

Articles

Political Process Equal Protection and the Repeal of Affirmative Action in Higher Education: The Sixth Circuit Splits from the Ninth

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I. INTRODUCTION

Imagine that a state passes a constitutional amendment prohibiting affirmative action policies by all government entities, including public education.¹ State universities can no longer consider race as a factor in admissions but may still look at academic achievement, work experience, extracurricular activities, athletic ability, and family legacy. Consider the following scenario recently postulated by the Sixth Circuit:

A student seeking to have her family's alumni connections considered in her application to [a university] could do one of four things to have the school adopt a legacy-conscious admissions policy: she could lobby the admissions committee, she could petition the leadership of the university, she could seek to influence the school's governing board, or, as a measure of last resort, she could initiate a statewide campaign to alter the state's constitution. The same cannot be said for a black student seeking the adoption of a constitutionally mandated permissible race-conscious admissions policy. That student could do only one thing to effect change: she could attempt to amend the [state] [c]onstitution—a lengthy, expensive, and arduous process—to repeal the consequences of the [law].²

On November 15, 2012, the Sixth Circuit determined that such an incongruent political system violates political process equal protection (PPEP).³ Just eight months prior to this decision, a Ninth Circuit panel reviewed a similar state constitutional amendment for the second time and found no constitutional problem.⁴ This Article analyzes the recent split between the Sixth and Ninth Circuits concerning the intersection of PPEP and the repeal of affirmative action policies in higher education. Part II will define PPEP and explore how it differs from the Supreme Court's conventional equal protection jurisprudence. Part III will create a roadmap of the most recent Supreme Court guidance on the topic, specifically three cases known as the *Hunter* trilogy. Part IV will explore the similarities and differences between the Sixth and Ninth Circuit cases and the different ways those courts perceived the *Hunter* trilogy. Part V will argue that the Ninth Circuit departed from the *Hunter* trilogy and the Sixth Circuit faithfully adhered to Supreme Court precedent. Finally,

¹ Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by any Means Necessary (BAMN) v. Regents of the Univ. of Mich., 701 F.3d 466, 470 (6th Cir. 2012) (en banc), cert. granted, Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013).

² *Id.* at 470.

³ See generally *id.*

⁴ See generally Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128 (9th Cir. 2012).

Part VI will conclude by examining the *Hunter* trilogy's effect on state education policies and the possible ways states can address affirmative action policies without violating the Fourteenth Amendment.

While this Article examines affirmative action policies in light of the Equal Protection Clause of the Fourteenth Amendment, it will not delve into the merits or constitutionality of those policies. In the 2003 opinion, *Grutter v. Bollinger*,⁵ the Supreme Court expressly permitted the consideration of race in university admissions.⁶ This Article is not designed to be a rallying cry for or against affirmative action. Rather, it focuses on the constitutional concerns that accompany ongoing attempts to limit the role of affirmative action in higher education.

II. DEFINING POLITICAL PROCESS EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment provides that “no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁷ A law offends the Constitution “under conventional equal protection analysis . . . if, on its face, it classifies on the basis of race.”⁸ Conventional equal protection, then, looks at laws to determine whether they classify individuals for different treatment on the basis of race. An example of a law that violates conventional analysis is one that “grants a particular class of individuals the right to engage in an activity yet denies other individuals the same right.”⁹

By contrast, PPEP forbids the government from restricting minority “right[s] to full participation in the political life of the community.”¹⁰ The Supreme Court succinctly defined PPEP in 1982:

⁵ 539 U.S. 306 (2003).

⁶ *Id.* at 328, 334–35 (holding that universities may consider race and ethnicity as a “plus” factor in evaluating an applicant’s file).

⁷ U.S. CONST. amend. XIV, § 1.

⁸ Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1022 (1996). Of course, the government has the opportunity to show that the law is narrowly tailored to serve a compelling government interest. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 658 (1993) (remanding to the district court to determine whether North Carolina’s reapportionment scheme was narrowly tailored enough to serve a compelling government interest). This test, known as strict scrutiny, also applies to political process equal protection. *See, e.g.*, *Crawford v. Bd. of Educ.*, 458 U.S. 527, 536 (1982) (applying strict scrutiny to political process equal protection case). However, this Article focuses on the first part of equal protection analysis—in other words, whether the law alters the political process along racial lines. Once such a determination has been made, a court then must determine whether the law survives strict scrutiny. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (holding that a law must pass strict scrutiny if it employs a racial classification).

⁹ *Equal Protection: An Overview*, LEGAL INFORMATION INSTITUTE (Aug. 19, 2010), http://www.law.cornell.edu/wex/equal_protection.

¹⁰ *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982). *See* Amar & Caminker, *supra* note 8, at 1027 (“The central idea behind this line of cases is relatively straightforward: Just as minorities cannot be singled out for substantively inferior treatment—say, subjected to a unique sales tax—neither can they be singled out and relegated to inferior treatment in the political process—say, subjected to a race-based poll tax.”).

It is beyond dispute, of course, that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner. But the Fourteenth Amendment also reaches a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.¹¹

PPEP examines whether the law restricts, either on its face or in effect, a minority group's access to an egalitarian political system.¹² Such a restriction can manifest itself as an outright ban on political access, or it can take the form of a more subtle political distortion.¹³ For instance, a state constitutional amendment forbidding affirmative action policies arguably violates PPEP if it makes it harder for minorities to achieve race-based legislation versus other groups proposing non-race-based legislation.¹⁴

III. THE HUNTER TRILOGY

A. *Hunter v. Erickson*

In 1969, the Supreme Court took its first comprehensive look at the intersection of equal protection and the political process.¹⁵ In *Hunter v. Erickson*, Nellie Hunter, a black citizen of Akron, Ohio, filed a complaint with the Commission on Equal Opportunity in Housing alleging racial discrimination by city homeowners.¹⁶ The complaint

¹¹ *Id.* (quoting *Mobile v. Bolden*, 446 U.S. 55, 84 (1980) (Stevens, J., concurring), *superseded by statute*, Pub. L. No. 97-205, 96 Stat. 131 (1982)).

¹² Keith E. Sealing, *Proposition 209 as Proposition 14 (As Amendment 2): The Unremarked Death of Political Structure Equal Protection*, 27 CAP. U. L. REV. 337, 337 (1999). Of course, a law that restricts everyone's access to the political process does not deny equal protection. *Seattle*, 458 U.S. at 469-70.

¹³ *Seattle*, 458 U.S. at 467 (explaining that a law that subtly distorts the political process may present an equal protection violation).

¹⁴ *See generally id.*; *see also* *Hunter v. Erickson*, 393 U.S. 385, 391 (1969) (forbidding laws that alter the political process along racial lines).

¹⁵ *See* Sealing, *supra* note 12, at 345-47 (recounting the development of political structure equal protection). Professor Sealing suggests *Reitman v. Mulkey*, 387 U.S. 369 (1967), was the first case to explore political structure equal protection. *Id.* at 342. However, he says, "*Reitman* can either be described as the seminal case in the Political Structure Equal Protection line or as the predecessor to the *Hunter* line." *Id.* The *Reitman* Court, however, decided the case on state action grounds, speaking in passing about the possibility of extending equal protection scrutiny to discriminatory political processes. *Id.* at 343, 344. *Hunter* explicitly did not rely on *Reitman* despite the fact that it used an embryonic form of PPEP to decide that case. *Id.* at 342 n.52. Therefore, *Hunter* is more accurately considered the genesis of the Supreme Court's PPEP jurisprudence.

¹⁶ *Hunter*, 393 U.S. at 387. The fair housing ordinance, which was repealed by the charter amendment, was created to "assure equal opportunity to all persons to live in decent housing

stated that her real estate agent had refused to show her several houses because of her race, in violation of a fair housing ordinance passed by the Akron city council.¹⁷ The complaint was dismissed, however, because of a recent city charter amendment that effectively repealed the fair housing ordinance by requiring majority approval of the city electorate before any current or future ordinance regulating housing discrimination could take effect.¹⁸ The amendment had no effect on other ordinances, which simply required a majority city council vote.¹⁹ Therefore, the amendment bifurcated the political process for passing local housing regulations by making it structurally more difficult to pass antidiscrimination ordinances than other laws.²⁰ The Ohio Supreme Court found no constitutional violation, and Hunter appealed to the Supreme Court.²¹

The Supreme Court vacated the Ohio court's decision, holding that the amendment was an equal protection violation.²² The Court explained that the amendment singled out race-related housing matters for special political treatment.²³ According to the Court, this explicit classification violated the Equal Protection Clause because it erected unequal political obstacles for minorities petitioning for antidiscrimination laws.²⁴ The Court seemed unfazed that the law did not discriminate against minorities on its face—determining that, in effect, it targeted minorities

facilities regardless of race, color, religion . . . or national origin." *Id.* at 386. The Commission on Equal Opportunity was charged with enforcing the city's fair housing ordinance and had the power to resolve disputes through "conciliation or persuasion if possible," and through "such order as the facts warrant." *Id.*

¹⁷ *Id.* at 387. The real estate agent had refused to show her certain houses because the owners "had specified they did not wish their houses shown to negroes." *Id.*

¹⁸ The text of the charter amendment provided:

Any ordinance enacted by the Council of the City of Akron which regulates the use, sale, advertisements, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.

