483 (1982) (referencing a "new and remote level of government").

138. See *id.* at 480 (noting that the initiative moved power up to the state level).

139. See *Coal. to Defend Affirmative Action*, 701 F.3d at 498-99 (Gibbons, J., dissenting) (suggesting that Proposal 2 has not reallocated political power).

140. See MICH. CONST. art. VIII, § 5 (delegating the power of university administration to school boards).

141. See *id.* (characterizing the boards as corporate bodies).

142. See *Coal. to Defend Affirmative Action*, 701 F.3d at 499 (Gibbons, J., dissenting) (noting that all voters have a say in the electoral process).

143. See *id.* at 470 (majority opinion) (arguing that students seeking affirmative action policies must amend the Michigan Constitution).

144. See *id.* at 504 (Gibbons, J., dissenting) (noting that voters have no ability to influence school board decisions).

145. See *id.* (equating the electorate with the legislature).

because the power over university admissions policies was not subject to removal to a higher level of government as required by the political structure doctrine.¹⁴⁶

2. Because Proposal 2 Does Not Burden the Interests of a Defined Minority Group, the Hunter-Seattle Test Was Not Satisfied.

The *Hunter-Seattle* test requires that challenged legislation burden the interests of a minority group.¹⁴⁷ In both *Hunter* and *Seattle*, the burden fell on racial minorities, particularly African-Americans.¹⁴⁸ The Court did not hold in either of those cases that a piece of challenged legislation must specifically burden a racial minority in order to comply with the political structure doctrine.¹⁴⁹ Nevertheless, in both instances the Court did identify discrete minority groups that suffered a burden, suggesting that there must be, at the very least, some identifiable group that is burdened by the challenged legislation.¹⁵⁰

Proposal 2 does not burden a minority interest consistent with *Hunter* and *Seattle*.¹⁵¹ To locate the burden imposed by Proposal 2, the majority compared two hypothetical groups: citizens attempting to institute affirmative action programs and citizens attempting to institute any other policy not affected by Proposal 2, like a policy that would give special consideration to family legacies or other such connections.¹⁵² Citizens seeking adoption of affirmative action programs must amend the Michigan Constitution in order to vitiate the effects of Proposal 2.¹⁵³ Citizens seeking other admissions policies, such as consideration of legacy connections, have the comparatively easier burden of petitioning university officials.¹⁵⁴

146. *See id.* (emphasizing that the electorate was the only level of government at which these decisions could be made).

147. *See, e.g., Hunter v. Erickson*, 393 U.S. 385, 391 (1969) (referring specifically to racial minorities).

148. *See, e.g., id.* at 387 (noting that Ms. Hunter was African-American).

149. *See, e.g., id.* at 391 (citing other minority groups that could have been burdened but were not).

150. *See, e.g., Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474 (1982) (referring specifically to racial or ethnic groups, not simply an undefined minority).

151. *See Coal. to Defend Affirmative Action*, 701 F.3d at 506 (en banc) (Sutton, J., dissenting) (finding no reasonable way of locating a burden).

152. *See id.* at 483-84 (majority opinion) (defending the concept of a comparative structural burden among groups).

153. *See id.* at 484 (noting that constitutional amendment is the sole recourse to enact affirmative action programs).

154. *See id.* (outlining other avenues available in addition to petitioning the school board).

Though the majority's rationale that a burden does exist for individuals seeking the adoption of affirmative action plans is tenable, its logic fails to specifically identify the minority group that is burdened and thus, does not comply with the narrow reading afforded to *Hunter* or *Seattle*.¹⁵⁵ By referring only to a hypothetical citizen, or group of citizens, who must crusade for adoption of affirmative action programs, the majority assumes without explanation that these individuals constitute a minority of the Michigan population.¹⁵⁶ However, both *Hunter* and *Seattle* identified discrete minority groups, African-Americans, who were disadvantaged by the challenged voter initiatives and the laws they repealed.¹⁵⁷ Thus, the failure of the *en banc* majority to pinpoint exactly which group Proposal 2 disadvantages does not comply with *Hunter* and *Seattle*.¹⁵⁸

Moreover, the majority's failure to identify a burdened minority group rests on the fact that Proposal 2 actually burdens no one.¹⁵⁹ By its own words, Proposal 2 prohibits discrimination or preferential treatment of individuals based on race.¹⁶⁰ By contrast, the charter amendment at issue in *Hunter* allowed the state to engage in racial discrimination by subjecting only the issue of racial discrimination in housing to a more rigorous process of enforcement than other types of housing discrimination.¹⁶¹ The overall effect of the *Hunter* amendment made it such that racial minorities, like African-Americans, had to work harder than other groups to achieve equal treatment.¹⁶²

3. Because the Hunter-Seattle Test Applies Only to Laws Condoning Discrimination Against Minorities, It Was Not Satisfied.

Hunter and *Seattle* attempted to remedy the inequalities created by legislation that had the effect of permitting the state to discriminate against

155. See, e.g., *Hunter v. Erickson*, 393 U.S. 385, 391 (1969) (noting that the amendment only burdened African-Americans).

156. See *Coal. to Defend Affirmative Action*, 701 F.3d at 484 (opining on the burdens of the "now-exhausted citizen").

157. See, e.g., *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 476-77 (1982) (emphasizing that a "particular" group of individuals must be burdened).

