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Good Will Hunting: How the Supreme Court's *Hunter* Doctrine Can Still Shield Minorities from Political-Process Discrimination

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NOTE

GOOD WILL HUNTING: HOW THE SUPREME COURT'S *HUNTER* DOCTRINE CAN STILL SHIELD MINORITIES FROM POLITICAL-PROCESS DISCRIMINATION

Kerrel Murray*

When the Sixth Circuit struck down Michigan's anti-affirmative-action Proposal 2 in 2012, its reasoning may have left some observers hunting for their Fourteenth Amendment treatises. Rather than applying conventional equal protection doctrine, the court rested its decision on an obscure branch of equal protection jurisprudence known as the Hunter doctrine, which originated over forty years ago. The doctrine, only used twice by the Supreme Court to invalidate a law since its creation, purports to protect the political-process rights of minorities by letting courts invalidate laws that work nonneutrally to make it more difficult for them to "achieve legislation that is in their interest." The Sixth Circuit's decision created a clean circuit split with the Ninth Circuit, which had upheld an identically worded California initiative fifteen years earlier.

The doctrine's purpose certainly seems laudable, but commentators and courts agree that it is unclear how it actually works. Although the Supreme Court had avoided using the doctrine since 1982, the circuit split forced it to confront the doctrine's scope and applicability, which it did by granting certiorari in March 2013.

This Note makes three contributions to the Hunter doctrine discussion. First, of course, none of the existing literature addresses the recently created circuit split. Furthermore, the circuit split presents a unique opportunity to investigate how the doctrine works because the laws in question were identical—the only difference was the result. Second, although many pieces have discussed direct democracy's unique issues, to my knowledge none of the Hunter literature focuses on the import of the fact that the laws invalidated by the Supreme Court under

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this doctrine were products of direct democracy. In the Note, I draw from the literature on the problems with direct democracy and suggest that those problems have particular significance in the context of the Hunter doctrine. Third, none of the pieces investigating the doctrine offer my normative suggestion for cabining it. First, I focus on the bounds of the “nonneutrality” requirement announced by the Court and on direct democracy’s peculiar qualities. I then argue that the doctrine is appropriately limited to situations where the confluence of those factors creates political-process burdens for minorities. Limiting the doctrine in this way helps it survive criticisms that it grants judges too much leeway to implement their own policy preferences. Ultimately, I apply the limited doctrine to a hypothetical factual scenario to show that it retains utility as a shield for minorities by providing a way to protect political-process rights when classic equal protection doctrine fails.

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INTRODUCTION

Imagine complete frustration. You have been advocating for a school redistricting policy that allows redistricting officials to take race into account in an effort to combat the negative effects of de facto segregation in the local school system. Your organization has been lobbying the local government to implement this policy, and although the campaign has had its share of setbacks, it has recently paid off: the school board has voted yes. But now, before the policy has even been implemented, you receive word that your opponents have placed an initiative on the next statewide election’s ballot that will reverse your victory. You and your opponents both know that most state residents opposed the board’s decision and that the initiative will almost certainly pass. To reverse its passage, you would have to somehow convince the same electorate that

overwhelmingly reversed your policy that they were completely incorrect—a nearly insurmountable burden. You believe your opponents are motivated by a desire to shackle minority interests in the political process but cannot prove it because the initiative’s text is neutral on its face, simply touting the benefits of a colorblind society. Thus, your legal counsel tells you, a conventional equal protection challenge will likely fail; to invalidate a facially neutral law, courts must find that the law was passed “because of” an intent to hurt minorities. This standard is always hard to meet, and it’s even harder here because it’s particularly difficult to impute a single intent to an entire electorate. You feel helpless, and as the election draws closer, you renew your efforts, trying to find some legal basis for fighting the initiative. Is there any constitutional doctrine you can rely upon? And, if one exists, should it? That is, can any doctrine that allows courts to invalidate a facially neutral policy preference enacted by a direct vote of the people work without granting too much power to unelected judges? In this Note, I argue that the answer to all of these questions is yes.

Admittedly, it cannot always constitute a constitutional violation when minorities lack the ability to implement their policy preferences. Numbers should matter in a representative democracy, and minorities by definition lack numerical strength. This relative powerlessness, however, can become problematic when the majority intentionally uses its comparative strength to entrench that powerlessness. Non-minorities have often pushed back when minorities attempt to enact certain “minority-favoring” policy preferences like race-conscious school redistricting or affirmative action. One can argue whether these policies are generally desirable or not, but regardless of one’s position, minorities support them far more than non-minorities.¹

This asymmetry in support often encourages opponents of these policies to turn to the direct democracy process to halt their enactment.² Because that process is the most unfiltered representation of the people’s will, it presents unique procedural dangers for minorities, who lack the numbers to ensure that their voices matter. It lets opponents bypass the advantages the representative process gives minorities, making it easier to drown out their policy preferences. And although anti-minority motivations may be apparent from context, conventional equal protection law’s focus on explicit discrimination may be insuffi-

1. See, e.g., Scott Jaschik, *Michigan Votes Down Affirmative Action*, INSIDE HIGHER ED (Nov. 8, 2006), <http://www.insidehighered.com/news/2006/11/08/michigan> (noting large racial disparities in statewide vote on anti-affirmative-action measure, such as 59% of white voters supporting the initiative compared to only 14% of black voters); Jeffrey M. Jones, *Race, Ideology, and Support for Affirmative Action*, GALLUP (Aug. 23, 2005), <http://www.gallup.com/poll/18091/race-ideology-support-affirmative-action.aspx> (noting 72% of blacks in the United States favor affirmative action compared to only 44% of whites, and that Hispanics also favor affirmative action more than whites).

2. See, e.g., Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 294 (“Time and again, initiatives are used to disadvantage minorities.”).

cient to protect minority interests, leaving supporters of these policies searching for other options.

This search recently proved fruitful. In November 2012, in *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, the Sixth Circuit revived a long-dormant strand of Fourteenth Amendment jurisprudence to strike down Michigan's Proposal 2, a popularly enacted constitutional amendment that banned affirmative action policies statewide.³ The court held that Proposal 2 created a "comparative structural burden," undermining the Equal Protection Clause's guarantee of "equal access to the tools of political change" to all citizens.⁴ In doing so, the Sixth Circuit applied what is known as the *Hunter* doctrine, first recognized by the United States Supreme Court in *Hunter v. Erickson*⁵ and reaching its zenith with *Washington v. Seattle School District No. 1*.⁶

Although rooted in the Equal Protection Clause, the *Hunter* doctrine differs from conventional equal protection doctrine as articulated in *Washington v. Davis*, which makes it nearly impossible to have a facially neutral law invalidated.⁷ Significantly, the *Hunter* doctrine lets courts scrutinize legislation—even if apparently facially neutral—that places political-process burdens on minorities and makes it comparatively more difficult for them to "achieve legislation that is in their interest."⁸ When such legislation reveals a nonneutral allocation of governmental power that uses the "racial nature of a decision to determine the decisionmaking process," it must be invalidated absent a compelling state interest.⁹

The Sixth Circuit's holding, however, created a circuit split regarding whether the doctrine reaches an anti-affirmative-action measure passed by initiative. The Ninth Circuit's 1997 decision in *Coalition for Economic Equity v. Wilson* held that Proposition 209 (nearly identical to Proposal 2 in wording and

3. See *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 470, 485 (6th Cir. 2012) (en banc), cert. granted sub nom. Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013). Specifically, Proposal 2 provided that no state entity could "discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." *Id.* at 471.

4. *Id.* at 470.

5. 393 U.S. 385 (1969); see *infra* text accompanying notes 22-32.

6. 458 U.S. 457 (1982); see *infra* text accompanying notes 52-53.

7. See 426 U.S. 229, 244-48 (1976); see also *infra* text accompanying notes 18-21.

8. See *Seattle*, 458 U.S. at 470 (internal quotation mark omitted).

9. *Id.* As I argue in Part II.A, nonneutral here refers to a "peculiarly tailored" way of distributing burdens or benefits within the political process, such that minorities or suspect classes are uniquely hindered. See text accompanying notes 68-76; see also *Seattle*, 458 U.S. at 470-71 (describing the nonneutral structure and passage of Initiative 350, the law at issue in the case).

effect) did not violate the *Hunter* doctrine.¹⁰ Considering the doctrine's opacity, the fact that there is a circuit split is less surprising than the thirty years it took for one to arise. The Supreme Court's March 25, 2013, grant of certiorari in *Schuette v. Coalition to Defend Affirmative Action* merely confirmed the need for clarity.

Granted, parts of the doctrine are straightforward. The Court's global purpose was protecting racial minorities' right to "full participation in the political life of the community."¹¹ The evil the Court wished to address was also clear: a "political structure that treats all individuals as equals, yet more subtly distorts governmental processes" for the purpose of hindering minorities in the political process.¹² The mechanism for achieving these ends is less clear. Commentators and courts have noted the doctrine's imprecise limits,¹³ and the Supreme Court has not applied the doctrine in over thirty years. Furthermore, the changes in Fourteenth Amendment law over those thirty years raise the question of whether the *Hunter* doctrine would be applied the same way today.¹⁴ And, although the Colorado Supreme Court used the doctrine to uphold a preliminary injunction against Colorado's Amendment 2,¹⁵ the Supreme Court declined the opportunity to follow suit, eventually striking down the amendment on another rationale.¹⁶ Thus, the doctrine is admittedly on shaky ground.

10. 122 F.3d 692, 696, 709-11 (9th Cir. 1997) (reversing the district court's grant of a preliminary injunction as based on the "erroneous legal premise" that Proposition 209 violated the *Hunter* doctrine).

11. See *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 474 (6th Cir. 2012) (en banc) (quoting *Seattle*, 458 U.S. at 467), cert. granted sub nom. *Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013).

12. See *id.* (quoting *Seattle*, 458 U.S. at 467).

13. See, e.g., *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006) (calling the line of cases "murky"); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1563 (1990) (saying that the Court's method of applying the doctrine "cannot easily be mapped"); Gregory Ellis, Note, *Rethinking the Hunter Doctrine*, 8 S. CAL. INTERDISC. L.J. 323, 333 (1998) (calling it "extremely difficult to sort out" the doctrine's substance).

14. *Seattle* was decided seven years before a majority of the Court first held that strict scrutiny applied to all racial classifications, regardless of whether they were discriminatory or preferential. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (plurality opinion) (applying strict scrutiny to all racial classifications); *id.* at 520-21 (Scalia, J., concurring) (agreeing with application of strict scrutiny to all racial classifications).

15. See *Evans v. Romer*, 854 P.2d 1270, 1285-86 (Colo. 1993) (en banc) (finding a reasonable degree of probability that Amendment 2 infringed on the political-process rights of gays and lesbians by preventing the state legislature or local governments from granting them protected status). The Colorado Supreme Court later reiterated its reasoning in that case in affirming the entry of a permanent injunction against Amendment 2. See *Evans v. Romer*, 882 P.2d 1335, 1339, 1350 (Colo. 1994) (en banc), *aff'd*, 517 U.S. 620 (1996).