Id. (quoting AKRON, OH., CITY CHARTER § 137 (1968)). The law applied retroactively, so all laws regulating the sale or lease of real estate property were void until passed under the new referendum process. *See id.*

¹⁹ *Id.* at 390 ("Those who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule: the ordinance would become effective 30 days after passage by the City Council, or immediately if passed as an emergency measure, and would be subject to referendum only if 10% of the electors so requested by filing a proper and timely petition.").

²⁰ *See id.*

²¹ *Id.* at 387–88 ("The trial court initially held the fair housing ordinance invalid under state law, but the Supreme Court of Ohio reversed. On remand, the trial court held that the fair housing ordinance was rendered ineffective by the charter amendment, and the Supreme Court of Ohio affirmed." (citation omitted)).

²² *Id.* at 393.

²³ *See id.* at 390. The charter amendment actually covered laws regulating the sale or lease of real estate not just on the basis of race, but also religion, national origin, and ancestry. *See id.* at 387.

²⁴ *Id.* at 391.

for unfavorable treatment.²⁵ The Court indicated that “mere repeal” of the ordinance would have been constitutionally permissible;²⁶ certainly if the majority wished to repeal the law, it commanded the votes to do so.²⁷ Therefore, the Court determined the law violated the Equal Protection Clause by creating a disparate political process, the burden of which fell solely on the minority.²⁸

B. *Washington v. Seattle School District No. 1*

The Court expanded on *Hunter*'s embryonic analysis in *Washington v. Seattle School District No. 1*.²⁹ In *Seattle*, the State of Washington passed a constitutional amendment called Initiative 350 by way of the state's referendum process.³⁰ The referendum was sponsored in an attempt to repeal the Seattle Plan,³¹ a mandatory busing and school reassignment program designed to desegregate public schools.³² Initiative 350 purported to prohibit school boards from reassigning students to schools other than the one closest or second closest to their

²⁵ *Id.* at 390 (“It is true that the section draws no distinctions among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end.”). Despite this facial neutrality, “the reality is that the law’s impact falls on the minority.” *Id.* at 391.

²⁶ *Id.* at 390 n.5. (“Thus we do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment.”).

²⁷ *Id.* at 390 (“The majority needs no protection against discrimination, and if it did, a referendum might be bothersome but no more than that.”).

²⁸ *See id.* at 392–93 (“[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.”).

²⁹ *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

³⁰ *Id.* at 463–64 (explaining that Initiative 350 was passed by a substantial margin). Although Initiative 350 drew 66% of the vote statewide, it failed to attract majority support in two legislative districts, both in Seattle. *Id.*

³¹ *Id.* at 463. The district court found that the initiative was directed solely at desegregative busing. *Seattle Sch. Dist. No. 1 v. Washington*, 473 F. Supp. 996, 1008 (W.D. Wash. 1979), *aff’d*, 633 F. 2d 1338 (1980), *aff’d*, 458 U.S. 457 (1982). It also found that Citizens for Voluntary Integration Committee (CiVIC), the organization sponsoring Initiative 350, was formed with the intent to dismantle the Seattle Plan. *Id.* at 1007. The district court concluded that the leadership of CiVIC acted “legally and responsibly” and did not address “its appeals to the racial biases of the voters.” *Id.* at 1009.

³² *Seattle*, 458 U.S. at 461. The State of Washington had, for some time, attempted to desegregate Seattle-area public schools before turning to the Seattle Plan. *Id.* at 460. Since 1963, the Seattle School District had *permitted* students to transfer from their neighborhood schools to remedy racial imbalance. *Id.* The school district implemented a “magnet” program and enacted a resolution defining racial imbalance as “the situation that exists when the combined minority student enrollment in a school exceeds the districtwide combined average by 20 percentage points, provided that the single minority enrollment . . . of no school will exceed 50 percent of the student body.” *Id.* After the district found that racial imbalance actually increased under the voluntary program, the district enacted the Seattle Plan, which required mandatory reassignment. *Id.* The Supreme Court noted that the district court found that mandatory reassignment “substantially reduced the number of racially imbalanced schools in the district and . . . the percentage of minority students in those schools which remain racially imbalanced.” *Id.* at 461.

place of residence.³³ Despite its facially sweeping ban, Initiative 350 contained several broad exceptions. School districts could reassign students for special education purposes or because of physical barriers or other hazards.³⁴ They could also reassign students because of “overcrowding, unsafe conditions or lack of physical facilities.”³⁵ Initiative 350 also prohibited “indirect” student assignments through the “redefinition of attendance zones, the pairing of schools, and the use of feeder schools,” all tools of the Seattle Plan.³⁶ In sum, the district court found that Initiative 350 allowed busing for most, if not all, purposes other than racial integration.³⁷

Justice Blackmun’s majority opinion began by proclaiming that the Equal Protection Clause prohibits government from denying racial minorities the right to vote or the ability to participate in the political process in a meaningful way.³⁸ But, the Court continued, equal protection also forbids “a political structure that treats all individuals as equals,’ yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.”³⁹ In comparing the permissible with the unconstitutional, the Court distinguished laws that allocate power according to neutral principles from laws that allocate power along racial lines.⁴⁰ Political devices such as the legislative veto and the requirements for amending state constitutions allocate political power neutrally.⁴¹ Although they may hinder minority-interested legislation at times, they treat all groups equally in their pursuit of political goals.⁴² These devices are permissible under the Equal Protection Clause, absent a discriminatory motive.⁴³ On the other hand, a “different analysis is

³³ *Id.* at 462. Initiative 350 did, however, permit voluntary desegregation by allowing students to choose to attend a school outside the allowable range permitted under the Seattle Plan. *Id.* at 473 n.16. The amendment also permitted courts to adjudicate constitutional issues relating to public schools, allowing courts to order busing and other measures upon a finding of de jure segregation. *Id.* at 463.

³⁴ *Id.* at 462.

³⁵ *Id.*

³⁶ *Id.* at 462–63.

³⁷ *Id.*

³⁸ *Id.* at 467 (“It is beyond dispute, of course, that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner.”).

³⁹ *Id.* (quoting *Mobile v. Bolden*, 446 U.S. 55, 84 (1980) (Stevens, J., concurring), *superseded by statute*, Pub. L. No. 97-205, 96 Stat. 131 (1982)).

⁴⁰ *Id.* at 469–70 (citing Justice Harlan’s reasoning in *Hunter* that only allocation of power along racial lines is prohibited).

⁴¹ *Id.* at 470 (noting that such neutral laws are not subject to attack on PPEP grounds).

⁴² *Id.* (“Because [neutral laws] make it more difficult for every group in the community to enact comparable laws, ‘they provid[e] a just framework within which the diverse political groups in our society may fairly compete.’” (quoting *Hunter*, 393 U.S. at 393 (Harlan, J., concurring) (alteration in original))).

⁴³ *Id.* (“[L]aws structuring political institutions or allocating political power according to ‘neutral principles’ . . . are not subject to equal protection attack Thus, the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action.”).

required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of the decision to determine the decisionmaking process.”⁴⁴

Turning to the facts of the case, the Court concluded that Initiative 350 fell in the impermissible category.⁴⁵ The State argued that the constitutional amendment allocated power neutrally because, on its face, it prohibited busing and reassignment for all purposes.⁴⁶ Despite the law’s facially neutral language, the Court determined that it was “effectively drawn for racial purposes.”⁴⁷ The Court pointed to the law’s exemptions, noting that Initiative 350 allowed busing and reassignment for virtually all purposes but desegregation.⁴⁸ Therefore, the Court determined that Initiative 350 had a racial focus because it treated integrative busing differently than busing for other purposes.⁴⁹

The State responded by arguing that Initiative 350 did not target minorities, given that minorities “may be counted among both the supporters and the opponents of [the law].”⁵⁰ Nevertheless, the Court explained that desegregation policies “at bottom inure[] primarily to the benefit of the minority.”⁵¹ According to the Court, it was sufficient that minorities could conceivably consider busing for integration to be in their interest.⁵² It explained that “[e]ducation has come to be a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his

⁴⁴ *Id.* (emphasis in original).