158. See *Coal. to Defend Affirmative Action*, 701 F.3d at 492 (Boggs, J., dissenting) (discussing the majority's extension of the *Hunter-Seattle* test).

159. See *id.* at 506 (Sutton, J., dissenting) (struggling to locate burdens on racial minorities and suggesting that no burden exists).

160. See *id.* (arguing that a ban on racial discrimination is an unusual way to burden a specific group).

161. See *Hunter v. Erickson*, 393 U.S. 385, 390 (1969) (noting that no expedited election mechanism was available to address racial housing matters).

162. See *id.* at 389 (finding that the charter did not convey a positive right to discriminate).

minorities, not legislation that prevented the state from discriminating against minorities.¹⁶³ For example, in *Hunter*, the requirement of a majority vote of the city's electorate to enforce a fair housing ordinance allowed the city to discriminate against its African-American population by making it harder for them to obtain freedom from discrimination in housing when that discrimination was based solely on their race.¹⁶⁴ Thus, the *Hunter-Seattle* doctrine is triggered in the narrow factual circumstances where the challenged legislation permits the State to engage in discrimination against minorities.¹⁶⁵ Consequently, the *Hunter-Seattle* doctrine is not triggered where a piece of challenged legislation expressly prohibits the State from favoring minority groups.¹⁶⁶

Michigan's Proposal 2 did not trigger the *Hunter-Seattle* test because its effect is not to allow the state to discriminate against any minority group.¹⁶⁷ This becomes clear by examining the policy targeted by Proposal 2 and the language of the legislation itself.¹⁶⁸ First, the existing policy affected by Proposal 2 is affirmative action, a preferential treatment program.¹⁶⁹ The Supreme Court acknowledges that affirmative action programs are exceptions to the Equal Protection Clause because they permit discrimination by allowing the State to prefer one group to another.¹⁷⁰ Applying this rationale, the policy that Proposal 2 targets is one that permits discrimination in the context of university admissions.¹⁷¹ By contrast, the targets of the challenged legislation in *Hunter* and *Seattle* were laws that prohibited discrimination.¹⁷²

163. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 461 (1982) (implying that by cancelling the desegregation program, the State could continue the discriminatory practice of segregation); see also *Hunter*, 393 U.S. at 387 (noting that the target of the amendment was a fair housing ordinance that required the State to treat all citizens equally in housing matters).

164. See *Hunter*, 393 U.S. at 389 (highlighting that only racial housing was affected).

165. See *Coal. to Defend Affirmative Action*, 701 F.3d at 512 (Griffin, J., dissenting) (remarking on the infrequent use of the political structure doctrine).

166. See *id.* at 506 (Sutton, J., dissenting) (showing that Proposal 2 prohibits Michigan from engaging in discrimination).

167. See *id.* at 510 (emphasizing that Proposal 2 removes preferential treatment).

168. See generally *id.* (analyzing affirmative action and its relation to Proposal 2).

169. See *id.* at 471 (majority opinion) (noting that Proposal 2 appears under the heading "Affirmative Action" in the Michigan Constitution).

170. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (using the term "racial preferences" to describe race-conscious admissions policies like affirmative action).

171. See *Coal. to Defend Affirmative Action*, 701 F.3d at 491 (Boggs, J., dissenting) (referring to affirmative action policies as "racial discrimination").

172. See, e.g., *id.* at 510 (Sutton, J., dissenting) (showing that *Hunter* removed an

That Proposal 2 does not condone discrimination consistent with the *Hunter-Seattle* doctrine can also be found by looking to the language of the amendment.¹⁷³ Proposal 2 states that Michigan “shall not discriminate . . . or grant preferential treatment” on the basis of race, color, ethnicity, or national origin.¹⁷⁴ Though the language is clear, the prohibition against engaging in discrimination or granting preferential treatment shows that Michigan has unequivocally barred such treatment and not condoned it.¹⁷⁵ *Hunter* and *Seattle* struck down the legislation at issue in those cases because they permitted the state to discriminate, not because they prevented discrimination.¹⁷⁶ Therefore, the Sixth Circuit’s use of those cases to invalidate Proposal 2 was inappropriate given the stark differences between the characteristics and functions of the legislation struck down in *Hunter* and *Seattle* compared to the characteristics and functions of the legislation struck down by the Sixth Circuit.¹⁷⁷

B. Because the Hunter-Seattle Test Has Narrow Applicability, the Court Should Have Used the Traditional Approach to Equal Protection, Triggering Rational Basis Under Which Proposal 2 Is Constitutional.

The majority’s reliance on the *Hunter-Seattle* approach to the Equal Protection Clause led the court to invalidate Proposal 2.¹⁷⁸ Because of this, the majority chose not to apply the traditional approach to the equal protection doctrine.¹⁷⁹ The court should have analyzed Proposal 2 under a traditional approach to equal protection because the *Hunter-Seattle* test only applies to legislative enactments that repeal antidiscrimination laws or other laws aimed at securing equality.¹⁸⁰

Under traditional equal protection analysis, the central purpose of the

antidiscrimination law and not a law that permitted discrimination).

173. See *id.* at 471-72 (majority opinion) (arguing that Proposal 2 prevents state schools from considering adoption of affirmative action).