16. See *Romer*, 517 U.S. at 635 (holding that Amendment 2 failed rational basis because it lacked any relationship to "legitimate state interests"). The Court only mentioned the *Hunter* doctrine to note that it would not use it as a rationale. See *id.* at 626.

Still, it is unobjectionable that a doctrine protecting the integrity of the political process is laudable, if it can be applied coherently. A successful doctrinal formulation must not only make sense of the cases, but must not encroach on our system of separated powers by improperly enlarging judicial power to invalidate democratically enacted laws.

Given that background, I argue in this Note that the *Hunter* doctrine, if clarified and limited, still provides a shield for minorities in the political process. In Part I, I explain why this deviation from classic equal protection law is necessary at all, and describe the Court's reasoning in the cases comprising the doctrine's framework. In Part II, I synthesize a clearer rule from those cases, and propose two limitations on the doctrine's reach: First, opposing holdings in the seemingly identical cases of *Seattle* and *Crawford v. Board of Education*¹⁷ reveal that the doctrine does not grant courts unbounded discretion to determine a "nonneutral" power allocation. Furthermore, the analysis courts must undertake to make that determination is no jurisprudential orphan—in fact, its similarities to the process used in other equal protection cases confirms courts have the ability to apply this test. Second, the doctrine's rarity and confinement to the direct democracy context is no coincidence. Rather, it appeared in these cases because of direct democracy's unique qualities. It therefore should be limited to that context, where it can do the most good while appropriately circumscribing the judiciary's role.

In Part III, I apply the doctrine to resolve the circuit split—perhaps counterintuitively, against the Sixth Circuit's pro-affirmative-action holding. I also show that this is the best reading by addressing some criticisms of the result. Finally, in Part IV, I discuss a hypothetical that shows the doctrine's continued vitality, despite the limits this formulation places on it.

I. UNCLEAR BEGINNINGS: THE *HUNTER*, *SEATTLE*, AND *CRAWFORD* DECISIONS

I must briefly recapitulate conventional equal protection doctrine to demonstrate the *Hunter* doctrine's deviation from that norm. In *Washington v. Davis* and *Personnel Administrator v. Feeney*,¹⁸ the Supreme Court laid out its approach to equal protection challenges to facially neutral laws.¹⁹ This analysis still controls constitutional challenges brought on this basis today.²⁰ Under this approach, if a law is race or gender neutral, plaintiffs can only show an equal protection violation by demonstrating that lawmakers passed the law at least

17. 458 U.S. 527 (1982). *Crawford* was decided on the same day as *Seattle*.

18. 442 U.S. 256 (1979).

19. See Derek W. Black, *Cultural Norms and Race Discrimination Standards: A Case Study in How the Two Diverge*, 43 CONN. L. REV. 503, 510-11 (2010).

20. See *id.* at 511-12.

partly “because of” its negative effects on minorities.²¹ This bodes poorly for our Introduction’s hypothetical activist. It does not matter that an initiative may have disproportionately negative effects on minorities in the political process, or that the initiative’s proponents may have selected the process for precisely that reason. Unless the initiative’s opponents can find a smoking gun of malicious intent, they will be out of luck under the conventional framework.

This background illuminates the context of *Hunter*, *Seattle*, and *Crawford*. The latter two cases are particularly instructive, since they were decided so soon after *Davis* and *Feeney* implemented the unforgiving “because of” standard. Their holdings show the *Hunter* doctrine’s utility in spite of that standard.

Hunter’s facts are straightforward. In the mid-1960s, the residents of Akron, Ohio, organized and passed an amendment to the city charter by initiative at a general city election, thereby repealing a new city council ordinance that guaranteed fair housing opportunities to all, regardless of race.²² The amendment also required that any future fair housing proposals pass a referendum, thus preventing the city council from ever unilaterally reenacting a fair housing ordinance.²³ The initiative therefore placed greater political-process burdens on those who wished to lobby the city council for fair housing than on those who lobbied for any other measure.²⁴ Although the amendment “neutrally” restricted all races equally in their pursuit of fair housing, the “law’s impact [fell] on the minority,” as the “majority need[ed] no protection against discrimination.”²⁵ After all, a majority could easily muster the votes to pass the required referendum.

Even though the amendment did not explicitly classify by race, the Court appeared to detect a racial classification, noting that “racial classifications are constitutionally suspect and subject to the most rigid scrutiny.”²⁶ Thus, because the amendment disadvantaged minorities “by making it more difficult to enact legislation in [their] behalf,” it was a “real, substantial, and invidious denial of

21. See *Feeney*, 442 U.S. at 279 (“‘Discriminatory purpose,’ however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” (citation and footnote omitted)); see also *Washington v. Davis*, 426 U.S. 229, 244-48 (1976) (finding no equal protection violation from racially disparate impact of a facially neutral employment test); Black, *supra* note 19, at 511 (noting these cases require plaintiffs to show a governmental “subjective motive” to discriminate).

22. *Hunter v. Erickson*, 393 U.S. 385, 386 (1969).

23. *Id.* at 387.

24. *Id.* at 390.

25. *Id.* at 391.

26. *Id.* at 392 (citation omitted) (internal quotation marks omitted). The Court was envisioning “classifications” broadly: in this case there was a burden so obviously intended to hurt minorities it might as well have been a racial classification. See also *infra* text accompanying note 71.

the equal protection of the laws.”²⁷ Critically, not only had the initiative repealed the fair housing law, but it had selectively burdened future attempts at enacting fair housing laws by requiring them to survive a referendum.²⁸ Thus, it went beyond a mere repeal of the fair housing law—a situation on which the Court explicitly disclaimed passing judgment.²⁹

It is easy to infer that the amendment’s proponents wished to hurt minorities by keeping them from lobbying a sympathetic city council. The Court’s justification for its holding, however, was novel. The Court found the facially neutral amendment to be a “meaningful and unjustified official distinction[] based on race.”³⁰ The impermissible distinction revealed itself in the law’s structure. The proponents of fair housing, and no one else, had to submit their desires for the approval of the same electorate that had just repealed a fair housing measure. This irregular structure strongly suggested that its drafters sought to burden minorities. In this context, the initiative’s form revealed a desire to achieve the results of invidious racial classification without doing it explicitly. Justice Harlan’s concurrence supported this view, calling the initiative an allocation of governmental power without “any general principle,” with “the clear purpose” of burdening minorities.³¹ Without any rational reason for the odd power allocation, the anti-minority effects of the law within the political process demanded an explanation based on invidious intent.³²

Hunter’s brevity left unclear precisely what constituted an impermissible political-process burden. Unfortunately, the Court did not fully apply the theory until thirteen years later in *Seattle*.³³ In 1978, Seattle School District No. 1 bolstered its ongoing efforts to combat racial isolation by proposing the “Seattle Plan,” which used voluntary and involuntary busing to reassign students to different “attendance zones.”³⁴ A group of Seattle residents drafted Initiative 350

27. *Id.* at 393.

28. *Id.* at 389-90.

29. *Id.* at 390 n.5 (“Thus we do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment.”).

30. *Id.* at 391-92.

31. *Id.* at 395 (Harlan, J., concurring).

32. *See id.* at 395-96.

33. A lower court did use the doctrine in 1970. *See Lee v. Nyquist*, 318 F. Supp. 710, 720 (W.D.N.Y. 1970), *summarily aff’d*, 402 U.S. 935 (1971). In *Lee*, a special three-judge panel struck down a law that “prohibited state education officials and appointed school boards from ordering desegregation remedies,” meaning that only elected school boards could do so. Lisa White Shirley, Comment, *Reassessing the Right of Equal Access to the Political Process: The Hunter Doctrine, Affirmative Action, and Proposition 209*, 73 TUL. L. REV. 1415, 1418 (1999). Although the Supreme Court affirmed, it did so summarily without opinion. *Id.* The affirmation’s precedential value is thus dubious at best. Furthermore, unlike the other cases discussed in this Note, the law in question was not a product of initiative. *See id.*

34. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 461 (1982). The plan worked by matching predominantly minority areas with predominantly non-minority areas

in opposition.³⁵ This statewide initiative prevented school boards from “directly or indirectly requir[ing]” students to attend schools besides the one “geographically nearest or next nearest” to their residences.³⁶ But it then provided several exceptions to this requirement, such as carve-outs for “health or safety hazards,” overcrowding, and special educational needs.³⁷ Thus, Initiative 350 in practice only banned busing for racial purposes—in fact, it banned the precise mechanisms by which the Seattle Plan worked.³⁸ After the district court held Initiative 350 unconstitutional, the Ninth Circuit affirmed, relying on *Hunter*.³⁹

The Court began by boiling *Hunter* down to the “simple but central principle” that a state cannot allocate governmental power “nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process.”⁴⁰ Nonneutral power allocation reveals the state action as a backdoor attempt at racial classification.⁴¹ When such an allocation makes it comparatively “*more* difficult” for minorities to “achieve legislation that is in their interest” by placing “*special* burdens on racial minorities” in the political process, it violates *Hunter*.⁴² These burdens must be struck down absent a compelling state interest.⁴³

Just like the Akron amendment, Initiative 350 appeared neutral. Indeed, unlike the Akron amendment, Initiative 350 did not explicitly mention race or racial issues at all.⁴⁴ Nevertheless, the Court had “little doubt that the initiative was effectively drawn for racial purposes.”⁴⁵ Initiative 350’s suspiciously

and making busing decisions based on the student’s zone, rather than their race as such. *See id.*

35. *Id.* at 461-62.

36. *Id.* at 462.

37. *Id.*

38. *Id.* at 462-63. Initiative 350 specifically picked out seven separate mechanisms that the Seattle Plan used to combat minority isolation, such as school pairing and attendance zone redefinition. *Id.*

39. *Id.* at 466.

40. *Id.* at 469-70.

41. *See id.* at 485 (acknowledging that not every attempt to address a racial issue creates a racial classification, but noting that the “peculiar and disadvantageous treatment” of the political process resulting from Initiative 350 evidenced “distinctions based on race” (internal quotation mark omitted)).

42. *Id.* at 470 (quoting *Hunter v. Erickson*, 393 U.S. 385, 391 (1969); *id.* at 395 (Harlan, J., concurring)). The *Seattle* Court added these emphases to the quote from *Hunter*; the emphasis on “special” indicates the importance of whether the burden resulted from nonneutral governmental action. The segment of the quote featuring the emphasis on “more” was drawn from Justice Harlan’s concurrence in *Hunter*. *See id.*

43. *Id.* at 485-86.