⁴⁵ *See id.* (“In our view, Initiative 350 must fall because it does not attempt to allocate governmental power on the basis of any general principle. Instead, it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities.”).

⁴⁶ *See id.* at 471 (restating Washington’s argument that Initiative 350 did not mention race and permitted busing for certain purposes, while prohibiting it for other purposes).

⁴⁷ *Id.* Compare Initiative 350 with the statute in *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *summarily aff’d*, 402 U.S. 935 (1971). In *Lee*, the State of New York passed a law that provided:

Except with the express approval of a board of education having jurisdiction, a majority of the members of such board having been elected, no student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of achieving equality in attendance or increased attendance or reduced attendance, at any school, of persons of one or more particular races, creeds, colors, or national origins[.]

318 F. Supp. at 712. The New York statute expressly prohibited busing for desegregation purposes. In contrast, Initiative 350 prohibited all busing, but then limited its broad application severely with several exceptions; in practical effect, these exceptions allowed busing for most, if not all, purposes other than desegregation. *See Seattle*, 458 U.S. at 471.

⁴⁸ *Id.* at 471. Compare Initiative 350 (which contained so many exceptions that it effectively prohibited busing *only* for desegregation purposes) with Proposition I in *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982) (which prohibited pupil assignment or transportation for *any* purpose absent a Fourteenth Amendment violation). *See infra* text accompanying notes 61–74. As such, the Court held that Initiative 350 was an equal protection violation, whereas Proposition I was not.

⁴⁹ *Seattle*, 458 U.S. at 474.

⁵⁰ *Id.* at 471–72.

⁵¹ *Id.*

⁵² *Id.* at 474.

environment.”⁵³ Children can only be successful in society if they learn to function in society.⁵⁴ Therefore, the Court determined that Initiative 350 had a sufficient racial focus to trigger the application of *Hunter*.⁵⁵

Upon holding that Initiative 350 contained a racial focus, the Court concluded that the amendment effectuated the kind of reallocation of power condemned in *Hunter*.⁵⁶ It stripped the school board of its authority over desegregative busing and rendered it to a remote level of government—the state constitution.⁵⁷ Minorities who wished to alter school district policy to allow busing or reassignment for desegregation purposes had only one option after Initiative 350: they had to amend the state constitution to repeal the busing ban.⁵⁸ Conversely, those seeking mandatory busing or student reassignment for *any* other purpose could simply petition the local school board.⁵⁹ Therefore, Initiative 350 stacked the deck against minorities seeking race-related legislation in violation of the Equal Protection Clause.⁶⁰

C. *Crawford v. Board of Education*

Announced the same day as *Seattle*, *Crawford v. Board of Education*⁶¹ presented the Supreme Court with a law similar to *Seattle*'s Initiative 350, but the Court reached a different outcome.⁶² In *Crawford*, California voters passed a constitutional amendment called Proposition I, which prohibited mandatory student assignment or transportation unless ordered by a federal court as a remedy for an equal protection violation.⁶³

⁵³ *Id.* at 472 (“Education has come to be a ‘principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.’” (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954))).

⁵⁴ *Id.* at 472–73 (“When [the child’s] environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community.”).

⁵⁵ *Id.* at 474.

⁵⁶ *Id.*

⁵⁷ *Id.* (“The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests.”). Before Initiative 350, “the power to determine what programs would most appropriately fill a school district’s educational needs—including programs involving student assignment and desegregation—was firmly committed to the local board’s discretion.” *Id.* at 479–80. After Initiative 350, “authority over all but [desegregation] remained in the hands of the local board.” *Id.* at 480.

⁵⁸ *See id.* at 474 (laying out political process for desegregating schools after Initiative 350).

⁵⁹ *Id.*

⁶⁰ *See id.* (“Indeed, by specifically exempting from Initiative 350’s proscriptions most nonracial reasons for assigning students away from their neighborhood schools, the initiative expressly requires those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action.”). The Court therefore concluded, “the reality is that the law’s impact falls on the minority.” *Id.* at 475.

⁶¹ 458 U.S. 527 (1982).

⁶² *See id.* at 535–40 (relying on the mere repeal doctrine to hold that the law did not violate equal protection).

⁶³ *Id.* at 529. Proposition I provided:

On appeal to the Supreme Court, petitioners argued that Proposition I employed an “explicit racial classification,” creating a dual court system that discriminated on the basis of race.⁶⁴ They contended that, ordinarily, state-created rights “may be vindicated by the state courts without limitation on remedies.”⁶⁵ Conversely, under Proposition I, minorities could not petition state courts for the desegregation remedy of busing without first repealing the constitutional amendment.⁶⁶

The Supreme Court rejected petitioners’ argument, pointing out that Proposition I “neither says nor implies that persons are to be treated differently on account of their race.”⁶⁷ Such a law would surely violate the Equal Protection Clause unless supported by a compelling government interest.⁶⁸ Conversely, the Court continued, a law that merely repeals existing legislation represents a neutral law, incapable of offending the Equal Protection Clause.⁶⁹ The Court distinguished *Hunter* by pointing out that the charter amendment in that case repealed an existing ordinance *and* required that future ordinances aimed at housing discrimination navigate a more demanding political process than ordinances passed for other purposes.⁷⁰ Therefore, that law altered the political process for those seeking to pass future antidiscrimination ordinances. In contrast, Proposition I amended the state constitution to prohibit desegregation, but did nothing to alter the amendment process itself.⁷¹

[N]o court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause[.]

Id. at 532 (alterations in original).

⁶⁴ *Id.* at 536. Petitioners who originally filed a class action in state court were minority students attending public schools in the Los Angeles Unified School District. *Id.* at 529.

⁶⁵ *Id.* at 536 (describing petitioners’ argument that Proposition I created burdens on minorities because they cannot seek a mandatory busing remedy for any violation other than a Fourteenth Amendment equal protection violation).

⁶⁶ *Id.*

⁶⁷ *Id.* at 537.

⁶⁸ *Id.* at 536.

⁶⁹ *Id.* at 539 (“In sum, the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.”).

⁷⁰ *Id.* at 540–41 (“In [*Hunter*], the Court held that the charter amendment was not a simple repeal of the fair housing ordinance. The amendment ‘not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [antidiscrimination] ordinance could take effect.’” (quoting *Hunter v. Erickson*, 393 U.S. 385, 389–90 (1969))).

⁷¹ *Id.* At first glance, the amendment in *Crawford* seems to erect the same kind of political hurdle as in *Seattle*, because minorities in California would have to amend the state constitution in order to obtain a busing remedy in any case except a federal equal protection violation (whereas individuals seeking other remedies needed only to sue on that violation and succeed on the merits).

Clarifying the mere repeal doctrine, the Court stated, “[w]ere we to hold that the mere repeal of race-related legislation is unconstitutional, we would limit seriously the authority of States to deal with the problem of our heterogeneous population.”⁷² “States would be committed irrevocably to legislation that has proved unsuccessful or harmful,” because they would be powerless to undo its effects.⁷³ Furthermore, states would be discouraged from experimenting with race-related legislation for fear that they could not undo what had already been done.⁷⁴

D. A Consolidation of the *Hunter/Seattle* Doctrine

The *Hunter* trilogy cases, when read together, create a succinct two-part test to “differentiate between constitutional and impermissible” legislation under PPEP inquiry.⁷⁵ The first prong of the test asks whether the law in question has a racial focus.⁷⁶ This analysis turns on whether the law in question targets a policy or program that “at bottom inures primarily to the benefit of the minority, and is designed for that purpose.”⁷⁷ Even if all races, including the majority, benefit from it, the policy or program inures primarily to the benefit of minorities if “minorities may consider . . . [it] to be ‘legislation that is in their interest.’”⁷⁸

The second prong seeks to determine whether the law reorders the political process in a way that places special burdens on racial minorities.⁷⁹ A law that makes it harder to pass race-related legislation,

The difference between *Crawford* and *Seattle* was that the remedy was one provided under the state constitution as interpreted by the state supreme court, above and beyond that required under the Fourteenth Amendment. *See id.* at 530–31 (explaining that the state supreme court held that “state school boards . . . bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin.”). The amendment in *Crawford* did not violate PPEP because it repealed additional rights for minorities previously available under state constitutional law, rather than altering processes or mechanisms for obtaining race-based legislation. *See Seattle*, 458 U.S. at 485–86.

