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The Hunter Doctrine: An Equal Protection Theory That Threatens Democracy

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NOTES

The *Hunter* Doctrine: An Equal Protection Theory That Threatens Democracy

I. INTRODUCTION

Referenda effect basic constitutional objectives by allowing individuals to participate equally in the governing process. The Supreme Court recently relied on the equal protection clause of the

fourteenth amendment[1] to invalidate a referendum procedure in *Washington v. Seattle School District No. 1.*[2] A state initiative, which received support from a majority of the voting electorate, effectively forbade local school boards from implementing mandatory student reassignment programs aimed at eliminating de facto racial imbalance[3] in state schools unless the electorate approved the proposed program. In finding an equal protection violation, the Court for the first time relied on a doctrine that it developed thirteen years earlier in *Hunter v. Erickson.*[4] The *Hunter* doctrine provides that if state action reallocates governing power concerning a racial issue to place unique procedural burdens on minority interests, then the action embodies an explicitly racial classification, receives heightened judicial scrutiny, and must meet a heavy burden of justification.

Ironically, the state school board in *Seattle School District*, acting under its authority to formulate educational policy, could have adopted the referendum result as a board policy without running afoul of the fourteenth amendment. Thus, the electorate decision not to bus students for racial purposes alone did not contravene the United States Constitution. Rather, the requirement of approval by referendum produced the constitutional violation.

The Court's reaffirmation and extension of the *Hunter* doctrine in *Seattle School District* raises serious questions about the scope of the doctrine. This Note analyzes the theoretical bases of the *Hunter* doctrine and concludes that the Court has constructed a theory by which it can usurp without constitutional authority the most fundamental of state democratic powers: the referendum. Part II of this Note briefly discusses relevant equal protection theory. Part III sets forth the *Hunter* doctrine and examines subsequent Supreme Court decisions that have applied the doctrine. Part IV analyzes the reasons that courts have refused to rely on *Hunter* in assessing equal protection claims. Finally, part V suggests that the *Hunter* doctrine is an unsound equal protection theory because it subjects a traditional democratic process—the referendum—to constitutional attack.

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1. The fourteenth amendment provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

2. 458 U.S. 457 (1982).

3. De facto racial imbalance is racial imbalance that exists in the absence of purposeful state-created segregation.

4. 393 U.S. 385 (1969).

II. Equal Protection Theory

A. Basic Equal Protection Doctrine

In reviewing alleged equal protection violations, courts try to determine whether the challenged state action discriminates by treating similarly situated individuals differently with respect to the receipt of a benefit or burden.[5] Once a court decides that a state action treats similarly situated individuals unequally, the court considers state justifications for the discriminatory action.[6] Depending upon the nature of the discrimination, the state must justify its unequal treatment either by demonstrating a compelling state interest or by offering a reason rationally related to a permissible state objective.[7] Generally, discriminatory state action must

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5. The equal protection clause "does not require that things different in fact be treated in law as though they were the same." *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting Tigner v. Texas, 310 U.S. 141, 147 (1940)); *see also* Tussman & tenBroeck, *The Equal Protection of the Law*, 37 CALIF. L. REV. 341, 344 (1949). The clause, however, does require that the state treat similarly situated people in a similar fashion. *See, e.g.*, F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); *see also* Tussman & tenBroeck, *supra*, at 344. The first step in equal protection analysis, therefore, is to determine whether the state action treats similarly situated individuals unequally. *Id.* at 344-45. For a thorough discussion of the concept of similarly situated individuals, see J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 586-90 (1983).

6. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 486 (1970) (state interest in encouraging employment and in avoiding discrimination between welfare families justifies imposing welfare grant ceiling); McGowan v. Maryland, 366 U.S. 420, 426 (1961) (statutory exceptions to Sunday sale prohibition justified because the state legislature reasonably could find excepted commodities necessary for either the health of the populace or the enhancement of recreation); *see also* McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 VAND. L. REV. 987, 988-93 (1975).

7. The Supreme Court initially used only the rational basis test to determine whether a state could justify a discriminatory action. Under this standard, a discriminatory state action is constitutional if the state's purpose and methods, or the consequences of its methods, are rationally related. As Justice Pitney stated, the rational basis standard requires that "classification[s] be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated be treated alike." F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

For more than half the century, the Supreme Court followed the rational basis test almost without deviation. *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Only in racial discrimination cases did the Court more strictly scrutinize discriminatory state actions on equal protection grounds. *See, e.g.*, Carter v. Texas, 177 U.S. 442 (1900) (excluding blacks from participation on a grand jury violates the equal protection clause). In nonracial discrimination cases the Court overturned few state actions on equal protection grounds during this period. *See* Gunther, *supra*, at 6.

During the last three decades, the Supreme Court has developed the "strict scrutiny" standard for analyzing discriminatory state action in equal protection cases. This more demanding standard applies to state action that impinges upon a "suspect class" of persons or

satisfy the tougher compelling state interest standard if the state action discriminates against a suspect class of persons or impinges upon a fundamental interest.[8] Because the Court is more likely to hold state action unconstitutional under strict scrutiny analysis than under a rational basis inquiry, for purposes of an equal protection challenge, the plaintiff is better off if it establishes that the state action discriminates against a suspect class, such as race.