174. See *id.* at 471 (noting that affirmative action policies had been in place for almost fifty years in Michigan).

175. See *id.* at 510 (Sutton, J., dissenting) (referring to Proposal 2 as “neutral”).

176. See *id.* (noting that the laws invalidated in *Hunter* and *Seattle* afforded the State a positive right to discriminate).

177. See *id.* at 495-96 (Gibbons, J., dissenting) (discussing why the *Hunter-Seattle* doctrine does not control based on the language of Proposal 2).

178. See *id.* at 513 (Griffin, J., dissenting) (noting that the majority deemed traditional equal protection inapplicable).

179. See *id.* at 489 (majority opinion) (summarizing why traditional equal protection principles were inapplicable).

180. See *id.* at 513 (Griffin, J., dissenting) (criticizing the majority’s decision to eschew traditional equal protection analysis given the *Hunter-Seattle* test’s limited applicability).

Equal Protection Clause is to prevent the use of racial classifications that often lead to racial discrimination and other undesirable social consequences.¹⁸¹ Analysis under this theory asks whether a challenged law distinguishes between individuals on the basis of a suspect classification like race.¹⁸² If the law does not make use of a suspect classification, it is subject to rational basis review.¹⁸³

Had the majority analyzed Proposal 2 using the traditional approach to equal protection, it would have found that Proposal 2 draws no distinctions on the basis of a suspect classification like race.¹⁸⁴ Due to the lack of a suspect classification, strict scrutiny was not triggered and rational basis should have been applied.¹⁸⁵ Consequently, under the deferential rational basis standard, Proposal 2 is constitutional because its prohibition against racial discrimination and racial preferences is rationally related to the state's legitimate interest in eliminating racial discrimination.¹⁸⁶

1. Because Proposal 2 Prohibits Racial Discrimination, It Does Not Draw a Racial Classification That Triggers Strict Scrutiny.

Laws that use a suspect classification like race as a means of legislative distinction automatically trigger strict scrutiny.¹⁸⁷ Laws that do not use a suspect classification are subject to rational basis review and must be rationally related to a legitimate state interest.¹⁸⁸ Thus, the first step in determining the appropriate level of scrutiny under which to evaluate a challenged law is to determine the nature of the classification at issue.¹⁸⁹

Proposal 2 does not distinguish between individuals or groups through the use of a suspect classification such as race and is consequently subject

181. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (holding that racial classifications do not reflect legitimate public concerns or interests).

182. See, e.g., *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) (noting that suspect classifications must survive strict scrutiny).

183. See, e.g., *Romer v. Evans*, 517 U.S. 620, 631 (1996) (suggesting that not all laws will automatically incur strict scrutiny).

184. See *Wilson*, 122 F.3d at 702 (noting that a bar on racial classifications is not a racial classification).

185. See *Coal. to Defend Affirmative Action*, 701 F.3d at 504 (Gibbons, J., dissenting) (emphasizing that Proposal 2 easily satisfies rational basis review).

186. See *id.* at 508 (Sutton, J., dissenting) (suggesting that the passage of Proposal 2 reflects a decision of Michigan's electorate to end preferential treatment programs).

187. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (holding that any use of race automatically triggers strict scrutiny).

188. See, e.g., *Romer*, 517 U.S. at 631 (noting that most laws classify individuals in some way).

189. See *id.* at 633 (suggesting that legislative classifications often reference a single trait like race).

to rational basis review.¹⁹⁰ Proposal 2 clearly states that Michigan may not discriminate against individuals on the basis of race or a limited list of other personal characteristics.¹⁹¹

Proposal 2 is not a racial classification. By barring discrimination and preferential treatment, the state is legally foreclosed from preferring one group on the basis of race, thus forcing the state to treat all citizens equally without regard for race.¹⁹² As the Ninth Circuit deftly observed in *Coalition for Economic Equity*, “a law that prohibits the State from classifying individuals by race . . . does not classify individuals by race.”¹⁹³ Therefore, Proposal 2 does not use a suspect classification that would trigger strict scrutiny.¹⁹⁴ Because Proposal 2 fails to meet the threshold requirements to trigger strict scrutiny, it need only pass the rational basis standard.¹⁹⁵

2. *Eliminating Distinctions Based on Race Is a Legitimate State Interest.*

Rational basis review first requires that there be a legitimate state interest to support the classification made by the law at issue.¹⁹⁶ The state interest does not need to be compelling, as under strict scrutiny, nor does it need to be the wisest or most important interest.¹⁹⁷ Due to the highly deferential nature of rational basis, the interest need only be legitimate in the eyes of the state.¹⁹⁸

The state interest advanced by Proposal 2 is Michigan’s interest in eliminating racial distinctions and preferential treatment.¹⁹⁹ Because Proposal 2 was the subject of a statewide vote that was subsequently

190. See *Coal. to Defend Affirmative Action*, 701 F.3d at 504 (Gibbons, J., dissenting) (noting the lack of racial classification such that only rational basis is triggered).

191. See *id.* at 471 (majority opinion) (listing other characteristics excluded from the reach of Proposal 2).

192. See *id.* at 510 (Sutton, J., dissenting) (stating that Proposal 2 places all individuals on a the same level).

193. See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) (emphasizing the legal effect of a prohibition on discrimination).