⁷² *Crawford v. Bd. of Educ.*, 458 U.S. 527, 539 (1982).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ The Sixth Circuit succinctly stated the test in 2012. *See Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by any Means Necessary (BAMN) v. Regents of the Univ. of Mich.*, 701 F.3d 466, 470 (6th Cir. 2012) (en banc), *cert. granted*, *Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013).

⁷⁶ *See Seattle*, 458 U.S. at 474 (“Given the racial focus of Initiative 350, this suffices to trigger application of the *Hunter* doctrine.”).

⁷⁷ *Id.* at 472.

⁷⁸ *Id.* at 474 (quoting *Hunter v. Erickson*, 393 U.S. 385, 395 (1969) (Harlan, J., concurring)).

⁷⁹ *Id.* at 467 (“[T]he Fourteenth Amendment also reaches a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.” (citations omitted) (internal quotation marks omitted)); *see also Hunter*, 393 U.S. at 391 (holding that the charter amendment placed special burdens on racial minorities’ ability to pass antidiscrimination

but not other legislation, violates the Equal Protection Clause, even if it is neutral on its face and treats all races equally.⁸⁰ As the *Hunter* Court noted, “the reality is that [such a law’s] impact falls on the minority.”⁸¹ The majority needs no protection against discrimination, because the law, by definition, has majority support and can easily be repealed with that support.⁸²

Finally, the *Hunter* trilogy expressly permits states to repeal race-related legislation, provided the state does nothing more.⁸³ Under *Crawford*, laws that merely repeal race-related legislation are safe from equal protection challenge.⁸⁴ The mere repeal doctrine warns that states must have flexibility to experiment without the fear of being irrevocably committed to ineffective or harmful legislation.⁸⁵

IV. THE CIRCUIT SPLIT

A. The Ninth Circuit: *Coalition for Economic Equity v. Wilson* and *Coalition to Defend Affirmative Action v. Brown*

In November 1996, California adopted Proposition 209, a constitutional amendment that banned affirmative action policies in “public education, public employment, [and] public contracting.”⁸⁶ Proposition 209, subsequently codified in Article 2, § 9 of the California constitution, provided:

(a) The state shall not 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

laws in future). Of course, laws are not unconstitutional simply because they “make it more difficult for minorities to achieve favorable legislation.” *Seattle*, 458 U.S. at 470 (quoting *Hunter*, 393 U.S. at 394). Laws placing political burdens on everyone make it “more difficult for every group in the community to enact comparable laws, [so] they ‘provid[e] a just framework within which the diverse political groups in our society may fairly compete.’” *Id.* (quoting *Hunter*, 393 U.S. at 393 (Harlan, J., concurring) (alteration in original)). On the other hand, “a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the racial nature of the decision to determine the decisionmaking process.” *Id.* at 470 (emphasis in original).

⁸⁰ See *Hunter*, 393 U.S. at 391 (“Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law’s impact falls on the minority.”).

⁸¹ *Id.*

⁸² *Id.*

⁸³ See *Crawford v. Bd. of Educ.*, 458 U.S. 527, 535 (1982) (“We agree with the California Court of Appeal in rejecting the contention that once a State chooses to do ‘more’ than the Fourteenth Amendment requires, it may never recede.”).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 697, 701 (9th Cir. 1997). The same amendment was at issue in a later as-applied challenge. *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1132 (9th Cir. 2012).

of public employment, public education, or public contracting.

....

(f) For the purposes of this section, “state” shall include, but not necessarily be limited to, . . . [the] public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.⁸⁷

Several individuals immediately filed suit against the state in *Coalition for Economic Equity v. Wilson*, where the parties alleged that Proposition 209 violated the Equal Protection Clause under both conventional and PPEP analysis.⁸⁸ Although the Ninth Circuit later addressed Proposition 209’s effect on university admissions in *Coalition to Defend Affirmative Action v. Brown*,⁸⁹ *Wilson* was determinative in the *Brown* decision.⁹⁰ In fact, the panel in *Brown* deferred entirely to *Wilson*’s ruling, providing only a superficial review of the facts.⁹¹ Therefore, the focus of this discussion will be *Wilson*, the true battleground over Proposition 209’s constitutionality.

The plaintiffs in *Wilson* argued that Proposition 209 created an unequal political structure “that denie[d] women and minorities a right to

⁸⁷ *Brown*, 674 F.3d at 1132 (quoting CAL. CONST. art. 1, § 31(a)). Each California voter was provided a pamphlet at the polls which explained Proposition 209 as follows:

A YES vote on [Proposition 209] means: The elimination of those affirmative action programs for women and minorities run by the state or local governments in the areas of public employment, contracting, and education that give “preferential treatment” on the basis of sex, race, color, ethnicity, or national origin.

A NO vote on this measure means State and local government affirmative action programs would remain in effect to the extent they are permitted under the United States Constitution.

....

University of California and California State University

The measure would affect admissions and other programs at the state’s public universities. For example, the California State University (“CSU”) uses race and ethnicity as factors in some of its admissions decisions. If this initiative is passed by the voters, it could no longer do so. . . .

Coal. for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1493–94 (N.D. Cal. 1996), *rev’d*, 122 F.3d 692 (9th Cir. 1997).

⁸⁸ *Wilson*, 122 F.3d at 697, 701.

⁸⁹ *See Brown*, 674 F.3d at 1133.

⁹⁰ *Id.* at 1131–32, 1135–36.

⁹¹ *Id.* at 1131–32. The plaintiffs in *Brown* brought an as-applied constitutional challenge to Proposition 209, whereas the plaintiffs in *Wilson* challenged the law on its face. *Id.* at 1135. Nevertheless, the court in *Brown* noted that *Wilson* considered the same scenario the plaintiffs were alleging. *Id.* Therefore, the *Brown* court determined that *Wilson* precluded the plaintiffs’ as-applied challenge. *Id.*

seek preferential treatment from the lowest level of government.”⁹² They contended that the same issue was present in *Wilson* as in *Hunter* and *Seattle*: the amendment made the process for obtaining a program that benefits minorities more difficult than the process for obtaining other types of programs, removing that power from a lower echelon of government and lodging it into a remote level of government—the state constitution.

While Proposition 209 is arguably factually synonymous with the amendments in *Hunter* and *Seattle*, *Wilson* distinguished Proposition 209 on two grounds. First, the panel differentiated between laws creating a sweeping prohibition on all race-conscious government hiring and admissions policies, and a piecemeal approach. The court explained that Proposition 209 banned “all [state] instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender”⁹³ Conversely, the amendment in *Seattle* only addressed the issue in one context (student reassignment in public schools⁹⁴) and the amendment in *Hunter* reached only one regulatory realm (housing discrimination⁹⁵). The *Wilson* panel explained that a general ban on discrimination or preferences by all state entities represents a neutral law;⁹⁶ in contrast, a ban targeting a specific regulated area (such as the housing market) or a particular government entity (such as school boards) violates the Equal Protection Clause.⁹⁷

The *Wilson* panel made this first distinction by relying solely on dicta in the *Seattle* case. The court cited a footnote in *Seattle* where Justice Blackman said, “We also note that the State has not attempted to reserve to itself exclusive power to deal with racial issues generally.”⁹⁸ The *Wilson* court explained that

[Proposition 209] does not isolate race or gender antidiscrimination laws from any specific area over which the state has delegated authority to a local entity. Nor does it treat race and gender antidiscrimination laws in one area differently from race and gender antidiscrimination laws in another. Rather, it prohibits all race and gender preferences by state entities.⁹⁹

⁹² *Wilson*, 122 F.3d at 703.

⁹³ *Id.* at 707.

⁹⁴ *Id.* at 706.

⁹⁵ *Id.*

⁹⁶ *Id.* at 707.

⁹⁷ *Id.* (“By removing desegregative prerogatives from these general grants of powers [afforded to local governing bodies], the State, as in *Hunter*, differentiated the treatment of racial problems in education from that afforded . . . racial issues generally.”).

⁹⁸ *Id.* at 715 (citing *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 479 n.22 (1982)).