44. *See id.* at 471. Although Initiative 350 is not quoted at length in *Seattle*, a lengthy excerpt can be found in Robert H. Beinfield, Note, *The Hunter Doctrine: An Equal Protection Theory That Threatens Democracy*, 38 VAND. L. REV. 397, 413 n.83 (1985).

45. *Seattle*, 458 U.S. at 471. The problem here is that “racial purposes” is left undefined. I discuss this later in Part II.A.

uneven structure left no question that it was intended to halt recent policy moves toward combating racial isolation, just as there was no question that the Akron amendment was intended to stop fair housing laws.⁴⁶ It did not matter that some proponents of racial busing were not minorities, nor was it fatal to the holding that some minorities actually opposed the Seattle Plan.⁴⁷ What mattered was the inescapable inference that Initiative 350 disguised an anti-minority *intent*.⁴⁸

Although invidious motives were apparent, it would have been dangerous to strike down a law on that basis alone when other motives were conceivable.⁴⁹ Thus, the *Hunter* doctrine requires that a law also have created comparative burdens—additional legislative obstacles—on a minority group’s ability to address a racial issue.⁵⁰ After Initiative 350, proponents of racial assignment plans had to lobby the state legislature or the state electorate to have their policy choices implemented, unlike proponents of every other scholastic issue.⁵¹ What mattered, beyond the indicia of invidious intent, was Initiative 350’s selective withdrawal of racial issues to a higher governmental level, to the detriment of their proponents.⁵² Its peculiar structure lent itself to a special inquiry into intent.

Although the Court treated *Seattle* as if *Hunter* was directly on point, *Seattle* required implicitly extending *Hunter*’s logic. The prohibition on nonneutral power allocations seemed to have expanded in scope. In *Hunter*, the electorate changed the political process at a core level by forcing only fair housing policies to be submitted to a referendum. In contrast, *Seattle*’s Initiative 350 did not explicitly change how the political process worked—the Court inferred the nonneutral power allocation from how the initiative affected minority group interests in the political process. One might well question, as Justice Powell did, whether the doctrine eviscerates the “supreme authority” of a state electorate to make policy decisions in these matters.⁵³

46. *See id.* The Court also took notice of representations by the initiative’s proponents that 99% of state school districts would be unaffected by the initiative—in other words, the 99% without mandatory busing. *See id.*

47. *See id.* at 472 (rejecting these points in finding that Initiative 350 addressed a racial issue).

48. *See id.* at 471-72.

49. *Cf. id.* at 489 (Powell, J., dissenting) (describing the majority opinion as an “unprecedented intrusion into the structure of a state government”).

50. *See id.* at 474, 477-78 (majority opinion).

51. *See id.* at 474. Thus, an initiative need not be a constitutional initiative to go beyond a “mere repeal.” Although it remained true that busing proponents could still lobby their legislators, the impermissible burden was that no other issues of school assignment needed to be submitted to legislators—they stayed at the local school board level.

52. *See id.* at 475-78 (rejecting the argument that the state’s acknowledged “plenary authority” over education made Initiative 350 a mere “change in policy,” and emphasizing the host of educational-programming decisions that remained delegated to the local school boards).

53. *See id.* at 494 (Powell, J., dissenting).

If *Seattle* stretches the *Hunter* doctrine, its companion case *Crawford v. Board of Education* provides a stopping point. There, the Court upheld California's Proposition I against a *Hunter*-based attack.⁵⁴ Proposition I prevented state courts from ordering busing unless the order was intended to remedy a violation that would be remediable under the federal Equal Protection Clause.⁵⁵ The Court rejected the argument that Proposition I evidenced a racial classification, noting that it applied generally to all "pupil school assignment"—the litany of exceptions that raised eyebrows in *Seattle* was absent here.⁵⁶ Furthermore, the Court noted that Proposition I did not block individual school districts from adopting busing plans to combat segregation if they so chose.⁵⁷ This explains why the Court concluded that no impermissible reallocation of power had occurred as a result of Proposition I.⁵⁸ Proposition I lacked Initiative 350's multitude of suspicious exceptions, and its political-process burden was at least in theory more avoidable. Thus, the Court could not as readily infer invidious intent, despite acknowledging that court-ordered integrative busing probably inspired Proposition I.⁵⁹ Thus, *Crawford* did not demand the drastic step of federal court intervention into a state initiative.

The reasoning in the *Hunter* line of cases suggests one seemingly unavoidable conclusion in light of conventional equal protection doctrine. The Court's invalidation of the *Hunter* and *Seattle* measures was rooted in the targeted political-process burdens their structures placed on minorities. Yet *Seattle* did not purport to overrule the holdings of *Davis* and *Feeney* that facially neutral laws will not be invalidated without evidence that they were adopted "because of" their disparate impact on minorities.⁶⁰

Thus, I argue, the *Hunter* doctrine represents a carve-out from the rule announced in *Davis*. The political-process setting of these cases is key. The Court relaxed the stringent "because of" rule when faced with laws that appeared peculiarly targeted to place political-process burdens on suspect classes. Lower courts applying the doctrine could conceivably reach further on less incontro-

54. *Crawford v. Bd. of Educ.*, 458 U.S. 527, 535 (1982).

55. *Id.* at 532. Practically, this meant that state courts could not order busing to remedy de facto segregation (as some California courts had done), since the federal Equal Protection Clause only reached de jure segregation.

56. *Id.* at 538 n.18 (internal quotation mark omitted).

57. *Id.* at 535-36. The Court explicitly contrasted this with Initiative 350, which removed the power to address segregation through busing from all school boards statewide. *Id.* at 536 n.12; see also *Seattle*, 458 U.S. at 462-63 (describing Initiative 350's structure).

58. See *Crawford*, 458 U.S. at 541-42.

59. *Id.* at 538 n.18.

60. *Seattle*'s compatibility with *Davis* and *Feeney* is bolstered by the fact that the dissent below attacked the majority opinion on the grounds of its incompatibility with *Feeney*. See Ellis, *supra* note 13, at 358 (citing *Seattle Sch. Dist. No. 1 v. Washington*, 633 F.2d 1338, 1354 (9th Cir. 1980) (Wright, J., dissenting), *aff'd*, 458 U.S. 457 (1982)). The Supreme Court's affirmance of the Ninth Circuit indicates that it was not convinced. *Cf. Seattle*, 458 U.S. at 471 (citing *Feeney* approvingly in the course of affirming the Ninth Circuit).

vertible evidence than they otherwise might. The courts have always guarded political-process rights with special care,⁶¹ and the *Hunter* doctrine continues that tradition. That explains how Initiative 350 and the Akron amendment were invalidated, despite their apparent facial neutrality.

This is why the doctrine presents a unique tool for minorities in the political process—its scope means it could be employed to combat discriminatory laws that are unreachable by other means. But, for the doctrine to work, there must be a principled explanation of how courts can infer “nonneutrality” from apparently neutral laws without necessarily having unbounded discretion. Unfortunately, the Supreme Court’s treatment of the doctrine stops in 1982, leaving little material to work with for the synthesis to which I now turn.

II. SYNTHESIZING THE DOCTRINE: TWO HIGH BARS TO ITS APPLICATION

A clear synthesis of the doctrine must explain the different results in *Seattle* and *Crawford* and resolve the recently created circuit split. It must also successfully limit the doctrine’s scope to avoid improperly expanding judicial power. The factual context of each case in the “*Hunter* trilogy”⁶² shapes this analysis.

A law that creates an impermissible “structural burden” satisfies two criteria. First, it “addresses” a racial issue nonneutrally.⁶³ It is important to note that this creates two subcriteria: a racial issue must be addressed *and* it must be addressed nonneutrally.⁶⁴ This is no empty distinction. *Crawford* shows that racial issues, even those at the center of heated debates, can be addressed in neutral ways that do not violate the doctrine.⁶⁵ Second, the law addressing the racial issue creates a “substantial and unique” structural burden on minorities.⁶⁶ I have focused my synthesis and proposed limitations on the first criteria, be-

61. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938) (suggesting the possibility that legislation that “restricts those political processes” that usually work to “bring about repeal of undesirable legislation” should receive “more exacting judicial scrutiny”); SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 147 (4th ed. 2012) (discussing the need for stronger “court oversight” when laws hamper the likelihood that the political process can self-correct); see also *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (describing voting as a “fundamental political right” because it is “preservative of all rights”).

62. Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1021 (1996) (describing the three cases as the “*Hunter* trilogy”).

63. See *Seattle*, 458 U.S. at 470-71, 474 n.17 (noting that Initiative 350 was constructed for “racial purposes” and that its passage allocated governmental power nonneutrally).

64. Compare *id.* at 470-71, 485 (noting that Initiative 350, addressing the racial issue of busing, was drawn for “racial purposes,” creating a racial classification), with *Crawford*, 458 U.S. at 537-38 (holding that Proposition I did not “embody a racial classification” because it addressed “race-related matters” neutrally, affecting everyone equally).

65. See *Crawford*, 458 U.S. at 537-38.

66. See *Seattle*, 458 U.S. at 470.

cause it informs the second. It is the nonneutral distribution of political-process burdens to suspect classes that makes a comparative burden impermissible.⁶⁷ Therefore, properly cabinning the first criteria will cabin the doctrine overall. With that in mind, I suggest the doctrine has two major limitations: a high bar to finding a “racial classification,” and a restriction of its scope to the products of direct democracy. I will address each in turn, and then explain how those limitations show the doctrine’s utility in cases where conventional equal protection doctrine might not help plaintiffs.

A. *A High Bar for Racial Classifications: Few Laws Are Truly “Peculiarly Tailored”*

As noted above, a neutral law without peculiar tailoring to only burden racial issues does not demand the inference that it is an attempt at racial classification.⁶⁸ For example, because Proposition I’s broadly neutral language was less uneven than Initiative 350’s exceptions for every busing rationale but race, the Court could not infer sufficient invidious intent to invalidate it.⁶⁹ This investigation depends in large part on the law’s goal. Initiative 350’s exceptions made it strikingly underinclusive with respect to its purported goal of preserving neighborhood schools; Proposition I’s encompassing language engendered less suspicion. Thus, contrary to some fears,⁷⁰ *Seattle* does not allow for unbounded judicial counter-majoritarian behavior. Rather, the doctrine only activates when the law’s “peculiar” structure—and that structure’s effect on minorities in the political process—cannot be justified in any rational way

67. See *supra* notes 63-65 and accompanying text; cf. *Crawford*, 458 U.S. at 537-38 (concluding that Proposition I’s across-the-board conferral of the benefits of “neighborhood schooling” showed that it did not evidence a racial classification). The inverse follows—when benefits are conferred haphazardly, a racial classification may be hidden in the legislation.