194. See, e.g., *Coal. to Defend Affirmative Action*, 701 F.3d at 504 (Gibbons, J., dissenting) (noting that Proposal 2 requires no heightened scrutiny).

195. See, e.g., *id.* (engaging in rational basis review absent the need for more stringent review).

196. See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996) (noting that the state determines whether the interest is legitimate).

197. See *id.* (postulating that an “unwise” law could survive).

198. See *id.* (requiring deference to state objectives).

199. See *Coal. to Defend Affirmative Action*, 701 F.3d at 508 (Sutton, J., dissenting) (emphasizing that Proposal 2 was the state’s mechanism for ending racial preferences).

approved through the voting process, it follows that a majority of the Michigan electorate favored the initiative and its underlying premise to end racial discrimination and preferential treatment.²⁰⁰ Thus, as the principal political authority of the state, the Michigan electorate affirmed its interest in and commitment to ending racial discrimination through the passage of Proposal 2.²⁰¹

The legitimacy of Michigan's interest in ending racial distinctions and preferential treatment is grounded in the notion that the purpose of the Equal Protection Clause is to eliminate government-sanctioned discrimination on the basis of race.²⁰² Given the clarity with which the Supreme Court has articulated that the central focus of the Equal Protection Clause is to end state-imposed racial discrimination, it follows that state initiatives that aim to accomplish that goal and have the effect of doing so are legitimate such that the "legitimate state interest" prong of the rational basis test is satisfied.²⁰³ Thus, because Proposal 2 reflects a collective decision by the Michigan electorate, the highest political authority of the state, to end racial discrimination and because that interest is well supported by Supreme Court doctrine, the state interest advanced by Proposal 2 satisfies the "legitimate state interest" prong of the rational basis standard.²⁰⁴

3. Proposal 2 Is Rationally Related to the State Interest of Eliminating Distinctions Based on Race.

That a law is grounded in a legitimate government interest does not end the application of the rational basis inquiry because the proposed law must have some relationship or connection to the achievement of the asserted state interest.²⁰⁵ Put differently, the law or classification at issue must be the means through which the asserted government interest is achieved.²⁰⁶ Thus, a court considering the relationship between the state interest

200. *See id.* at 471 (majority opinion) (discussing the passage of Proposal 2 by a fifty-eight to forty-two percent margin).

201. *See id.* at 491-92 (Boggs, J., dissenting) (outlining Michigan's historical path to equality legislation).

202. *See, e.g.,* *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (noting that racial classifications create racial tension).

203. *See Coal. to Defend Affirmative Action*, 701 F.3d at 514 (Griffin, J., dissenting) (viewing bans on racial preferences as consistent with the Fourteenth Amendment).

204. *See id.* at 513 (suggesting that racial neutrality in a law is a legitimate interest).

205. *See, e.g.,* *Romer v. Evans*, 517 U.S. 620, 632 (1996) (noting that the link between the state interest and the measure is the crux of rational basis).

206. *See id.* (emphasizing that the law must advance the legislative interest).

advanced by Proposal 2 and the means through which that interest is achieved need only find some relationship, regardless of how small, between the two.²⁰⁷

The state interest that Proposal 2 seeks to accomplish is an end to racial preferences and racial discrimination.²⁰⁸ The means through which that end is to be pursued is through Proposal 2.²⁰⁹ Proposal 2 explicitly emphasizes that the state “shall not discriminate” on the basis of race.²¹⁰ A plain reading of the amendment’s language reveals that its effect is to prohibit the state from discriminating, not to allow the state to do so.²¹¹ Thus, the question of satisfying rational basis now becomes whether a prohibition on the use of racial discrimination is rationally related to the state interest in eliminating racial discrimination.²¹²

If a state’s interest is coterminous with the means through which that interest is achieved, the “rational relationship” prong of the rational basis test is satisfied.²¹³ Proposal 2 has a rational relationship to Michigan’s interest in ending racial preferences and discrimination because that interest is directly aligned with the means being used to achieve that interest.²¹⁴ If Michigan’s goal is to eliminate all racial discrimination, then Proposal 2 is rationally related to that interest because the state cannot, as a matter of law, discriminate on the basis of race.²¹⁵ After the passage of Proposal 2, the State cannot prefer one group of individuals to another or otherwise discriminate against a certain group, thus achieving the state interest in eliminating discrimination.²¹⁶ Because there is some discernible relationship between Michigan’s interests and the means through which

207. *See id.* at 633 (explaining that the fit inquiry ensures that laws are not drawn to discriminate against a group).

208. *See Coal. to Defend Affirmative Action*, 701 F.3d at 508 (Sutton, J., dissenting) (asserting that the “people of Michigan” chose to end racial preferences).

209. *See generally id.* at 471-72 (majority opinion) (discussing how Proposal 2 altered affirmative action in Michigan).

210. *See* MICH. CONST. art. I, § 26(2) (listing sex, color, ethnicity, and national origin as other affected classes).

211. *See Coal. to Defend Affirmative Action*, 701 F.3d at 504 (Gibbons, J., dissenting) (noting that Proposal 2 is neutral).

212. *See id.* (applying rational basis but not discussing it).

213. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632 (1996) (suggesting that a narrowly-drawn law closely related to the state interest satisfies rational basis).