⁹⁹ *Id.*

The second distinction in *Wilson* focused on the difference between antidiscrimination laws and preferential treatment laws.¹⁰⁰ The court observed in a rather overgeneralized fashion, “[e]ven a state law that does restructure the political process can only deny equal protection if it burdens an individual’s right to equal treatment.”¹⁰¹ In *Wilson*, the panel pointed out that plaintiffs were challenging Proposition 209 because it erected an obstacle to preferential treatment.¹⁰² Conversely, the plaintiffs in *Hunter* and *Seattle* challenged amendments that operated as impediments to equal treatment.¹⁰³ In *Hunter*, the charter amendment prevented Nellie Hunter from petitioning for antidiscrimination laws to prevent unequal treatment in the housing market.¹⁰⁴ In *Seattle*, Initiative 350 prevented local school districts from reassigning pupils to ensure all races received an equal education.¹⁰⁵ The Equal Protection Clause’s controlling words, the court warned, are “equal” and “protection.”¹⁰⁶ Even though the Equal Protection Clause permits race-based preferences, the panel stated that that “hardly implies that the state cannot ban them altogether.”¹⁰⁷ Therefore, the *Wilson* court concluded that an obstacle to preferential treatment represents a neutral law and cannot, by definition, be the basis for an equal protection violation.¹⁰⁸

In *Brown*, the Ninth Circuit relied heavily on *Wilson* by applying these distinctions to the specific setting of affirmative action in university admissions.¹⁰⁹ In *Brown*, high school and college students argued Proposition 209 created an “unequal political structure,” which prevented racial minorities from using the democratic process to repeal the ban on affirmative action in higher education.¹¹⁰ The court turned down the opportunity to reexamine Proposition 209 in this as-applied context, however, holding that *Wilson* acknowledged this scenario, and thus, foreclosed any further consideration.¹¹¹ As such, *Wilson* became the Ninth Circuit’s position: no PPEP violation regarding prohibitions on affirmative action in higher education.

¹⁰⁰ *Id.* at 707–08.

¹⁰¹ *Id.* at 707.

¹⁰² *Id.* at 708.

¹⁰³ *See id.* at 707–08 (characterizing the laws at issue in *Hunter* and *Seattle* as impediments to equal treatment).

¹⁰⁴ *Id.* at 707.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 708.

¹⁰⁸ *Id.* at 707, 709.

¹⁰⁹ *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1135 (9th Cir. 2012).

¹¹⁰ *Id.*

¹¹¹ *Id.* Plaintiffs argued that *Wilson* was a facial challenge, in contrast to the *Brown* plaintiffs’ as-applied challenge. *Id.* The *Brown* court responded, explaining that *Wilson* considered the very situation under which *Brown* was brought. *Id.* While the *Wilson* decision was a facial challenge, it considered Proposition 209’s effects on higher education, and therefore, the *Brown* panel held that *Wilson* foreclosed a reexamination of Proposition 209’s constitutionality. *Id.*

B. The Sixth Circuit: *Coalition to Defend Affirmative Action (BAMN) v. Regents of the University of Michigan*

In 2006, Michigan passed Proposal 2, a statewide ballot initiative prohibiting affirmative action in “public employment, public education, or public contracting.”¹¹² Proposal 2 amended the Michigan constitution, eviscerating universities’ discretion to consider race as a factor in admissions.¹¹³ While it did not preclude universities from considering other factors, the amendment prohibited the consideration of race in admissions.¹¹⁴ The amendment provided in part:

(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not 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.

(2) The state shall not 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.

(3) For the purposes of this section “state” includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.¹¹⁵

Several individuals and interest groups¹¹⁶ filed suit in the U.S. District Court for the Eastern District of Michigan challenging the

¹¹² *Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by any Means Necessary (BAMN) v. Regents of the Univ. of Mich.*, 701 F.3d 466, 471 (6th Cir. 2012) (en banc), cert. granted, *Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013). Proposal 2 had a controversial history. The Sixth Circuit explained, “Proposal 2 found its way on the ballot through methods that undermine[d] the integrity and fairness” of the democratic process—the proponents of Proposal 2 had garnered the requisite number of signatures using “fraud and deception.” Nevertheless, the court sua sponte rendered the challenge to the signatures moot, because the proposal had already passed Michigan’s constitutional amendment process. *Operation King’s Dream v. Connerly*, 501 F.3d 584, 591–92 (6th Cir. 2007).

¹¹³ *BAMN*, 701 F.3d at 471–72.

¹¹⁴ *Id.* at 471 (noting that Proposal 2 allowed universities to consider, for example, grades, athletic ability, geographic diversity, or family alumni connections).

¹¹⁵ *Id.*

¹¹⁶ The lead plaintiff challenging Proposal 2 in *BAMN*—Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by any Means Necessary—was also the lead plaintiff challenging Proposition 209 in *Brown*.

constitutionality of Proposal 2 under the Equal Protection Clause.¹¹⁷ The district court granted the state's motion for summary judgment, finding that Proposal 2 did not violate the Equal Protection Clause of the Fourteenth Amendment.¹¹⁸ Plaintiffs appealed to the Sixth Circuit.¹¹⁹

On appeal, petitioners argued that Proposal 2 violated the Equal Protection Clause under both the political process and traditional theories.¹²⁰ The Sixth Circuit ultimately dismissed the conventional argument but struck down the amendment on political process grounds.¹²¹ It explained:

A student seeking to have her family's alumni connections considered in her application to one of Michigan's esteemed public universities could do one of four things to have the school adopt a legacy-conscious admissions policy: she could lobby the admissions committee, she could petition the leadership of the university, she could seek to influence the school's governing board, or, as a measure of last resort, she could initiative a statewide campaign to alter the state's constitution. The same cannot be said for a black student seeking the adoption of a constitutionally permissible race-conscious admissions policy. That student could do only one thing to effect change: she could attempt to amend the Michigan [c]onstitution—a lengthy, expensive, and arduous process—to repeal the consequences of Proposal 2. The existence of such a comparative structural burden undermines the Equal Protection Clause's guarantee that all citizens ought to have equal access to the tools of political change.¹²²

The court's political process analysis began with “[t]he first prong of the *Hunter/Seattle* test[,] . . . whether [the law] has a ‘racial focus.’”¹²³ In particular, the court asked whether Proposal 2 targets a program that “inures primarily to the benefit of the minority.”¹²⁴ The court answered with a resounding *yes*. Like in *Seattle*, Proposal 2 targeted policies

¹¹⁷ While Proposal 2 addressed racial preferences in public education, public employment, and public contracting, plaintiffs challenged Proposal 2 only as applied to public education and university admissions. *BAMN*, 701 F.3d at 472.

¹¹⁸ *Id.* at 473.

¹¹⁹ A panel of the Sixth Circuit initially reversed the district court's grant of summary judgment. *Coal. to Defend Affirmative Action v. Univ. of Mich.*, 652 F.3d 607, 631–32 (6th Cir. 2011). The Attorney General then sought en banc review, which the Sixth Circuit granted, vacating the panel opinion. *BAMN*, 701 F.3d at 473.

¹²⁰ *BAMN*, 701 F.3d at 473.

¹²¹ *Id.* at 485 (concluding “that Proposal 2 reorder[ed] the political process in Michigan to place special burdens on minority interests”).

¹²² *Id.* at 470.

¹²³ *Id.* at 478–79.

¹²⁴ *Id.* at 477 (quoting *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 475 (1982)).

designed to foster diversity in the classroom.¹²⁵ The court determined that school diversity is vital to ensuring that minority students “achieve their full measure of success.”¹²⁶ Proposal 2, according to the court, targeted programs that “promote cross-racial understanding, help to break down racial stereotypes, and enable students to better understand persons of different races.”¹²⁷ Therefore, the court determined that Proposal 2 targeted programs—here affirmative action and classroom diversity—that inure primarily to the benefit of minorities.¹²⁸

As in *Seattle*, it made no difference to the court whether Proposal 2 benefitted non-minority students as well as minority students.¹²⁹ The court pointed to *Grutter* and admitted that classroom diversity undoubtedly benefits all races.¹³⁰ Nonetheless, the court affirmed the reasoning in *Seattle* and *Hunter* that the wider benefits associated with the policies targeted by Proposal 2 did not undermine their primary benefit to minorities.¹³¹

After holding that Proposal 2 had a racial focus, the Sixth Circuit proceeded to the second prong of the *Hunter/Seattle* test: whether the amendment reallocated political power in a way that placed burdens on minority groups.¹³² The court also answered in the affirmative, holding that the amendment created a disparate political process.¹³³ Students seeking to alter admissions policy regarding affirmative action had only one avenue of change after Proposal 2: to amend the Michigan constitution.¹³⁴ Students seeking to change admissions policies on any ground other than race could lobby the admissions committee, petition higher administrative authorities, seek to affect board elections, or campaign for an amendment to the Michigan constitution.¹³⁵ The court emphasized that the cost and effort required to amend the state’s

¹²⁵ *Id.* at 478.