68. Compare *Crawford*, 458 U.S. at 537-38 (concluding that Proposition I’s across-the-board conferral of the benefits of “neighborhood schooling” showed that it did not evidence a racial classification), with *Seattle*, 458 U.S. at 485 (finding a racial classification from Initiative 350’s “peculiar” impact on the political process). It is likely also true that laws that are actually neutral are less likely to create comparative structural burdens.

69. Cf. *Crawford*, 458 U.S. at 537, 538 & n.18, 539 (noting that Proposition I addressed race-related matters “neutrally,” making it a “simple repeal” that did not “embody[] a . . . racial classification”).

70. See, e.g., Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities’ Democratic Citizenship*, 60 OHIO ST. L.J. 399, 404 (1999) (“[W]hen courts review actions taken directly by the public, rather than by their elected representatives, the judiciary’s counter-majoritarian hubris is more readily apparent.”); see also Beinfield, *supra* note 44, at 430 (arguing that the doctrine “threatens to expand the equal protection clause beyond its traditional limits by imposing the will of the minority on questions traditionally resolved by the electoral process”).

without demanding an inference of invidious intent.⁷¹ Only then does an evaluating court begin to treat the law as “presumptively invalid.”⁷²

The *Crawford* plaintiffs’ failure to meet this threshold shows just how high it is, suggesting one strong doctrinal limitation. It would be difficult to argue that Proposition I’s proponents were unaware of the racial elements of busing policy, and the *Crawford* Court did not attempt to claim otherwise.⁷³ This shows that the doctrine necessarily will have false negatives. That is, there will be times when a law that very well might have an anti-minority intent will escape, despite its unequal impact. It will be a rare law that rises to the level of impermissibility seen in *Seattle*. But rarity does not necessitate impotence. Clear intent to disarm minorities in the political process by burdening their pursuit of policies they favor violates the *Hunter* doctrine.⁷⁴

Although unpalatable at first blush, these false negatives are the appropriate result of limiting a doctrine that might otherwise inappropriately expand judicial power and discretion. It cannot be that any structural change that alters a policy that had some racial elements always violates the Fourteenth Amendment.⁷⁵ There are many neutral reasons a populace might want to change such a policy—and if they pursue their goals neutrally, as in *Crawford*, the *Hunter* doctrine likely will not apply.⁷⁶ Thus, the first limiting factor is that racial classifications should only be found when the text of a law is “carefully tailored,” demonstrating a desire to create a harder path for minorities.⁷⁷ This is a stringent requirement, but as Part IV shows, not all laws will be able to cloak themselves in neutrality. In fact, some factual contexts are complex enough that the only way to accomplish an anti-minority goal is to carefully tailor the legislation. And it should be recalled that the unique confluence of political-process rights and suspect classes in this context means that, although stringent, the

71. See *Seattle*, 458 U.S. at 485. Thus, in some ways, the doctrine bears a resemblance to “heightened rational basis.” See *infra* text accompanying notes 79-83. When the selected means are grossly ill-fitted to the purported ends, courts should look closer.

72. See *Seattle*, 458 U.S. at 485 & n.28.

73. See *Crawford*, 458 U.S. at 538 n.18 (“[I]t is clear that court-ordered busing . . . prompted . . . Proposition I.”).

74. There is a fair, separate argument that *Crawford* did not deal with a restructuring of a political process in the same sense as *Hunter*, since Proposition I dealt with a completely different branch of government—the judiciary. Although interesting, it has less explanatory power, chiefly because the *Crawford* Court focused its holding on the fact that Proposition I was not a racial classification.

75. Cf. ISSACHAROFF, KARLAN & PILDES, *supra* note 61, at 953 (“[A]ny substantive constitutional provision restructures the political process with respect to the issue involved.” (emphasis added)). What makes a *Hunter* situation impermissible is nonneutral restructuring with regard to a suspect class.

76. See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 706 (9th Cir. 1997) (noting that not “every attempt to address a racial issue” creates a racial classification; the attempt must be discriminatory).

77. See *Seattle*, 458 U.S. at 471.

Hunter doctrine is still more forgiving to potential plaintiffs than conventional equal protection doctrine.⁷⁸

Some might balk at using nonneutrality as a threshold device for the *Hunter* doctrine. One might question whether courts have the institutional capacity to evaluate whether laws that ought to receive rational basis scrutiny are really oddly tailored. But, as *Crawford's* holding shows, the evidence must be weighty for a court to make that decision, and courts surely have the capacity to examine factual contexts. Furthermore, close inspection of odd tailoring is not anomalous to equal protection jurisprudence, even when the law in question normally would not receive strict scrutiny.

The Supreme Court's decisions in *Romer v. Evans*⁷⁹ and *City of Cleburne v. Cleburne Living Center, Inc.*⁸⁰ show that courts have the tools for this task. In *Romer*, Amendment 2's "discontinu[ity] with the reasons offered for" preventing gays and lesbians from seeking protection against discrimination revealed its lack of neutrality.⁸¹ In *Cleburne*, requiring special permits for homes for the mentally retarded was irrelevant to the city's purported legitimate interests, revealing the law's irrationality.⁸² In these cases, as Cass Sunstein has argued, "rationality review . . . actually meant something."⁸³ Concededly, these cases do not map directly onto the *Hunter* doctrine. For example, unlike the *Hunter* line of cases, the Court did not purport to apply strict scrutiny in *Romer* and *Cleburne* after finding the laws' tailoring suspicious. And, unlike *Seattle*, the laws in *Romer* and *Cleburne* more obviously targeted a group. Nevertheless, those decisions at least indicate that courts have the institutional capacity to assess whether laws fail the *Hunter* doctrine's threshold requirement of nonneutrality. Just as courts can infer irrationality and animus from a poor means-end fit, they can infer nonneutrality from odd tailoring that evidences legislative goals other than those asserted.

Thus, the *Hunter* doctrine's threshold requirement that nonneutrality be inferred from odd tailoring is not a bright-line rule, but it is administrable. A

78. See *supra* note 61 and accompanying text.

79. 517 U.S. 620, 631-32 (1996) (holding that Colorado's Amendment 2 failed even the "most deferential of standards" by singling out gays and lesbians for negative treatment, and therefore not reaching the question of whether gays and lesbians are a suspect class).

80. 473 U.S. 432, 446, 448 (1985) (declining to declare the mentally retarded a suspect class, but nevertheless invalidating an ordinance that only required special permits for homes for the mentally retarded).

81. *Romer*, 517 U.S. at 632.

82. *Cleburne*, 473 U.S. at 448.

83. See Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 59 & n.266 (1996) (referring to, among others, *Romer* and *Cleburne*); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1194 (9th Cir. 2005) (Kozinski, J., concurring) (calling *Cleburne* an example of "robust and realistic rational basis review" where courts consider the purported justifications for the law "in light of the real-world circumstances that gave rise to it"), *rev'd*, 551 U.S. 701 (2007).

strikingly poor fit may only reasonably be explained by a nonneutral attempt to burden minorities in the political process. Still, *Crawford* demonstrates that showing nonneutrality is no easy task. The requirement, therefore, provides a strong limit on the scope of potential *Hunter* challenges.

B. *Direct Democracy's Qualities Indicate Hunter Should Be Limited to That Context*

A second limitation on the doctrine is that it is properly applied exclusively in the direct democracy context. In contrast to representative legislative processes, direct democracy involves submitting legislative proposals to a direct vote of the populace.⁸⁴ Initiatives allow citizen groups to place a proposed law on the ballot if they meet a signature threshold, and referenda allow the populace to force a legislatively enacted law to be approved by a direct vote before taking effect.⁸⁵ Direct democracy in the United States originated in the anti-corruption Progressive movements of the early twentieth century.⁸⁶ Today, twenty-seven states provide their citizens with the mechanism of either the initiative or the referendum.⁸⁷

But despite its laudable beginnings, direct democracy is not free from the risk of misuse. In fact, although the connection is not made explicit in the *Hunter* trilogy, a closer look at direct democracy's qualities reveals it is no coincidence that each case dealt with this type of law.⁸⁸ A pragmatic synthesis of the *Hunter* doctrine that preserves the doctrine's usefulness for minorities in the political process must clearly cabin its reach. For several reasons, restricting the doctrine to the products of direct democracy is a supportable line to draw.

First, direct democracy removes most of the representation filters that work to root out invidious intent.⁸⁹ Thus, laws with "peculiar" or "carefully tailored" characteristics demand more suspicion when they are the product of direct de-

84. See, e.g., *What Are Ballot Propositions, Initiatives, and Referendums?*, INITIATIVE & REFERENDUM INST., <http://www.iandrinstute.org/Quick%20Fact%20-%20What%20is%20I&R.htm> (last visited Feb. 1, 2014).

85. See, e.g., *id.*

86. See Vargas, *supra* note 70, at 411, 412 & n.37 (describing reformers' desire to "neutralize the power of special interest groups" by affording the populace direct access to the law-making process).

87. See INITIATIVE & REFERENDUM INST., http://www.iandrinstute.org/statewide_i&r.htm (last visited Feb. 1, 2014).

88. See *Crawford v. Bd. of Educ.*, 458 U.S. 527, 531-32 (1982) (constitutional initiative); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 462 (1982) (statutory initiative); *Hunter v. Erickson*, 393 U.S. 385, 387 (1969) (popularly enacted amendment to city charter).

89. See Eule, *supra* note 13, at 1526-27; see also Vargas, *supra* note 70, at 480-81 (discussing John Hart Ely's theory of representation reinforcement and suggesting its particular applicability in the context of the *Hunter* doctrine).

mocracy.⁹⁰ Second, the unique issues with ascertaining intent in the context of direct democracy make it harder for initiative proponents to rebut that suspicion—all a court has to go on is the text.⁹¹ Third, unlike the classical representation process, courts cannot rely on the democratic process to rectify “improvident decisions.”⁹² Indeed, the majoritarian nature of direct democracy ensures that a sufficiently organized majority’s policy preferences cannot be counteracted. The facts bear out these structural deficiencies. Minorities are almost always the targets of, and losers in, the direct democracy process.⁹³

Representation filters in the conventional legislative process force deliberation, debate, and compromise. For example, all states but Nebraska require legislatively enacted laws to pass through a bicameral legislature.⁹⁴ The bicameral legislature slows the legislative process, forcing proposals to survive multiple stages where bargaining is necessitated before becoming law.⁹⁵ This contrasts sharply with the plebiscite, which can be “overly susceptible to contagious passions” and cleverly masked invidious purposes.⁹⁶ Direct democracy severely limits the horse-trading elements of the conventional legislative process—each decisionmaker’s isolation in the voting booth diminishes the opportunity for discourse.⁹⁷ The deliberation-forcing elements of the conventional legislative process allow underrepresented groups to work through legislators to ensure that their view on a law is heard.⁹⁸ Not only are these deliberative advantages

90. See Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 159 (1995) (noting “danger signals” for initiatives, including “propositions explicitly or implicitly targeted at socially subordinated groups”); *cf. id.* at 128 (discussing “structural features” of direct democracy, such as voter unfamiliarity with legal jargon and the larger legal context, that allow initiative drafters to manipulate unaware voters). These same structural features can empower disingenuous initiative proponents to “carefully tailor” laws in ways that may run afoul of the *Hunter* doctrine.