214. *See Coal. to Defend Affirmative Action*, 701 F.3d at 504 (Gibbons, J., dissenting) (arguing that a court should not question the motives of the electorate in changing laws).

215. *See id.* at 514 (Griffin, J., dissenting) (suggesting that Proposal 2 actually enshrines equality values into the Michigan Constitution).

216. *See id.* at 513 (equating discrimination with the idea of preference).

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those interests are achieved, Proposal 2 satisfies the second prong of the rational basis standard.²¹⁷

C. Because the Traditional Approach Holds That the "Mere Repeal" of Race-Conscious Legislation Does Not Violate the Equal Protection Clause, the Ninth Circuit Reached the Correct Conclusion in Wilson, and Because Proposal 2 Functions as a "Mere Repeal," It Is Constitutional.

In *Coalition for Economic Equity*, the Ninth Circuit chose not to apply the *Hunter-Seattle* approach to equal protection.²¹⁸ The court chose instead to decide the case on the standard set in *Crawford v. Board of Education*.²¹⁹ *Crawford* holds that when the State repeals existing legislation dealing with race that is not required by the Constitution and without removing the power of the State or its citizens to reinstate those laws, that repeal is not an invalid racial classification that violates the Equal Protection Clause.²²⁰ The Ninth Circuit used *Crawford* as the basis on which to hold California's Proposition 209 constitutional because it functioned only as a repeal of California's affirmative action plans without taking further steps to disadvantage any particular group.²²¹ Like California's Proposition 209, Michigan's Proposal 2 also functions as a "mere repeal" under the *Crawford* standard because it allows Michigan voters to reinstate affirmative action policies by appealing to the statewide electorate and because affirmative action policies are not constitutionally required in the first place.²²²

1. Proposal 2 Is a "Mere Repeal" Because the Citizens of Michigan May Still Reinstate Affirmative Action Policies.

Under *Crawford*, if the State repeals legislation that touches on race but still permits the citizens of that state or the state government to somehow

217. See, e.g., *id.* at 493 (Gibbons, J., dissenting) (using the traditional approach to trigger rational basis and thereby finding Proposal 2 constitutional under that approach).

218. See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 706 (9th Cir. 1997) (reasoning that *Hunter* and *Seattle* must be read narrowly).

219. See *id.* (declining to adopt the Plaintiffs' expansive reading of *Hunter* and *Seattle*).

220. See *Crawford v. Bd. of Educ.*, 458 U.S. 527, 537-38 (1982) (noting the constitutionality of neutral race-related laws).

221. See generally *Wilson*, 122 F.3d at 705 (discussing why *Crawford* applies under the facts of *Wilson*).

222. See *Coal. to Defend Affirmative Action*, 701 F.3d at 514 (Griffin, J., dissenting) (applauding the Ninth Circuit's reliance on *Crawford* in lieu of the *Hunter-Seattle* test).

reestablish those policies, there is no equal protection violation.²²³ Consequently, unless there is no feasible way to reinstate the repealed laws, the Equal Protection Clause has not been violated by the repeal alone.²²⁴ Because Proposal 2 leaves open the possibility of reinstating the policies it repealed, there is no equal protection violation under *Crawford*.²²⁵

Proposal 2 eliminated Michigan's affirmative action programs in a statewide election in which all parties had the right to participate.²²⁶ Neither the majority nor the dissenting opinions in *Coalition to Defend Affirmative Action* disagreed on this point.²²⁷ The fact that a vote occurred does not mean that Michigan can never reinstate those policies.²²⁸ Rather, to the same extent that Michigan repealed its affirmative action programs through a vote, it can reinstate those programs by putting another initiative reinstating affirmative action policies before the Michigan electorate for a vote.²²⁹ Because the possibility of a vote exists and is a means through which Michigan may reinstate its affirmative action policies, Michigan did not forever remove the power of Michigan's voters to reinstate those policies.²³⁰ Therefore, under *Crawford*, Proposal 2 functions solely as a repeal of race-based legislation.²³¹

2. Proposal 2 Is a "Mere Repeal" Because Affirmative Action Policies Are Not Required by the Constitution.

In addition to the proposition that the repeal of race-based legislation does not offend the Equal Protection Clause if channels for reinstatement remain open, *Crawford* also specified that if the policy being repealed is not one required by the Constitution to begin with, then its repeal does not

223. See, e.g., *Crawford*, 458 U.S. at 539 (holding that states must have the flexibility to achieve diversity).

224. See *id.* at 541 (noting that the states need not legislate beyond constitutional requirements).

225. See *Coal. to Defend Affirmative Action*, 701 F.3d at 470 (emphasizing that Michigan residents could "repeal" the effects of Proposal 2 if they so desired).

226. See, e.g., *id.* at 499 (Gibbons, J., dissenting) (noting that majority and minority voices were entitled to participate).