¹²⁶ *Id.* (quoting *Seattle*, 458 U.S. at 472–73). The court further explained, “Such programs do so through ‘preparing minority children for citizenship in our pluralistic society, while . . . teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage.’” *Id.* (alteration in original) (quoting *Seattle*, 458 U.S. at 473).

¹²⁷ *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)) (internal quotations marks and alterations omitted).

¹²⁸ *Id.* at 479.

¹²⁹ *Id.* (“*Seattle* not only mandates our conclusion that Proposal 2 is racially focused, but it also dispels any notion that the benefit race-conscious admissions policies may confer on the majority undercuts its ‘racial focus.’”).

¹³⁰ *BAMN*, 701 F.3d at 479 (citing *Grutter*, 539 U.S. at 327–33). See also *id.* (citing *Seattle*, 458 U.S. at 472–73).

¹³¹ *Id.*

¹³² See *id.* at 483–85.

¹³³ See *id.* at 484 (“Because Proposal 2 entrenched the ban on all race-conscious admissions policies at the highest level, this last resort—the campaign for a constitutional amendment—is the sole recourse available to a Michigan citizen who supports enacting such policies.”).

¹³⁴ *Id.* (comparing the political process minorities must navigate to change affirmative action policies with process to change other admissions policies).

¹³⁵ *Id.* at 484.

constitution made this option prohibitively expensive.¹³⁶ Only after surmounting this hurdle could the “now-exhausted [minority] reach the starting point of his neighbor who sought a legacy-related admissions policy change.”¹³⁷ Therefore, Proposal 2 reordered the political process in a way that violated the Equal Protection Clause.

Upon concluding there was an equal protection violation, the court turned its attention to the discrimination/preferential treatment distinction—an argument that the Ninth Circuit found dispositive. Like in *Wilson*, the State of Michigan and the *BAMN* dissenters argued that *Hunter* and *Seattle* were inapplicable because Proposal 2 prohibited preferential treatment, while *Hunter* and *Seattle* only prohibited laws that “burden racial minorities’ ability to obtain *protection from discrimination*.”¹³⁸ The court dismissed this argument as an incorrect interpretation of *Seattle*.¹³⁹ In *Seattle*, the court explained, Washington’s busing program was not implemented to correct for de jure segregation because there was no finding that the segregation was the result of intentional discrimination.¹⁴⁰ As such, *Seattle*’s busing program could not be described as an antidiscrimination policy—rather, it was an ameliorative measure.¹⁴¹ The court explained that it was “inaccurate to suggest that [the law in *Seattle*] affected antidiscrimination legislation by making it more difficult for minorities to obtain *protection from discrimination* through the political process.”¹⁴² Therefore, the Sixth Circuit read *Seattle* and *Hunter* as applying to laws placing burdens on the political process for minority interests, regardless of whether those interests are antidiscriminatory or ameliorative.

¹³⁶ *Id.* (observing that placing an amendment on the ballot required either two-thirds support of both legislative houses or “the signatures of a number of voters equivalent to at least ten percent of the number of votes cast for all candidates for governor in the preceding general election.”).

¹³⁷ *Id.*

¹³⁸ *See id.* at 485 (emphasis in original). The court further elaborated on the dissenters’ argument:

At bottom, this is an argument that an enactment violates the Equal Protection Clause under *Hunter* and *Seattle* only if the political process is distorted to burden legislation providing constitutionally-mandated protections, such as antidiscrimination laws. Under this theory, a state may require racial minorities to endure a more burdensome process than all other citizens when seeking to enact policies that are in their favor if those policies are constitutionally *permissible* but not constitutionally *required*.

Id. (emphasis in original).

¹³⁹ *Id.* at 486.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* (emphasis in original).

V. WHICH CIRCUIT WAS CORRECT?

The Sixth and Ninth Circuits faced similar amendments in *BAMN* and *Wilson/Brown*. Both prohibited affirmative action in all functions of government, including university admissions.¹⁴³ Both permitted public universities to continue using other, non-race-based admissions criteria such as grades, athletic ability, geographic diversity, and family legacy.¹⁴⁴ Both were implemented at the constitutional level, entrenching the ability to repeal them at the highest level of government. Yet the circuits came to opposing conclusions about the constitutionality of those laws under the Equal Protection Clause. While reaching opposite conclusions, both courts addressed the *Hunter* trilogy in their analyses and accurately identified or purported to use the same two-part test.¹⁴⁵ The reason for their discord can be boiled down to a disagreement about two issues: the scope of the law in question and the antidiscrimination/preferential treatment distinction.

A. The Scope of the Law

The Ninth Circuit distinguished the laws in *Hunter* and *Seattle* from Proposition 209 on the basis of Proposition 209's flat prohibition on all governmental discriminatory and preferential treatment.¹⁴⁶ It quoted the Supreme Court as recognizing an "explicit distinction 'between state action that discriminates on the basis of race and state action that addresses, in a neutral fashion, race-related matters.'"¹⁴⁷ The court explained that a general prohibition on all government discrimination or preferential treatment represents a neutral law that does not violate equal protection.¹⁴⁸ By the Ninth Circuit's reasoning, the laws in *Hunter* and *Seattle* violated equal protection because they targeted a specific government branch or race-related policy.¹⁴⁹

¹⁴³ Compare *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 696 (9th Cir. 1997) and *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1132 (9th Cir. 2012) (with an amendment that prohibits discrimination and preferential treatment on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, and public contracting), with *BAMN*, 701 F.3d at 471 (with an amendment that prohibits discrimination and preferential treatment on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, or public contracting).

¹⁴⁴ *Brown*, 674 F.3d at 1132; *BAMN*, 701 F.3d at 471.

¹⁴⁵ See *Brown*, 674 F.3d at 1135 (relying generally on *Wilson*); *Wilson*, 122 F.3d at 703 (applying *Hunter/Seattle* two-step test); *BAMN*, 701 F.3d at 477 (laying out the *Hunter/Seattle* test as the applicable precedent).

¹⁴⁶ *Wilson*, 122 F.3d at 707.

¹⁴⁷ *Id.* at 705 (quoting *Crawford v. Bd. of Educ.*, 458 U.S. 527, 538 (1982)).

¹⁴⁸ *Id.* at 707.

¹⁴⁹ See *id.* ("It does not isolate race or gender antidiscrimination laws from any specific area over which the state has delegated authority to a local entity. Nor does it treat race and gender

Just like the amendment in *Wilson/Brown*, the Sixth Circuit faced a similarly broad prohibition of discrimination or preferential treatment.¹⁵⁰ Yet the court, nonetheless, found that it violated equal protection under the political process line of cases.¹⁵¹ It made no reference to the amendment's breadth.¹⁵² Rather, it focused on the amendment as a whole, whether broad or narrow, to see if it had a racial focus.¹⁵³

By mischaracterizing a broad law as a neutral law, the Ninth Circuit misinterpreted Supreme Court precedent. The *Hunter* and *Seattle* decisions centered on the racial focus of the laws, not the scope of their prohibitions.¹⁵⁴ In *Hunter*, the Supreme Court explained that the ordinance rescinded the fair housing ordinance and created a different, more onerous political process to achieve race-based fair housing laws in the future.¹⁵⁵ Meanwhile, the *Hunter* Court pointed out, "[t]he automatic referendum system does not reach housing discrimination on sexual or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes."¹⁵⁶ Therefore, the law altered the political process to pass antidiscrimination laws, but left unchanged the process for passing all other ordinances.¹⁵⁷ As such, the law contained an unconstitutional racial classification.¹⁵⁸

In *Seattle*, the Supreme Court similarly focused on Initiative 350's creation of disparate political processes to obtain busing for a race-related purpose as opposed to virtually any other purpose.¹⁵⁹ The Court noted the district court's finding that Initiative 350 allowed schools to continue busing students for almost all nonintegrative purposes.¹⁶⁰ Meanwhile, Initiative 350 removed the power of local school districts to bus for desegregation and instead placed it at the state constitutional

antidiscrimination laws in one area differently from race and gender antidiscrimination laws in another. Rather, it prohibits all race and gender preferences by state entities.").

¹⁵⁰ See *BAMN*, 701 F.3d at 471 (noting that the law prohibited race-based discrimination or preferential treatment in government hiring, public contracting, and university admissions).

¹⁵¹ *Id.* at 485.

¹⁵² See *id.* (analyzing only the amendment's racial focus and impact on political process).