91. See *id.* at 110 (noting lack of classic alternative sources like committee reports in the context of direct democracy); see also ISSACHAROFF, KARLAN & PILDES, *supra* note 61, at 972 (describing similar problems in interpreting the products of direct democracy).

92. *Cf. Vance v. Bradley*, 440 U.S. 93, 97 (1979) (calling for judicial restraint even when courts may think the legislature has acted “unwisely”). In the direct democracy context, the “unwise” decision of burdening minority political-process rights will not be rectified by the very electorate that originally imposed the burden.

93. See Chemerinsky, *supra* note 2, at 294, 297; Vargas, *supra* note 70, at 425.

94. See Eule, *supra* note 13, at 1557 n.243.

95. See *id.* at 1557.

96. See *id.* at 1527.

97. See *id.* This excludes referenda, where the legislature necessarily plays a role. In such cases, the representation filters are not bypassed. *Crawford’s* statute was the product of such a joint effort—perhaps explaining the Court’s reticence to draw negative conclusions about the law. See *id.* at 1566.

98. See Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283, 1304 (1984) (“Perhaps we cannot force white voters to listen to blacks in their neighborhoods, but black legislators can interact with and influence their white colleagues.”). Additionally, the ongoing relationships legislators cultivate with each other can foster camaraderie that may help reduce the extremism of laws that pass through the other filters.

removed in the context of direct democracy, but minorities are disproportionately less likely to vote on initiatives, weakening their influence further.⁹⁹ These realities, present in the *Hunter* line of cases, explain why those oddly tailored initiatives demanded increased scrutiny.

Moreover, the quicksilver nature that makes direct democracy appealing to its proponents also deprives them of the ability to refute that increased scrutiny. Representation filters produce indicia of intent like legislative committee reports.¹⁰⁰ Thus, courts must necessarily emphasize text more in these cases. Some observers have suggested that extrinsic materials like ballot descriptions or the proponents' media representations can replace the role of committee reports here.¹⁰¹ But these extrinsic materials present their own problems. For example, to the extent that courts search for the intent of the law's enactors in these sources, statistics show that few voters read ballot pamphlets and that the division between those who do and those who do not falls heavily along class lines.¹⁰² As for media representations, asking judges to wade into the waters of the media cycle would likely muddy the inquiry, not clarify it.¹⁰³

This Note cannot outline all of the peculiar issues of intent in the direct democracy context, and I will not belabor the point.¹⁰⁴ I only note these problems to highlight the difficulty of rebutting an inference of invidious intent from a measure's text alone when conventional indicia of intent are unavailable. Thus, direct democracy presents a unique challenge for defenders of a law that places structural burdens on minorities. Because the process produces such sparse evidence, more weight necessarily falls on any already suspicious text.

Furthermore, the direct democracy process is naturally less subject to self-correction than other legislative processes. For example, the Court indicated that the burden Initiative 350 placed on minorities in the political process was intentional, not accidental.¹⁰⁵ Whereas minorities can ask their legislators to return to the table with further arguments and bargaining chips, the initiative process is too diffuse for such targeted efforts. Because of their lack of political strength, minorities will inevitably lack the strength to secure a policy about-face from an electorate that originally chose to burden them. The justification for judicial reticence is at its lowest ebb in such cases.

These realities suggest a reasonable focus for the *Hunter* doctrine. A "peculiar" or "carefully tailored" law passed by the full legislature has been vetted

99. See Eule, *supra* note 13, at 1515.

100. See Schacter, *supra* note 90, at 110.

101. See *id.* at 141-46.

102. See *id.* at 142-43.

103. See *id.* at 144-45 (noting that media representations are "sprawling and diffuse," and unlikely to "yield definitive answers about the design of the voters").

104. Jane Schacter's article treats the subject in depth. See *id. passim*.

105. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) (noting that Initiative 350 was constructed for "racial purposes").

by a tempering process that the same law passed by initiative has not.¹⁰⁶ Thus, whereas courts can presume that minorities have, through their representatives, had a voice in drafting the text and scope of laws originating in the legislature, they know that initiative proponents have sole control over an initiative's language.¹⁰⁷ This uniquely untrammelled ability to manipulate relevant language makes it reasonable for courts to limit the *Hunter* doctrine by declining to find that statutory language has been sufficiently "tailored" to require action except in cases of direct democracy.

Direct democracy's unique issues explain why the Supreme Court has only applied the *Hunter* doctrine in this context.¹⁰⁸ Limiting the doctrine to this context should mollify those who fear it could support court interference into every law bearing on race. Despite this limitation, the doctrine can still work in the area in which its supporters need it most, since studies have shown that minorities are almost always the loser in the initiative process.¹⁰⁹ Thus, this second limitation helps balance these competing interests—and perhaps, if implemented, could increase the doctrine's chances of survival before a skeptical Supreme Court.

I do not propose this limitation unaware of the representative process's imperfections. Certainly, a nonneutral power allocation could plausibly slip through its safeguards. But the representative process's filters—and its comparatively greater potential for self-correction—mean that it demands judicial intervention comparatively less than direct democracy's nearly oversight-free system.¹¹⁰ It is therefore a reasonable stopping point.

106. See Eule, *supra* note 13, at 1555 (suggesting that the legislature's collective nature will ensure that "diverse views" combat both implicit and explicit bigotry).

107. See Schacter, *supra* note 90, at 129-30 (noting that in almost all cases, initiative proponents draft unilaterally, with little to no oversight beyond "obvious attempts to mislead"). I acknowledge that this dichotomy only works when minorities have the voting power to choose good conduits for their interests—a subject that would take this Note too far afield.

108. See *supra* note 88 and accompanying text. *Lee v. Nyquist*, discussed in note 33 above, is admittedly problematic because it did not deal with a product of direct democracy. See 318 F. Supp. 710, 720 (W.D.N.Y. 1970), *summarily aff'd*, 402 U.S. 935 (1971). But, the Court's summary affirmance likely should not play as large a part in the doctrine's synthesis as the other full opinions. At any rate, to the extent that *Lee* contradicts this view, I would argue that it oversteps the doctrine's proper bounds.

109. See Vargas, *supra* note 70, at 425. Successes for proponents of same-sex marriage in the 2012 election may affect this analysis, see Lauren Markoe, *Election 2012 Shows a Social Sea Change on Gay Marriage*, HUFFPOST RELIGION (Nov. 12, 2012, 7:38 AM EST), http://www.huffingtonpost.com/2012/11/08/election-2012-gay-marriage-sea-change_n_2090106.html, but it may be too soon to tell. It is worth noting that during the height of the civil rights era and during the time leading up to *Seattle* in 1982, anti-integration initiatives—like anti-fair-housing and anti-school-desegregation initiatives—passed nearly ninety percent of the time when placed on the ballot. See Vargas, *supra* note 70, at 426-27.

110. Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that closer scrutiny should be applied to legislation restricting "political processes which can ordinarily be expected to bring about repeal of undesirable legislation"); Nathaniel Persily,

C. *The Doctrine's Utility when Conventional Equal Protection Doctrine Fails*

These limitations show that the *Hunter* doctrine does not overlap with conventional equal protection doctrine as expressed in *Washington v. Davis*. First, although courts usually cannot invalidate neutral laws because of disparate impact alone, oddly tailored laws requiring *Hunter* intervention are not neutral laws, and are not simply invalidated for their disparate impact.¹¹¹ Rather, the doctrine only activates when a facially neutral law's peculiar tailoring, coupled with disparate political-process burdens on a suspect class, demands judicial correction.¹¹²

So, in contrast with *Davis*, disparate political-process burdens are key to a *Hunter*-based challenge, and legitimately shape a court's analysis of the context surrounding a suspiciously crafted law. For example, one commentator has argued that borderline laws are nudged within the *Hunter* doctrine's reach when there is a close causal relation between their careful tailoring and their disparate impact on minorities in the political process.¹¹³ Courts should not be foreclosed from examining disproportionate impact in their analysis of the law's nonneutrality.

Although this synthesis deviates from conventional equal protection doctrine, it is not unsupported by the seminal cases. The Court never said in *Feeney* or *Davis* that the inevitability of a disproportionate impact is completely irrelevant—in fact, *Feeney* acknowledges that such inferences may legitimately “ripen” into proof of invidious intent.¹¹⁴ Cases like *Hunter* and *Seattle* represent a carefully circumscribed class of cases where these inferences can and should ripen. There is a critical difference between a truly neutral law with a foreseeably disparate impact and a “neutral” law whose neutrality is belied by exceptions that only operate to burden minority process interests.

Second, as discussed in Part II.B, limiting the doctrine's application to the direct democracy context adds another constraint on the ability of courts to invalidate laws. The limitations of direct democracy prevent courts from examining the statutory history to rebut an inference of invidious intent, as the

Suing the Government in Hopes of Controlling It: The Evolving Justifications for Judicial Involvement in Politics, 5 U. PA. J. CONST. L. 607, 609 (2003) (noting Ely's description of the first *Carolene Products* rationale as “clearing the channels of political change” (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 105-34 (1980)) (internal quotation marks omitted)).

111. See Allison Moore, *Loving's Legacy: The Other Antidiscrimination Principles*, 34 HARV. C.R.-C.L. L. REV. 163, 180 (1999) (arguing that *Seattle* rejected the idea that the *Hunter* doctrine endorsed the type of disparate impact test rejected in *Davis*).

112. See *supra* Part II.A.

113. See Moore, *supra* note 111, at 180.

114. See 442 U.S. 256, 279 n.25 (1979) (acknowledging that legitimate inferences of malicious intent can be drawn from the inevitability of disproportionate impact, but noting that such inferences had failed to “ripen into proof” in *Feeney's* case).

Feeney Court did.¹¹⁵ Furthermore, the confidence that courts otherwise have that the representation filters have eliminated invidious motives is lost when direct democracy bypasses those filters. Finally, there is little hope that the political process can self-correct when the precise harm that must be addressed is the perversion of the political process. Thus, the *Hunter* doctrine has been applied exclusively in the direct democracy context, and should be limited to that context in the future.¹¹⁶

Therefore, courts should invalidate laws that do not explicitly mention race if they are products of direct democracy, create a process burden, and display indicia of invidious motive. To protect the political process's integrity, the *Hunter* doctrine lets courts reach out to invalidate facially neutral laws when they might lack sufficient evidence to invalidate them under conventional equal protection doctrine.¹¹⁷ The doctrine's limitation to the direct democracy context helps quell any suggestion that it oversteps the bounds of the judicial role. Although this limitation is important, it will not play a large part in analyzing the circuit split between the Sixth and Ninth Circuits, because both laws in question were initiatives. I now turn to that circuit split.