227. See, e.g., *id.* at 471 (majority opinion) (referring to the "Michigan voters").

228. See *id.* at 505 (Sutton, J., dissenting) (characterizing the enactment of Proposal 2 as an electoral choice).

229. See *id.* at 506 (suggesting that a vote or constitutional amendment are available to Michigan residents).

230. See *id.* at 488 (majority opinion) (noting that voters may lobby for affirmative action policies either way).

231. See *Crawford v. Bd. of Educ.*, 458 U.S. 527, 540 (1982) (highlighting that legislation must significantly alter channels for reinstatement to violate the Equal Protection Clause).

constitute a violation of the Equal Protection Clause.²³² This idea is supported by the notion that states should be given maximum flexibility to eliminate bad laws, to adopt new or different laws, and to experiment with different governance schemes.²³³ Thus, when a state adopts a policy that is not required by the Federal Constitution, it is free to recede from that policy without violating the Equal Protection Clause.²³⁴

A court examining Michigan's Proposal 2 through the *Crawford* lens would look to the policy that is being repealed and then decide whether that policy is constitutionally required to determine whether the repeal is constitutional.²³⁵ First, the policy that Proposal 2 repeals is affirmative action.²³⁶ Second, affirmative action is not required by the Constitution because it is an exception to the baseline rule of equality embodied by the Equal Protection Clause.²³⁷ It follows that the repeal of affirmative action does not violate the Equal Protection Clause under the *Crawford* standard.²³⁸

Affirmative action programs are not required by the Constitution because they are judicially-granted exceptions to the Equal Protection Clause, currently allowed by the Supreme Court, and which are only constitutional within narrowly defined contours and the permissive language of Court.²³⁹ As the Supreme Court held in *Grutter*, an interest in diversity "can justify" the use of affirmative action programs.²⁴⁰ The Court's use of the permissive word "can" suggests that states are not required to adopt affirmative action programs, only that they may do so if they believe that their institutions are somehow deficient in diversity.²⁴¹

232. See *id.* at 535 (finding that busing was not constitutionally required in the first place).

233. See *id.* at 539 (allowing states wide latitude in their internal governance within the boundaries of the Constitution).

234. See *id.* at 540 (arguing that it would be unjust to require a state to maintain legislation that it was not required to pass).

235. See, e.g., *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 709 (9th Cir. 1997) (noting the distinction between what the Constitution permits and requires).

236. See *Coal. to Defend Affirmative Action*, 701 F.3d 466, 471 (6th Cir. 2012) (en banc) (highlighting that Proposal 2 explicitly used the words "Affirmative Action").

237. See, e.g., *id.* at 494 (Gibbons, J., dissenting) (arguing that affirmative action is presumptively invalid and not required).

238. See *Wilson*, 122 F.3d at 709 (noting that permitting something is different than requiring it).

239. See *Coal. to Defend Affirmative Action*, 701 F.3d at 506 (Sutton, J., dissenting) (emphasizing that racial preferences are "barely" constitutional).

240. See *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (holding that diversity is a compelling state interest).

241. See *Coal. to Defend Affirmative Action*, 701 F.3d at 513 (Gibbons, J.,

Furthermore, the Supreme Court's temporal limitations on affirmative action programs show that they are not required by the Constitution.²⁴² As stated in *Grutter*, the goal of eliminating the use of race and racial discrimination necessarily requires that any existing uses of race be eliminated.²⁴³ This goal can be achieved by requiring that schools include sunset provisions and engage in periodic reviews of their affirmative action programs.²⁴⁴ Consequently, it makes little sense to say that a policy like affirmative action is constitutionally required when the Supreme Court has already clearly instructed both that the policy must end in the future and, more persuasively, that it is not required by the Constitution.²⁴⁵ Therefore, because the affirmative action programs repealed by Proposal 2 are not required by the Constitution to begin with, the repeal of those programs does not violate the Equal Protection Clause under the standard articulated in *Crawford*.²⁴⁶

IV. POLICY RECOMMENDATION

While the *Hunter-Seattle* approach to the Equal Protection Clause is not often invoked, there are at least two persuasive reasons to support the argument that the continued use of the doctrine should be discouraged.²⁴⁷ First, it appears to be at odds with current Supreme Court doctrine favoring the elimination of all programs that confer racial preferences.²⁴⁸ Second, it potentially hinders fundamental beliefs about the legitimacy of voting and the democratic process.²⁴⁹ Accordingly, the Supreme Court should reverse the Sixth Circuit's decision and declare that the *Hunter-Seattle* test was inapplicable under those facts.²⁵⁰

dissenting) (analyzing the impact of the holdings of *Grutter*).

242. See, e.g., *Grutter*, 539 U.S. at 342 (suggesting that affirmative action will soon be obsolete and unnecessary).

243. See *id.* (referring to the sunset provisions as required, not discretionary).

244. See *id.* (noting that the good faith of university administrators in ending affirmative action is presumed).

245. See *Coal. to Defend Affirmative Action*, 701 F.3d at 511 (Gibbons, J., dissenting) (arguing that the choice to end affirmative action ultimately rests with the states).

246. See, e.g., *Crawford v. Bd. of Educ.*, 458 U.S. 527, 542 (1982) (suggesting that states need not align their laws to the Constitution in all respects).

247. See, e.g., *Coal. to Defend Affirmative Action*, 701 F.3d at 512 (Griffin, J., dissenting) (referring to the *Hunter-Seattle* doctrine as "ill-advised").

248. See *id.* at 494-95 (Gibbons, J., dissenting) (noting that recent decisions on affirmative action are analytically critical).

249. See *id.* at 513 (Griffin, J., dissenting) (referring to the democratic process as "necessary" to state governance).