¹⁵³ *Id.* at 478–79.

¹⁵⁴ See *Hunter v. Erickson*, 393 U.S. 385, 389 (concluding there was an equal protection violation because of the racial classification); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471–74 (1982) ("Given the racial focus of Initiative 350, this suffices to trigger application of the *Hunter* doctrine.").

¹⁵⁵ *Hunter*, 393 U.S. at 389–90.

¹⁵⁶ *Id.* at 391.

¹⁵⁷ *Id.* at 390. See *Seattle*, 458 U.S. at 485 ("This does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible racial classification. But when the political process or the decisionmaking mechanism used to address racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly 'rests on "distinctions based on race."'" (citations removed)).

¹⁵⁸ *Hunter*, 393 U.S. at 390.

¹⁵⁹ *Seattle*, 458 U.S. at 470.

¹⁶⁰ *Id.* at 471.

level.¹⁶¹ Therefore, the Court found that Initiative 350 altered the political process in an impermissible way.¹⁶²

Notably absent is any reference to the breadth or scope of Initiative 350 or the charter amendment. The Court in *Seattle* did say in dicta, comprising less than a footnote, that the State did “not attempt[] to reserve to itself exclusive power to deal with racial issues generally.”¹⁶³ The Ninth Circuit clung to this footnote in *Wilson* (and in turn, *Brown*), interpreting *Seattle* as saying that a general law outlawing all race-based discrimination or preferences at all levels of government is constitutionally permissible.¹⁶⁴ But this interpretation of *Seattle* ignores the key alternative hypothetical that the *Seattle* holding relies on: “[t]he State, of course could have reserved to state officials the right to make all decisions in the areas of education and student assignment.”¹⁶⁵ Such an alternative amendment would be neutral because it would change the political process for an entire area of the law—education—rather than singling out race-related busing for unique treatment.

As a matter of policy, it does not make sense to immunize broad amendments like that in *Wilson/Brown* from equal protection challenge solely because they apply at all levels of government. The signature characteristic of a PPEP violation is the reorganization of the political process that makes it harder for minorities to obtain legislation or remedies that benefit them than for others to achieve legislation or remedies.¹⁶⁶ Both narrow and broad laws can create unequal political structures, but a broad law effects a more serious constitutional violation. A narrow discriminatory law may only affect minorities’ ability to achieve legislation in one small governmental arena. A general one may instead impair the ability of minorities to achieve *any* legislation that benefits them over the majority. Both the broad and narrow discriminatory laws unconstitutionally alter the political process for minorities, but the broad one does it on a larger scale. Therefore, if

¹⁶¹ *Id.* at 480.

¹⁶² *Id.* at 479.

¹⁶³ *Id.* at 479 n.22.

¹⁶⁴ See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 707 (9th Cir. 1997) (“When, in contrast, a state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender, it has promulgated a law that addresses in neutral-fashion race-related and gender-related matters.”).

¹⁶⁵ *Id.* (quoting *Seattle*, 458 U.S. at 487). *Wilson* quoted this language from *Seattle* and then promptly ignored it.

¹⁶⁶ *Seattle*, 458 U.S. at 470. The Court explained:

[A] different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of the decision to determine the decisionmaking process. State action of this kind, the Court [in *Hunter*] said, “places *special* burdens on racial minorities within the governmental process,” thereby “making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest.”

Id. (quoting *Hunter*, 393 U.S. at 391, 395 (alterations in original) (emphasis in original)).

anything, broad laws should be considered more serious infractions on minority rights.

B. The Antidiscrimination/Preferential Treatment Distinction

The Ninth Circuit also tried to distinguish *Hunter* and *Seattle* by suggesting that the laws in those cases repealed antidiscrimination laws, rather than preferential treatment policies.¹⁶⁷ The court explained, “[t]he controlling words, we must remember, are ‘equal’ and ‘protection.’ . . . [; i]mpediments to preferential treatment do not deny equal protection.”¹⁶⁸ Accordingly, the Ninth Circuit concluded that the Fourteenth Amendment cannot be violated by a ban on preferential treatment programs.¹⁶⁹

Essentially, the Ninth Circuit limited review under PPEP to laws prohibiting antidiscrimination laws, not preferential treatment policies. It completely overlooked the fact that the Supreme Court in *Seattle* extended PPEP jurisprudence to programs that were not constitutionally mandated.¹⁷⁰ In addition, Ninth Circuit’s reaffirmation of *Wilson*’s holding in *Brown* did not give adequate attention to intervening Supreme Court precedent in *Grutter*.¹⁷¹

As the Sixth Circuit explained, the antidiscrimination/preferential treatment distinction “adopt[s] a strained reading [of *Seattle*] that ignores the preferential nature of the legislation at issue in [that case], and inaccurately recast[s] it as anti-discrimination legislation.”¹⁷² In *Seattle*, the school district implemented the desegregation plan to alleviate de facto segregation in public schools.¹⁷³ There was no finding of

¹⁶⁷ *Wilson*, 122 F.3d at 707–08 (pointing out that the statute in *Hunter* made it more difficult for Nellie Hunter to obtain protection against unequal treatment, and similarly, the statute in *Seattle* made it more difficult for minority students to obtain protection against unequal treatment in education). See *id.* at 707 (“[A] state law that . . . restructure[s] the political process can only deny equal protection if it burdens an individual’s right to equal treatment.”)

¹⁶⁸ *Id.* at 708. The court later continued, “That the Constitution permits the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether.” *Id.*

¹⁶⁹ *Id.* at 708.

¹⁷⁰ See *Seattle*, 458 U.S. at 485–86.

¹⁷¹ *Grutter v. Bollinger*, 539 U.S. 306 (2003). While the Court in *Grutter* did not address whether its PPEP jurisprudence applied to preferential treatment programs, it held that these programs do not necessarily violate equal protection. *Id.* at 334 (holding that universities may consider race as “plus” factor in admissions). The court in *Wilson* may have implied the opposite when it said, “[i]mpediments to preferential treatment do not deny equal protection.” *Wilson*, 122 F.3d at 708. On the other hand, *Wilson* could be construed as saying that, while the Equal Protection Clause does not forbid affirmative action, it also does not require it. Nonetheless, *Brown*’s failure to reexamine *Wilson* in light of *Grutter* ignored the fact that, because race can constitutionally be considered in admissions, it is a constitutionally legitimate political goal. Therefore, minorities have a constitutional right to promote affirmative action through the political process.

¹⁷² *BAMN*, 701 F.3d at 486.

¹⁷³ See *Seattle*, 458 U.S. at 460–61. The Court also said, “In a very obvious sense, the initiative thus ‘disadvantages those who would benefit from laws barring’ *de facto* desegregation ‘as against

government-sponsored discrimination, so the school district's policy was an ameliorative measure, not a response mandated by the Equal Protection Clause.¹⁷⁴ The State of Washington was under no obligation to adopt desegregation policies.¹⁷⁵ The Seattle Plan, therefore, could not be described as an antidiscrimination law or policy, even though that is how the Ninth Circuit characterized it. In fact, *Seattle* implicitly expanded PPEP review to preferential treatment programs.¹⁷⁶

The Supreme Court never made a distinction between antidiscrimination laws and preferential treatment laws in *Hunter* or *Seattle*. *Hunter* analyzed the charter amendment's effect on antidiscrimination laws, but only because the law in question repealed a strictly antidiscrimination law. *Seattle*, far from distinguishing between discrimination and preferential treatment, extended the *Hunter* analysis to an amendment that can only be described as containing preferential treatment policies. Therefore, the Ninth Circuit was wrong to draw a distinction where none existed.

Furthermore, the Ninth Circuit's reaffirmation of *Wilson* in *Brown* demonstrates a misunderstanding of affirmative action policies by ignoring the fact that affirmative action is constitutionally permissible under *Grutter*.¹⁷⁷ As long as universities devise a method of considering race that is narrowly tailored, they may adopt preferential treatment programs.¹⁷⁸ Political process equal protection asks only whether a law has a racial focus and alters the political process in a way that places special burdens on minority interests.¹⁷⁹ Affirmative action policies are in the interest of minorities,¹⁸⁰ and they are constitutionally permissible in some settings. Therefore, they fit within the PPEP framework.

While the Ninth Circuit failed to properly interpret *Grutter* and *Seattle*, the Sixth Circuit adhered closely to Supreme Court guidance. When confronted with the antidiscrimination/preferential treatment distinction, the court in *BAMN* correctly interpreted the amendment in *Seattle* as one that was not constitutionally required, and hence, the

those who . . . would otherwise regulate' student assignment decisions; 'the reality is that the law's impact falls on the minority.'" *Id.* at 474–75 (quoting *Hunter*, 393 U.S. at 391).