III. RESOLVING THE CIRCUIT SPLIT: WHY THE SIXTH CIRCUIT GOT IT WRONG

As mentioned in the Introduction, the Sixth Circuit's 2012 application of the *Hunter* doctrine in *Coalition to Defend Affirmative Action v. Regents of the University of Michigan* created a circuit split with the Ninth Circuit's 1997 application in *Coalition for Economic Equity v. Wilson*. Both cases dealt with constitutional amendments, passed by initiative, that banned preferences statewide for "race, sex, color, ethnicity, or national origin."¹¹⁸ In Subparts A and B, I briefly recapitulate each case. Then, in Subpart C, I marshal my proposed doctrinal synthesis and conclude that the Ninth Circuit's application is

115. *See id.* at 279 ("[T]he statutory history shows that . . . the preference was consistently offered to 'any person' who was a veteran.").

116. As noted in note 108 above, *Lee v. Nyquist* is one case that could conceivably contradict this view. As stated above, however, that argument may not hold, and to the extent it does, I would argue that *Lee* applied the doctrine incorrectly.

117. *See Amar & Caminker, supra* note 62, at 1034-35 (discussing the idea that the *Hunter* doctrine is a "soft intent" doctrine that allows courts to reach laws that cannot be invalidated under *Washington's* intent requirement). The authors rejected this idea, deciding that the cases were not clear enough—but did not discuss the direct democracy element that I have proposed here. *See id.* at 1035. To the extent that we disagree, I am simply proposing a more ambitious reading.

118. *See Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 471 (6th Cir. 2012) (en banc), *cert. granted sub nom. Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 696 (9th Cir. 1997). For ease of reference, I will call these two initiatives collectively "antipreference initiatives."

truer to the doctrine's emphasis on nonneutrality. I conclude in Subpart D by addressing some criticisms of this result.

A. *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*

Michigan's Proposal 2 eliminated the use of "race, sex, color, ethnicity, or national origin" to grant preferential treatment in the public sector, including in admissions decisions; the Sixth Circuit noted that "[n]o other admissions criterion . . . suffered the same fate."¹¹⁹ Although Proposal 2 purported to apply to all state action, the challenge was limited to public education by the time it reached the Sixth Circuit.¹²⁰

The Sixth Circuit held that Proposal 2 violated the *Hunter* doctrine. First, it presented its own synthesis: an enactment violates the doctrine when it "has a racial focus, targeting a policy or program that inures primarily to the benefit of the minority . . . and . . . reallocates political power or reorders the decision-making process in a way that places special burdens on a minority group's ability to achieve its goals through that process."¹²¹

The court found a racial focus because Proposal 2 sought to eliminate programs that benefited minorities "by enhancing their educational opportunities and promoting classroom diversity."¹²² The court emphasized that "minorities may consider . . . [these policies to be] in their interest."¹²³ The court then held that this racial focus created an impermissible structural burden. Proposal 2 forced affirmative action supporters to campaign for constitutional amendments to achieve their policy goals, while supporters of other admissions policies, like legacy preferences, could lobby the admissions committees or governing boards of individual universities.¹²⁴ Finally, the court rejected the argument that there was a principled difference between burdening the ability to obtain protection from discrimination and burdening the ability to obtain preferential treatment.¹²⁵ It noted that the *Seattle* Court rejected a similar argument made against Seattle's voluntary busing program—in favor of a broader holding—when it emphasized that "minorities may consider busing . . . legislation that is in their interest."¹²⁶

119. *Coal. to Defend Affirmative Action*, 701 F.3d at 471.

120. *Id.* at 472.

121. *Id.* at 477 (internal quotation marks omitted).

122. *Id.* at 478.

123. *Id.* at 478-79 (quoting *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474 (1982)) (internal quotation marks omitted).

124. *See id.* at 484. The majority's discussion of whether the affected admissions procedures were part of a political process, although interesting, does not affect the resolution of the circuit split, and thus will not be discussed here. *See id.* at 480-83.

125. *Id.* at 485-86.

126. *See id.* at 486-87 (emphasis omitted) (quoting *Seattle*, 458 U.S. at 474).

B. Coalition for Economic Equity v. Wilson

The Ninth Circuit's analysis of California's Proposition 209 resulted in an essentially opposite result. Proposition 209's operative language was identical to Proposal 2's, banning "preferential treatment . . . on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."¹²⁷ Thus, no other criteria for preferential treatment by the state were affected, creating a similar structural burden to the one the Sixth Circuit found in *Coalition to Defend Affirmative Action*.

Despite these similarities, the Ninth Circuit held that the *Hunter* doctrine was inapplicable.¹²⁸ Significantly, the court "accept[ed] without question[]" that Proposition 209 structurally burdened minorities.¹²⁹ Thus, the only question left was whether that burden resulted from a desire to racially classify.¹³⁰ The court held that it did not, stating that Proposition 209's broad ban on discrimination or preferences by any arm of the state addressed race and gender neutrally.¹³¹ Although Proposition 209 addressed a racial issue, not every acknowledgment of a racial issue is an impermissible nonneutral classification.¹³² The court refused to draw an inference of invidious intent, contrasting Proposition 209's sweeping language with Initiative 350's suspicious distribution of exceptions to its mandate.¹³³ Far from raising eyebrows with its "peculiar" language, Proposition 209 appeared quite congruent with the Fourteenth Amendment's goal of a "political system in which race no longer matters."¹³⁴

127. *See* *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 696 (9th Cir. 1997).

128. *Id.* at 710-11 (reversing the district court's grant of a preliminary injunction as based on the "erroneous legal premise" that Proposition 209 violated the *Hunter* doctrine).

129. *Id.* at 705.

130. *See id.* at 705-06 ("[F]or the doctrine to apply at all, the state somehow must reallocate political authority in a discriminatory manner.").

131. *Id.* at 707.

132. *See id.* at 706; *see also* *Crawford v. Bd. of Educ.*, 458 U.S. 527, 537-38 (1982) (holding that Proposition I did "not embody a racial classification" because it addressed "race-related matters" neutrally).

133. *Wilson*, 122 F.3d at 707 (contrasting Proposition 209's prohibition with Initiative 350's attempt to "reserve to [the State] exclusive power to deal with racial issues" at the highest level (quoting *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 479 n.22 (1982))).

134. *Id.* at 708 (quoting *Shaw v. Reno*, 509 U.S. 630, 657 (1993)) (internal quotation mark omitted).

C. *Resolution: Why Michigan's Proposal 2 Did Not Evidence a Nonneutral Power Allocation*

Part II's doctrinal synthesis indicates that the Ninth Circuit has the better of this circuit split.¹³⁵ Initially, it is fair to acknowledge that these constitutional initiatives create a structural burden. Supporters of racial and gender preferences must lobby the statewide electorate to achieve their goals, while others, like supporters of legacy preferences, can lobby lower levels of government like a board of regents.¹³⁶ This is not enough, however, because almost any law that addresses an issue arguably creates a structural burden for the "losers" with respect to that issue.¹³⁷ An impermissible burden must have resulted from a "peculiar," nonneutral, political-process power allocation with regard to a protected subject like race. Otherwise, there is no basis for inferring an attempt to racially classify.¹³⁸

The Sixth Circuit misstepped when it suggested that any enactment that has a "racial focus" and reorders the decisionmaking process with the effect of making it harder for minority groups to achieve their goals must be invalidated under the *Hunter* doctrine.¹³⁹ These conditions are certainly necessary, but they

135. Although direct democracy's unique qualities provide an important limitation on the doctrine, as discussed in Part II.B above, those qualities will not bear directly on the circuit split since both circuits addressed constitutional amendments passed by initiative.

136. See, e.g., *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 484 (6th Cir. 2012) (en banc) (listing the multiple levels at which other goals could be pursued, and calling the burden Proposal 2 created the "highest possible hurdle"), cert. granted *sub nom.* *Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013).

137. See, e.g., *Seattle*, 458 U.S. at 496 (Powell, J., dissenting) ("Any time a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers."); ISSACHAROFF, KARLAN & PILDES, *supra* note 61, at 953 ("[A]ny substantive constitutional provision restructures the political process with respect to the issue involved." (emphasis added)). For example, Michigan's 2012 Proposal 2 proposed adding the right of collective bargaining for public- and private-sector employees to the Michigan Constitution. See *Proposal 2: A Constitutional Amendment on Collective Bargaining*, DETROIT FREE PRESS, <http://www.freep.com/article/99999999/NEWS15/120927092> (last visited Feb. 1, 2014). The proposal failed, see *Michigan Proposal 2 Results: Voters Reject Collective Bargaining Amendment*, HUFFPOST DETROIT, (Nov. 7, 2012, 2:47 PM EST), http://www.huffingtonpost.com/2012/11/07/michigan-proposal-2-results-2012_n_2080767.html, but had it succeeded, opponents of collective bargaining would have "lost" with respect to this issue. Had they wished to reimplement their policy preferences, they would have been burdened in the political process by being forced to convince the same electorate that rejected their policy previously to make an about-face. But surely, without evidence of nonneutrality, this is insufficient to show a violation of the *Hunter* doctrine. Indeed, the proposal could not have been a nonneutral attempt to subtly achieve an otherwise impermissible classification, because it did not deal with a subject within a protected sphere like race.

138. See *Wilson*, 122 F.3d at 706; see also *Seattle*, 458 U.S. at 485 (noting the relevant inquiry is "whether the legislation . . . was designed to accord disparate treatment on the basis of racial considerations").

139. See *Coal. to Defend Affirmative Action*, 701 F.3d at 477.

are not sufficient. By ignoring the possibility that Proposal 2 was neutral, the court implied that any law that addresses race violates the doctrine if it removes a program that minorities consider to be in their interest.¹⁴⁰ It does matter whether the targeted program inures primarily to the minority's benefit, but the answer to that inquiry does not determine whether the law evidences an impermissibly nonneutral classification. Rather, it answers the question of whether the issue is a uniquely "racial issue."¹⁴¹

The structure of the argument in *Seattle* supports this reading. There, the Court only began discussing whether the Seattle Plan inured primarily to the minority's benefit in response to an assertion that integrative busing was not a racial issue.¹⁴² But neither *Seattle* nor *Crawford* ever suggested that addressing a racial issue, full stop, suffices to create a nonneutral classification. Indeed, *Crawford* suggested quite the opposite. The *Crawford* Court acknowledged that court-ordered integrative busing prompted Proposition I.¹⁴³ But, despite that "clear" impetus, "Proposition I d[id] not embody a racial classification," because it "addresse[d], in neutral fashion, race-related matters."¹⁴⁴ This distinction is critical in circumscribing the doctrine; a law can address a racial issue—and even create some political-process burdens—without being nonneutral.¹⁴⁵

Michigan's Proposal 2 and California's Proposition 209 are more like Proposition I than Initiative 350. Minorities certainly may consider preferences to be "legislation that is in their interest."¹⁴⁶ The distinction is that unlike Proposition I, Proposition 209, and Proposal 2, the irrationally uneven text of the Akron amendment and Initiative 350 left no doubt that they were "effectively drawn for racial purposes," such that their negative effects fell on minorities.¹⁴⁷

140. *See id.* at 478-79 (arguing that Proposal 2 has a racial focus because preferences primarily benefit minorities, and minorities consider preferences to be in their interest). The court then proceeded to analyze whether Proposal 2 reordered the political process without addressing the possibility that Proposal 2's burden allocation was neutral. *See id.* at 483-89 (concluding that Proposal 2's political-process hurdles violated the *Hunter* doctrine—and addressing potential counterarguments—without considering the possible counterargument that those hurdles resulted from a sufficiently neutral formulation).