250. See *id.* at 504 (finding no reason why traditional Equal Protection analysis

A. Continued Application of the Hunter-Seattle Test Ignores Current Supreme Court Doctrine Dictating That All Such Programs Must End When No Longer Needed.

With the Supreme Court's dual decisions in *Grutter* and *Gratz*, the Court showed a clear proclivity toward the eventual elimination of affirmative action when it was no longer needed.²⁵¹ The Supreme Court based its conviction on the notion that the Equal Protection Clause, if it is to have any substance at all, is meant to eliminate discrimination based on race.²⁵² The Court has given gravitas to its belief by requiring all affirmative action programs to end in the future through the use of sunset provisions and periodic reviews by governing school boards.²⁵³ If the courts continue to embrace the *Hunter-Seattle* doctrine in the same robust manner as the Sixth Circuit did and use it to invalidate state law bans on affirmative action, then state governments and the courts will be acting in contravention of the Supreme Court's clear mandate by allowing affirmative action programs to persist.²⁵⁴

Further, the *Hunter-Seattle* test makes it easier to sidestep the Supreme Court's decision in *Grutter*.²⁵⁵ Instead of looking substantively at whether a legislative classification actually uses a racial classification, as under the traditional approach, under the *Hunter-Seattle* test, the courts presume that any shift in the political process automatically creates an invalid racial classification.²⁵⁶ Not all racial classifications are invalid, only those that are not narrowly tailored to achieve a compelling state interest under strict scrutiny.²⁵⁷ Thus, to the extent that the *Hunter-Seattle* doctrine makes it easier to invalidate state law bans on affirmative action, its use should be discouraged.²⁵⁸

would not suffice).

251. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (holding that the use of race is not prohibited but that it is not also required).

252. See *id.* at 342 (suggesting that even compelling uses of race may not survive in the future).

253. See *id.* (highlighting that school officials recognize that affirmative action should be limited in duration).

254. See, e.g., *Coal. to Defend Affirmative Action*, 701 F.3d at 512 (Griffin, J., dissenting) (noting that the *Hunter-Seattle* doctrine was created long after the passage of the Fourteenth Amendment).

255. See *id.* (noting that the *Hunter-Seattle* test requires a strong judicial presumption in favor of finding a racial classification).

256. See *id.* at 512-13 (suggesting that *Hunter* and *Seattle* did not use a racial classification).

257. See *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (requiring courts to analyze the specific circumstances necessitating affirmative action).

258. See *Coal. to Defend Affirmative Action*, 701 F.3d at 512 (Griffin, J.,

B. By Nullifying State Legislation Passed by the Electorate, the Hunter-Seattle Doctrine Thwarts the Democratic Process.

Dissenting in *Seattle*, Justice Powell expressed dismay at the Court's intrusion into the structure of state government through its use of the political structure doctrine.²⁵⁹ Justice Powell grounded his disdain in the notion that the *Hunter-Seattle* doctrine curtails the freedom of the states to structure matters of internal governance free from interference by the courts, a longstanding bulwark for the benefit of the states against encroachments on their autonomy.²⁶⁰ Further, Justice Powell suggested that the use of the *Hunter-Seattle* doctrine directly challenged the authority of the state's electorate to pass laws, thus hindering the democratic process.²⁶¹

To some extent, Justice Powell's concerns manifested themselves in the Sixth Circuit's decision in *Coalition to Defend Affirmative Action*, suggesting that his skepticism was well placed.²⁶² Relying on the *Hunter-Seattle* doctrine, the majority invalidated Proposal 2.²⁶³ Upon closer inspection, however, the court not only invalidated the measure but actually overturned the otherwise valid result of Michigan's democratic processes.²⁶⁴

Justice Powell found this kind of judicial overreaching into the democratic processes of the states troubling because unless the states disobey the Constitution, their legislative judgments must be left intact.²⁶⁵ Thus, the *Hunter-Seattle* test has the potential to intrude on the power of the states and, more importantly, their electorates, by invalidating legislative enactments that otherwise comply with the Federal

dissenting) (discussing why the *Hunter-Seattle* doctrine is inconsistent with equal protection principles).

259. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 489 (1982) (Powell, J., dissenting) (referring to the intrusion as "unprecedented").

260. See *id.* (noting the freedom afforded to states in structuring legislative and judicial functions).

261. See *id.* at 496 (arguing that voters may always try to preempt locally-adopted policies by appealing to the legislature).

262. See *Coal. to Defend Affirmative Action*, 701 F.3d at 513 (Griffin, J., dissenting) (vigorously defending Justice Powell's dissent in *Seattle* for his assertion that the *Hunter-Seattle* test "unconstitutionally suspends" the democratic process).

263. See *id.* at 489 n.10 (majority opinion) (noting that Proposal 2 is only invalid as applied to education).

264. See, e.g., *id.* at 490 (Boggs, J., dissenting) (emphasizing that the citizens of Michigan were responsible for Proposal 2).

265. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 491 (1982) (Powell, J., dissenting) (arguing that in the absence of a constitutional violation the courts should not intervene).