¹⁷⁴ *BAMN*, 701 F.3d at 486.

¹⁷⁵ See *Seattle*, 458 U.S. at 493 (Powell, J., dissenting). In his dissent, Justice Powell stated:

The issue here arises only because the Seattle School District—in the absence of a then-established state policy—*chose* to adopt race-specific school assignments with extensive busing. It is not questioned that the District itself, at any time thereafter, could have changed its mind and canceled its integration program without violating the Federal Constitution.

Id. (emphasis added).

¹⁷⁶ *Id.* at 485 (majority opinion) (discussing how the amendment's race-conscious restructuring of its political decisionmaking process is an impermissible violation of the equal protection clause).

¹⁷⁷ *Grutter v. Bollinger*, 539 U.S. 306, 334–35 (2003).

¹⁷⁸ *Id.* at 333.

¹⁷⁹ See *supra* Part II.

¹⁸⁰ See *BAMN*, 701 F.3d at 478–79 (“[I]t is beyond question that Proposal 2 targets policies that ‘minorities may consider . . . [to be] in their interest.’” (quoting *Seattle*, 458 U.S. at 474)).

distinction is one without a difference.¹⁸¹ The court noted that Initiative 350, the amendment at issue in *Seattle*, repealed discretionary school board policies.¹⁸² Desegregation was not constitutionally required because there was no finding of de jure segregation.¹⁸³ The Sixth Circuit determined, therefore, that Initiative 350 could only be viewed as a repeal of preferential treatment policies.¹⁸⁴ The court also explained that *Seattle* created no distinction between antidiscrimination policies and preferential treatment policies.¹⁸⁵ Thus, the court stated, “[i]t should be unsurprising, then, that the language of *Hunter* and *Seattle* encompasses any legislation in the interest of racial minorities.”¹⁸⁶

VI. CONCLUSION

Both the Ninth and the Sixth Circuits correctly identified the *Hunter* trilogy as the controlling precedent in their respective decisions.¹⁸⁷ One of the main reasons the Ninth Circuit ultimately reached a different conclusion was its concern that a strict reading of the *Hunter* trilogy would debilitate California’s ability to allocate power among the different subdivisions of government.¹⁸⁸ In *Seattle*, Justice Powell made a similar argument in dissent when he vehemently argued that the majority opinion violated principles of state sovereignty.¹⁸⁹ In particular, he was convinced that the Court was infringing states’ right to make decisions regarding the administrative structure of public

¹⁸¹ *BAMN*, 701 F.3d at 485–87.

¹⁸² *Id.* at 486.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (quoting *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982), for the proposition that the Equal Protection Clause “protects against distortions of the political process that ‘place special burdens on the ability of minority groups to achieve *beneficial legislation*’” (emphasis added in *BAMN*)).

¹⁸⁷ See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 704 (9th Cir. 1997) (applying the *Hunter/Seattle* test); *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1135 (9th Cir. 2012) (deferring to *Wilson*’s holding); *BAMN*, 701 F.3d at 476–86 (applying the *Hunter/Seattle* test).

¹⁸⁸ *Wilson*, 122 F.3d at 706 (“‘States have extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them.’ That a law resolves an issue at a higher level of state government says nothing in and of itself.” (quoting *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978))). The Ninth Circuit also explained:

The *Seattle* majority specifically allayed any concern that its holding rendered the state powerless to address racial issues where localities acted first. . . . Plaintiffs’ counsel went even one step further at oral argument. He urged that “[t]he people of California are not entitled to make a judgment as to whether compelling state interests have been vindicated. That is for the courts.” *Au Contraire!* That most certainly *is* for the people of California to decide, *not* the courts.

Id. at 707–09. It is clear by language like this that states’ rights were of primary concern to the court.

¹⁸⁹ *Seattle*, 458 U.S. at 493 (Powell, J., dissenting) (“Application of these settled principles demonstrates the serious error of today’s decision—an error that cuts deeply into the heretofore unquestioned right of a State to structure the decisionmaking authority of its government.”).

schools.¹⁹⁰ This sentiment was echoed by Justice Black in his *Hunter* dissent when he said, “The result of what the Court does is precisely as though it had commanded the State by mandamus or injunction to keep on its books and enforce what the Court favors as a fair housing law.”¹⁹¹ To him, the Court was infringing upon state prerogatives and committing states to legislation “when convinced by experience that a law is not serving a useful purpose.”¹⁹²

While it may be true that PPEP review limits the freedom of states to structure political decisionmaking, it does not leave states powerless to repeal affirmative action in the context of public universities. Many states may determine that affirmative action policies no longer represent an attractive way of furthering educational objectives and minority interests. *Grutter*, after all, allowed affirmative action but did not require it.¹⁹³ As the Ninth Circuit said in *Wilson*, “The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.”¹⁹⁴

Political process equal protection only restricts the *method* states use to repeal affirmative action policies. It does not forbid states from repealing them in the first place. In the context of public universities, discretion over admissions policies often lies with the board of regents.¹⁹⁵ If the board is elected by popular vote¹⁹⁶ or appointed by the state executive,¹⁹⁷ voters can address affirmative action by campaigning

¹⁹⁰ *Id.* at 493–95.

¹⁹¹ *Hunter v. Erickson*, 393 U.S. 385, 396 (1969) (Black, J., dissenting).

¹⁹² *Id.* at 397.

¹⁹³ *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (allowing universities to consider race as a plus factor in admissions).

¹⁹⁴ *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 709 (9th Cir. 1997).

¹⁹⁵ *E.g.*, *Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by any Means Necessary (BAMN) v. Regents of the Univ. of Mich.*, 701 F.3d 466, 480–81 (6th Cir. 2012) (en banc), *cert. granted*, *Schuetz v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013) (noting that the Michigan constitution gave plenary authority to governing boards of public universities, including authority to create bylaws governing admissions). The court determined that much of the authority was delegated to the associate vice provost and executive director of undergraduate admissions. *Id.* at 481. Nevertheless, the board retained ultimate authority to set policies because it appointed individuals to those positions. *Id.*

¹⁹⁶ Boards in Michigan are popularly elected. *Id.* at 483. The Sixth Circuit also alluded to affirmative action’s often central role in board members’ election campaigns:

Telling evidence that board members can influence admissions policies—bringing such policies within the political process—is that these policies can, and do, shape the campaigns of candidates seeking election to one of the boards. As the boards are popularly elected, citizens concerned with race-conscious admissions policies may lobby for candidates who will act in accordance with their views—whatever they are. Board candidates have, and certainly will continue, to include their views on race-conscious admissions policies in their platforms. Indeed, nothing prevents Michigan citizens from electing a slate of regents who promise to review admissions policies based on their opposition to affirmative action.

Id.

¹⁹⁷ In California, the University of California’s Board of Regents consists of the governor, the lieutenant governor, the speaker of the assembly, the superintendent of public instruction, the president and vice president of the alumni association, the acting president of the university serving

to elect school board members or governors who run on an anti-affirmative action platform. As such, everyone, whether members of the minority or the majority, would have the same opportunity to promote and elect candidates that reflect their views on the subject of university admissions.¹⁹⁸ This alternative approach allows a state to circumvent the second prong of the *Hunter* trilogy and avoid a reordering of the political process along racial lines.

Affirmative action will continue to remain a contentious issue, especially in higher education where admission to a prestigious university may have a direct effect on one's career aspirations. The PPEP issues that split the Sixth and Ninth Circuits, however, may soon be resolved because, as of March 25, 2013, the Supreme Court granted certiorari to *BAMN*.¹⁹⁹ If it squarely addresses the circuit split, the decision is sure to hold a significant place in Supreme Court jurisprudence, especially in light of what appears to be a growing interest on the part of the Supreme Court in examining affirmative action issues.²⁰⁰

ex officio, and 18 other members appointed by the governor and approved by the state senate. CAL. CONST., art. 9, § 9, cl. 1(a).

¹⁹⁸ In *BAMN*, the Sixth Circuit found that Michigan voters could constitutionally influence the governance of universities by electing the board. See *supra* note 196.

¹⁹⁹ *Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013)

²⁰⁰ The Court decided *Fisher v. University of Texas at Austin* on June 24, 2013, one month after it granted certiorari in *Schuette v. Coal. to Defend Affirmative Action*. See *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013) (addressing the affirmative action elements of the University of Texas's overall admissions policy).