141. *See Seattle*, 458 U.S. at 472-73.

142. *Id.* at 471-72.

143. *Crawford v. Bd. of Educ.*, 458 U.S. 527, 538 n.18 (1982).

144. *Id.* at 537, 538 & n.18 (emphasis added).

145. Of course, Proposition I created a structural burden—after its passage, those that supported busing as a judicial remedy for de facto segregation had to submit that policy proposal to the entire electorate, while supporters of other permissible remedies did not. *See supra* text accompanying notes 54-55 (describing Proposition I's content).

146. *See Seattle*, 458 U.S. at 474 (quoting *Hunter v. Erickson*, 393 U.S. 385, 395 (1969) (Harlan, J., concurring)) (internal quotation marks omitted). This is true notwithstanding some minorities' opposition to preferences—what matters is that minorities *might* reasonably consider them to be in their interest. *See id.* at 472 (rejecting the argument that some minorities' opposition to busing showed that busing was not a racial issue).

147. *See id.* at 471 (emphasis added). As noted above, "racial purposes" in this context must mean impermissible racial-classification purposes—otherwise, any law that touches on race would create a nonneutral allocation. *Crawford's* reasoning precludes this possibility.

In both of those cases, “peculiar” tailoring for no apparent legitimate reason regarding a racial issue demanded that the Court find the law in question to “rest[] on distinctions based on race.”¹⁴⁸ It justifiably raises concerns when a law’s language is ill-suited to its purported goal—especially when the law seems well suited to an unstated impermissible purpose.

Initiative 350 purported by its terms to be a law to preserve neighborhood schooling, yet its sweeping exceptions made it undeniable that it was a nonneutral attempt to impose political-process burdens on busing supporters.¹⁴⁹ As in *Seattle*, both antipreference initiatives addressed a racial issue. Unlike Initiative 350, they lacked the careful tailoring that shows nonneutrality, which is a prerequisite for finding an impermissible racial classification.¹⁵⁰ If Proposition I’s neutrality excepted it from the *Hunter* doctrine despite its focus on court-ordered integrative busing, then the antipreference initiatives’ broad, exceptionless focus on preferences for race, gender, and national origin provide far less evidence of nonneutrality.

I do not note the inclusion of gender and national origin in the antipreference initiatives to reargue the Ninth Circuit’s suggestion in *Wilson* that the *Hunter* doctrine might not apply because women and minorities constituted a majority of the enacting electorate.¹⁵¹ Rather, the inclusion simply emphasizes the greater inferential leap required to conclude that the antipreference initiatives were passed to create a higher procedural burden for minorities. Neither law excepts large classes of people in the way Initiative 350 excepted most student-assignment methods.¹⁵² Thus, the neutral justification that Proposition 209 and Proposal 2 simply pursue the Equal Protection Clause’s global “goal of a political system in which race no longer matters”¹⁵³ is more plausible.

Additionally, it is true that the antipreference initiatives are not as neutral as they *could be*. They could, for example, have included prohibitions against preferences for other statuses, such as sexual orientation, veteran status, or disability.¹⁵⁴ But for a law to survive the doctrine as presented here, its defenders

148. *See id.* at 485 (internal quotation marks omitted).

149. *See id.* at 462-63 (listing the numerous targeted exceptions to Initiative 350). This is reminiscent of “least restrictive means” or “narrow tailoring” analysis, *see, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (“[T]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.”)—if Washington really wanted to preserve neighborhood schooling, Initiative 350 was woefully underinclusive for that goal.

150. *See Crawford v. Bd. of Educ.*, 458 U.S. 527, 537-38 (1982).

151. *See Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 704 (9th Cir. 1997). In any case, that suggestion misses the doctrine’s point of inferring otherwise undetectable intent to impermissibly classify. It is irrelevant that a cobbled together “majority” is the target of the animus.

152. *See Seattle*, 458 U.S. at 462-63. The opposite is true—they sweep in large classes.

153. *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

154. *See Moore, supra* note 111, at 192-93 (noting veteran status and disability as preference statuses that such initiatives might ban).

need not show that it is perfectly neutral, just that it is sufficiently neutral to prevent an inference of invidious intent.¹⁵⁵ This is a fair balance in light of the *Hunter* doctrine's relaxed standard. If plaintiffs need not meet the stringent "because of" standard by eliminating all plausible alternatives, defendants' burden should be commensurately lighter.

At bottom, without overwhelming evidence of careful tailoring, a court should not take the drastic step of striking down an apparently neutral law enacted democratically by the electorate.¹⁵⁶ Otherwise, the judiciary looks less like a protector of minority rights and more like an unelected superlegislature telling the electorate the best way to structure its laws—the classic "countermajoritarian difficulty."¹⁵⁷ In fact, judicial invalidation of initiatives may pose a greater threat to the democratic process than invalidation of conventional legislation. When a law that represents its unfiltered policy preferences is struck down, the electorate is more likely to feel that its will has been undermined and may respond with apathy.¹⁵⁸ That risk must give way to the Equal Protection Clause, but if the law's tailoring does not suggest an equal protection violation, courts should not upset the majority's will. Direct democracy has its issues, but unless those issues make direct democracy per se invalid, we must be willing to live with those problems when the law in question is neutral.

D. Addressing Criticisms

This view of the doctrine can be attacked in several ways, some of which I will address here. First, I concede that laws banning preferences will tend to escape scrutiny under this view, since they usually have the rational justification of pursuing a colorblind society, even if they are actually driven by animus. This is a fair criticism, but as discussed in Part II.A, false negatives are a desirable result of an appropriately narrow reading of the *Hunter* doctrine. For better or worse, antipreference laws are unlikely to fall within the *Hunter* doctrine's purview because they appear to work neutrally and have plausible explanations. Still, it is not impossible for these laws to be so woefully

155. I do not mean to imply that the *Hunter* doctrine is properly limited to race by saying that the inclusion of gender and national origin may help indicate an initiative's neutrality. That discussion is beyond the scope of this Note, although courts have suggested that the doctrine may extend beyond race. See, e.g., *Evans v. Romer*, 854 P.2d 1270, 1276 (Colo. 1993) (en banc) (suggesting that the doctrine applies to any "independently identifiable group[]").

156. Cf. *Seattle*, 458 U.S. at 489 (Powell, J., dissenting) (calling the majority opinion an "unprecedented intrusion into the structure of a state government").

157. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334, 335 & n.2, 336 (1998) (citing ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962)).

158. See Eule, *supra* note 13, at 1506-07.

underinclusive of the asserted goal of colorblindness that they violate the *Hunter* doctrine—just unlikely. Here, it is proper to err on the side of preserving a strict separation of powers by limiting the judiciary's role.¹⁵⁹ If the *Hunter* doctrine is not clearly implicated by a law's structure and context, using the doctrine to invalidate the law looks less like enforcing equal protection and more like enacting judicial policy preferences.¹⁶⁰

Admittedly, one might argue that more judicial discretion is necessary here, in the interest of reaching more laws motivated by animus. Whether that interest or the interest in the separation of powers should trump here requires a difficult value judgment, but few rule formulations can escape that difficulty. At minimum, however, the importance of the separation of powers should play a role in a court's consideration of whether to apply the *Hunter* doctrine. The *Hunter* doctrine is only one strand of equal protection jurisprudence, and there will be problems it is not well suited to handle. As argued in Part II.B, applying the doctrine represents a judicial judgment that the voter initiative—a process Justice Hugo Black called “as near to a democracy as you can get”¹⁶¹—has failed. It should be used cautiously.

Second, one could complain that antipreference initiatives bar policies that are permissible under the Equal Protection Clause.¹⁶² Thus, the argument goes, these initiatives do not actually pursue a colorblind society neutrally, because they are overinclusive of that end to the extent that they ban one acceptable method of pursuing that goal. This means that such laws do not merely “adopt[] the Equal Protection Clause.”¹⁶³ This is concededly a real tension. Some actions that lawmakers might legitimately believe will bring society closer to colorblindness in the long term may in the short term hinder this same interest by hampering an alternative method of pursuing it. The answer must be that because these policies are merely permissible, a truly neutral ban should not violate the Equal Protection Clause. Given the legitimate interest of pursuing colorblindness, the electorate should be given some leeway in determining the best method to achieve that goal.

Finally, some might complain that this doctrine does not bind courts in any meaningful way. What is sufficiently odd tailoring will be determined entirely at the whim of district judges. But the judiciary must always make judgments of degree, whether it is parsing facts to determine whether an asserted interest is compelling or examining alternatives to determine whether an action is the least restrictive means. Recall the proposed high bar to finding that a peculiarly

159. See Schacter, *supra* note 90, at 148 (“Privileging the perspective of the voters . . . can be understood to honor the separation of powers and to protect the electorate’s prerogatives.”).

160. See *supra* notes 156-58 and accompanying text.

161. See Eule, *supra* note 13, at 1506 (internal quotation mark omitted).

162. See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 712 (9th Cir. 1997) (Schroeder, J., dissenting from denial of rehearing en banc).

163. See *id.* (quoting *Crawford v. Bd. of Educ.*, 458 U.S. 527, 535 (1982)).

tailored law evidences a racial classification.¹⁶⁴ That bar means that even an activist judge would have to dig deep to create a *Hunter* violation out of whole cloth. And, of course, the district court is not the last step—poorly substantiated decisions below tend to fare poorly on appeal. These constraints should mollify those who fear the doctrine’s misuse by activist courts.

There may be other reasonable arguments against the rule as described here, but I believe this narrow reading best explains the *Hunter* trilogy itself, and satisfactorily resolves the circuit split.