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Constitution.²⁶⁶ Consequently, use of the *Hunter-Seattle* doctrine should be curtailed to prevent such distortions of state democratic processes.²⁶⁷

V. CONCLUSION

The future of affirmative action in the United States remains unresolved, but the decision in *Coalition to Defend Affirmative Action* reinvigorates the debate by addressing state law bans on those programs.²⁶⁸ The Supreme Court's recent decision in *Fisher v. University of Texas* showed the Court's continuing commitment to the principles articulated in *Grutter*.²⁶⁹ With the Supreme Court's review of *Coalition to Defend Affirmative Action* well underway, this Comment has argued that the Court should reverse that decision.²⁷⁰ Though the question of whether the *Hunter-Seattle* test applied in *Coalition to Defend Affirmative Action* should continue to be used remains an open question in the courts and the scholarship, the Court should seriously consider its potential pitfalls when reviewing the decision of the Sixth Circuit.²⁷¹ In his dissent in *Coalition to Defend Affirmative Action*, Judge Griffin certainly opened the door for the Supreme Court to overrule the *Hunter-Seattle* doctrine when he, somewhat ominously, urged the Court to "consign [the] misguided doctrine to the annals of judicial history."²⁷²

At the least, the Court must review the Sixth Circuit's decision in *Coalition to Defend Affirmative Action* and declare that the *Hunter-Seattle* test was not triggered under those facts, thereby affirming the Ninth Circuit's decision.²⁷³ Further, this Comment suggests that the Court should

266. See *id.* (holding that race-neutral policies do not violate the Constitution).

267. See *Coal. to Defend Affirmative Action*, 701 F.3d at 505 (Sutton, J., dissenting) (noting that affirmative action programs themselves often stem from a democratic process).

268. See *id.* at 473 (majority opinion) (attempting but failing to distinguish *Grutter* from the instant case suggesting a similarity between the two).

269. See *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2417 (2013) (emphasizing that *Bakke*, *Grutter*, and *Gratz* are the cases upon which analysis of the University of Texas admissions policy must turn).

270. See *supra* Part III (illustrating why Proposal 2 does not trigger strict scrutiny and why it is constitutional under rational basis review).

271. See *Coal. to Defend Affirmative Action*, 701 F.3d at 509 (Sutton, J., dissenting) (arguing that the *Hunter-Seattle* doctrine unfairly insulates one side of any debate on matters of policy and political fairness); see also *supra* Part IV (discussing potential drawbacks of continued invocation of the *Hunter-Seattle* test).

272. See *id.* at 512 (Griffin, J., dissenting) (characterizing the *Hunter-Seattle* doctrine as an anomaly lacking any constitutional basis).

273. See *Coal. to Defend Affirmative Action*, 701 F.3d at 514 (Griffin, J., dissenting) (suggesting that the circuit split results in doctrinal muddiness that the

instead analyze Proposal 2 under the Court's precedent embracing the broad traditional approach to equal protection because it ultimately survives constitutional scrutiny under that approach and because that analysis does not overturn the valid result of a state referendum.²⁷⁴ Should the Court choose to rule more broadly and overrule *Hunter* and *Seattle*, there are plausible reasons for doing so, though a more in-depth analysis of those reasons should be undertaken.²⁷⁵ Certainly, the infrequent invocation of the *Hunter-Seattle* doctrine is strong preliminary evidence of a judicial distaste for the doctrine and perhaps suggests more fundamental concerns about its precarious position in the law of equal protection.²⁷⁶

Putting aside doctrinal or political concerns, from a purely analytic standpoint, state law bans on affirmative action appear to be consistent with the Court's principles articulated in *Grutter* and reaffirmed in *Fisher*.²⁷⁷ This is because their effect is to bring such programs to an end, which is precisely what *Grutter* envisioned by requiring sunset provisions and forecasting a twenty-five year lifespan on existing affirmative action programs.²⁷⁸ Thus, whatever may be said about the merits or pitfalls of the under-used *Hunter-Seattle* doctrine, there remains the persuasive argument that when a state chooses, through the democratic process, to repeal affirmative action policies, which are presumptively invalid but only narrowly permitted, the state acts in compliance with the Equal Protection Clause and the current posture of the Supreme Court.²⁷⁹

majority should have avoided).

274. See *supra* Part III.B (discussing how the traditional approach triggers rational basis under which Proposal 2 is constitutional); see also *Coal. to Defend Affirmative Action*, 701 F.3d at 511 (noting that the majority's decision is hard to reconcile with the Equal Protection Clause).

275. See, e.g., *Coal. to Defend Affirmative Action*, 701 F.3d at 496 (Gibbons, J., dissenting) (suggesting that equal protection doctrine has evolved since *Hunter* and *Seattle*).

276. See *id.* at 512 (Griffin, J., dissenting) (pointing to the fact that only three cases had used the *Hunter-Seattle* doctrine before the Sixth Circuit's decision in *Coalition to Defend Affirmative Action* and that two of those cases were *Hunter* and *Seattle* themselves).

277. See *id.* at 493 (Boggs, J., dissenting) (arguing that invalidation of Proposal 2 is inconsistent with "general constitutional law").

278. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (implying that in twenty-five years the United States will undergo a societal shift rendering affirmative action inapt).

279. See, e.g., *Coal. to Defend Affirmative Action*, 701 F.3d at 492 (Boggs, J., dissenting) (calling the principles underlying Proposal 2 "laudable").