IV. HUNTING FOR APPLICATIONS

It is not unfair to wonder whether this view reads the *Hunter* doctrine out of existence in an attempt to save it. Surely no group that really had anti-minority motivations for an initiative would be foolish enough today to tip its hand with an initiative blatantly tailored to create an impermissible burden falling under the *Hunter* doctrine. There is no question that this reading severely curtails the doctrine’s reach. But this is appropriate in light of the doctrine’s antidemocratic potential. A broader reading invites a complete overruling of the doctrine, which would be an unfortunate result—it can still play an important role in protecting minorities in the political process.¹⁶⁵ It may not play this role often, but the Supreme Court’s reluctance to use it may demonstrate how rarely the doctrine is truly required to uphold equal protection. The doctrine only needs to work in at least one plausible scenario where conventional equal protection law would not work to show its continued utility. These scenarios do exist. Indeed, in certain contexts, an initiative’s proponents may have no choice but to structure an initiative such that it reveals their intent to burden minority political strength.

The continued pursuit of diversity in K-12 education provides the relevant framework. So, a brief recapitulation of *Parents Involved in Community Schools v. Seattle School District No. 1*¹⁶⁶ is necessary. In that case, four Justices expressed their view that the only compelling interests capable of justifying racial classifications were remedying past intentional discrimination and diversity in higher education.¹⁶⁷ Justice Kennedy concurred in the judgment, but thought the plurality was mistaken to suggest that K-12 schools had to accept the status quo of de facto racial segregation.¹⁶⁸ Justice Kennedy believed that diversity, “depending on its meaning and definition,” was a per-

164. See *supra* Part II.A.

165. This, incidentally, is another justification for restricting the doctrine to direct democracy as argued in Part II.B—extending the doctrine to a new context could invite the Court to completely overrule it.

166. 551 U.S. 701 (2007).

167. *Id.* at 720-22 (plurality opinion).

168. *Id.* at 788 (Kennedy, J., concurring in part and concurring in the judgment).

missible goal for a school district to pursue.¹⁶⁹ Because the four dissenting Justices agreed with him on that point, there were technically five votes for allowing race-conscious actions by school districts pursuing diversity as a compelling interest.¹⁷⁰

Justice Kennedy suggested many methods of pursuing diversity that do not make the fatal error of defining individual students by their race. For example, education officials could strategically select new school sites, draw attendance zones with an eye toward neighborhood demographics, focus on recruiting targeted demographics, or track relevant statistics by race.¹⁷¹ Such methods would allow officials to consider the racial impact of a decision without impermissibly using race.¹⁷² It is beyond this Note to analyze these suggestions' precedential value, if any, although four other Justices likely agree with Justice Kennedy. But they set the stage for a scenario showing the *Hunter* doctrine's continued usefulness.

Therefore, let us return to the scenario suggested in the Introduction, assuming for these purposes that Justice Kennedy's suggestions are permissible. A supporter of redistricting like the activist in the Introduction rarely stands alone. In fact, parents often support redrawing school-attendance zones.¹⁷³ Reasons for this support include combating overcrowding, reducing travel distance, and enhancing learning by eliminating those types of obstacles.¹⁷⁴ School officials have used similar reasoning.¹⁷⁵ Imagine that parents, citing some of these concerns, launch a campaign to convince education officials to redraw attendance zones. Institutional inertia has set in, and across the state, old school boards are voted out for moving too slowly and replaced with new boards, whose members pledge to resolve the problems. This is all uncontroversial, until officials in one of the most populous school districts begin investigating statistics and are struck by the de facto segregation of school popu-

169. *Id.* at 783.

170. *See id.* at 865 (Breyer, J., dissenting); *see also* U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS 2-3 (2011), available at <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf> (noting that a "majority of the Justices recognized that seeking diversity and avoiding racial isolation are compelling interests for school districts").

171. *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment).

172. *See id.*

173. *See, e.g.*, Pavan Basetty et al., Letter to the Editor, *Opinion: It's Time We Redraw the School Attendance Zones in Milpitas*, MILPITAS PATCH (Nov. 1, 2011, 7:17 PM), <http://milpitas.patch.com/articles/opinion-it-s-time-we-redraw-the-school-attendance-zones-in-milpitas>.

174. *See, e.g., id.*

175. *See, e.g.*, Elizabeth A. Harris, *Anxious Brooklyn Parents See Redrawn School Boundaries*, N.Y. TIMES (Oct. 18, 2012), <http://www.nytimes.com/2012/10/18/nyregion/boundaries-for-popular-brooklyn-schools-are-redrawn.html>.

lations—and resolve to do something about it.¹⁷⁶ Some parents are shocked when, at the news conference announcing the new attendance-zone plan, officials announce they will not only take into account school overcrowding and travel distance, but racial isolation as well. Thus, as they draw attendance zones, they will categorize geographic areas by socioeconomic status and average parental educational level, conscious that those criteria are proxies for race in the United States.¹⁷⁷ They will also pair underperforming elementary schools within certain zones with middle schools in the same geographic area as other, higher-performing elementary schools, knowing this also combats racial isolation.¹⁷⁸

The dilemma is clear. Although most parents support the use of school overcrowding and travel distance as factors in redrawing the attendance zones, some dislike the idea of the school board combating racial isolation. Perhaps some see racial isolation as a feature, not a bug. Seeking to have their cake and eat it too, a parent group drafts an initiative to selectively ban the consideration of racial isolation as a factor in attendance-zone drawing.¹⁷⁹

The only way to accomplish this goal may be an initiative that violates the *Hunter* doctrine.¹⁸⁰ The parent groups always wanted the attendance zones redrawn, which means the most neutral means of accomplishing their goal (banning attendance-zone redrawing for any reason) would defeat their original aim. In any case, completely banning attendance-zone redrawing would be politically unpalatable and is thus impractical. It seems unlikely that the parent group would be so crude as to draft an initiative proposing that “racial isolation may not be used as a factor for purposes of attendance zone redrawing.” They would have to try something more like *Seattle*, banning attendance-zone redrawing generally but then exempting every possible criterion except racial isolation. Or, they could try something like *Hunter*, repealing the policy change and then requiring all policies pursuing diversity to pass a referendum. The possibilities are numerous, but this use of direct democracy could violate the *Hunter* doctrine.

As in the antipreference cases, it appears clear that a structural burden has been created. Those who pursue race-conscious attendance-zone redrawing will be unable to lobby the school board, while supporters of other policies will

176. See *Parents Involved*, 551 U.S. at 725 (recounting respondent school districts’ stated goals of “reduc[ing] racial concentration in schools” and ensuring that racially segregated housing distributions would not bar minority students from excellent schools).

177. See U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., *supra* note 170, at 10-11.

178. See *id.* at 10. By “pair” I simply mean that a number of students that graduate from underperforming elementary schools will have the opportunity to attend higher-performing middle schools in a different geographic area.

179. This hypothetical works whether it is a statewide initiative or something closer to *Hunter*, where a city or county charter is amended by the entire electorate.

180. Assume for these purposes that the term lengths of the relevant school officials make waiting for the next election impractical.

retain that ability.¹⁸¹ Here, however, the case is much stronger for inferring an intent to classify invidiously than it was in the antipreference cases. Whereas Proposal 2 and Proposition 209 broadly banned preferences without using odd exceptions (like in *Seattle*) and without specifically adverting to the racial issue (like in *Hunter*), this hypothetical initiative cannot accomplish its proponents' goals without doing one or both.

This is only one example, and other scenarios are quite conceivable. Imagine a city's newly appointed department of elections wants to enhance the voting process to bolster a spirit of civic engagement and participation. Its broad policy changes include streamlined online registration, more in-person voting locations, longer voting windows, and the ability to opt in to voting by mail.

The department also includes a program for which minority groups lobbied heavily, called "voting workshops." The workshops take place in city districts that have had voter turnout below certain unacceptable levels—districts that turn out to be predominantly minority. The workshops focus on registering those who might not otherwise have the time or knowledge to register on their own, and help felons who have served their time to become reenfranchised. Both policies will most strongly affect minority populations.

This could create a dilemma similar to the school-redistricting example. Most city residents will probably support generally streamlining voting. There may, however, be enough discomfort with plans clearly targeted at enhancing minority voting strength to engender support for a popularly enacted city charter amendment to reverse that aspect of the program.¹⁸² The potential tactics are numerous, but one might involve prohibiting department employees from registering anyone while away from the department office. Regardless of method, the law would create political-process burdens for minorities, since voting workshop supporters now would have to convince an entire electorate to change its mind.

The *Hunter* doctrine could be a useful tool here. Certainly, there are conceivably other justifications for such measures besides a desire to create minority political-process burdens. For example, prohibiting department employees from registering anyone while away from the office may save the city money. The point is, however, that the mere existence of plausible explanations should not suffice to sink a *Hunter* challenge, as the doctrine is outlined here. No matter how it is accomplished, a law preserving department policies the majority likes while carefully excising minority-benefiting policies it dis-

181. See, e.g., *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 484 (6th Cir. 2012) (en banc) (noting that Proposal 2 created the "highest possible hurdle"), cert. granted *sub nom.* *Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013).

182. We need not settle on one particular reason why this might be. Some may be concerned about political impact if this city's minorities tend to vote for one party or type of candidate. Some may truly be motivated by garden-variety animus. What matters here is whether nonneutral tailoring creates a political-process burden.

likes is at least plausibly “peculiarly tailored.” And the doctrine facilitates closer judicial scrutiny when such a law—if popularly enacted—burdens minority political-process interests.

Of course, it is possible that neither of these hypothetical challenges succeed. Their defenders may be able to show that the tailoring fits the asserted goal. But the *Hunter* doctrine should not mean that minority plaintiffs always win; it is just one tool to help protect their interests in the critical political-process sphere. These hypotheticals show that the right circumstances may force opponents of a race-conscious policy to use direct democracy in a way that violates the *Hunter* doctrine. They thus show the *Hunter* doctrine’s continued utility in this circumscribed set of circumstances. Where conventional equal protection doctrine may be insufficient, direct democracy’s unique qualities, along with the process burden created by nonneutral tailoring, change the equation.

CONCLUSION

Preserving the *Hunter* doctrine’s usefulness is a tall task. The leading cases are inconclusive regarding the doctrine’s basis, and at first glance, it looks like a classic case of improper judicial aggrandizement. The Sixth Circuit’s decision, however, created a circuit split on one of today’s most heated issues, and the Supreme Court’s grant of certiorari showed the Court’s readiness to address the doctrine directly for the first time in decades. With that in mind, I have proposed a view of the doctrine that could confine its potentially sweeping reach and preserve it for the future. Refocusing the doctrine on the products of direct democracy allows it to reach many cases of anti-minority legislation that might escape conventional equal protection doctrine. And although my proposed standard for finding a nonneutral power allocation is high, Part IV’s examples show that it does not completely eviscerate the doctrine. Unfortunately, as long as minorities have particular interests, some will wish to block those interests. Properly conceived, the *Hunter* doctrine should remain part of the toolbox for those interests’ proponents.