B. Duty to Desegregate State Schools

State action that creates and maintains racially segregated public schools—"de jure" segregation—constitutes purposeful and intentional discrimination against racial minorities and requires a compelling state interest to withstand constitutional challenge.[9] The equal protection clause places an affirmative duty on state authorities to cure the effects of state-imposed unconstitutional segregation by implementing programs designed to eliminate segregation and to establish a unitary school system.[10] In contrast, racial imbalance in state schools that does not result from state enforced segregation programs—"de facto" segregation—is not discrimina-

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a "fundamental interest." Under this standard, the state's discriminatory policy must be necessary to effect a "compelling" or "substantial" state interest. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978). Professor Gunther describes the strict scrutiny standard as " 'strict' in theory and fatal in fact." *See* Gunther, *supra*, at 6. As Gunther indicates, when the Court applies the strict scrutiny standard, the Court rarely upholds discriminatory state actions. *Id.*; *see, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (strict scrutiny invalidated statute forbidding interracial marriage); McLaughlin v. Florida, 379 U.S. 184 (1964) (strict scrutiny invalidated statute prohibiting cohabitation of unmarried interracial couples). *But see* Korematsu v. United States, 323 U.S. 214 (1944) (wartime emergency deemed sufficiently compelling to justify state's racially discriminatory classification). In contrast, Professor Gunther describes the rational basis standard as "minimal scrutiny in theory and virtually none in fact." Gunther, *supra*, at 6. Thus, the level of scrutiny that the Court chooses often determines the constitutional fate of the state's unequal treatment. For a discussion of the Court's two-tiered approach to equal protection cases, see McCoy, *supra* note 6, at 990-93; *see also* Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment After* Feeney, 79 COLUM. L. REV. 1376, 1376 n.3 (1979).

In a number of recent cases the Court arguably has strayed from the two-tiered analysis and has applied an intermediate level of scrutiny. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (gender based classification); Jimenez v. Weinberger, 417 U.S. 628 (1974) (classification of nonsanctioned illegitimate children). *See generally* Note, *Refining the Methods of Middle-Tier Scrutiny: A New Proposal for Equal Protection*, 61 TEX. L. REV. 1501 (1983) (discussing the emerging intermediate level of judicial review).

8. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 706-10 (10th ed. 1980).

9. *See* Brown v. Board of Educ., 347 U.S. 483 (1954); *see also* Green v. County School Bd., 391 U.S. 430 (1968).

10. *See* Green v. County School Bd., 391 U.S. 430 (1968); Brown v. Board of Educ., 349 U.S. 294 (1955).

tory state action and, therefore, is not a constitutionally impermissible condition.[11] The affirmative state duty to desegregate schools, therefore, does not extend to this type of racial imbalance.

A critical difference exists between de jure segregation, a constitutionally impermissible condition requiring an all out effort on the part of the states to desegregate, and de facto segregation, a condition of racial imbalance that federal courts are without authority to alter.[12] De jure segregation involves state intent or purpose to segregate.[13] De facto segregation occurs even without discriminatory action by state authorities. Thus, to make out a prima facie case of racial discrimination against a state officer and vest a reviewing federal court with the power to issue a desegregation order, a challenger must establish that the state officer acted with segregative intent in creating the racial imbalance in public schools.

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11. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Board of Educ., 402 U.S. 1 (1971). The *Swann* Court stated that de facto segregation is racial imbalance in state schools not precipitated by discriminatory state action. *Id.* at 17-18. One commentator defined de facto segregation as "racial imbalance resulting merely from adherence to the traditional, racially neutral, neighborhood school policy in a community marked by racially segregated residential patterns." Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 275 (1972). *But see* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (Powell, J., concurring in part and dissenting in part) (arguing that the Court should abandon the de jure/de facto distinction). Despite Justice Powell's strong opinion in *Keyes*, the de jure/de facto distinction still exists and now is embodied in the discriminatory intent test that the Court articulated in Washington v. Davis, 426 U.S. 229 (1976) (discriminatory purpose, not disproportionate impact, justifies applying strict scrutiny to facially neutral state action).

Subsequent Supreme Court cases consistently have reaffirmed this basic equal protection principle. *See, e.g.*, Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977) (absent proof of discriminatory motive, refusal to adopt zoning ordinance, though discriminatory in "ultimate effect," posed no equal protection question). The Court also has applied the principle in subsequent school desegregation cases. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 413 (1977) ("The finding that the pupil population . . . is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board."); *see also* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464-65 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 541 (1979); Personnel Adm'r v. Feeney, 442 U.S. 256, 273-76 (1979) (purposeful discrimination standard applied in context of gender based legislation). The school segregation cases decided after *Washington v. Davis* rarely relied on the de jure/de facto distinction in analyzing the constitutionality of school desegregation programs. Although the Court now articulates its analysis in terms of discriminatory intent, *see, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977), substantively, the analysis is identical.

12. *See Keyes*, 413 U.S. at 193.

13. *Id.* at 208.

C. *Repeal of Racially Protective State Action*

The mere repeal of state legislation that gives greater protection to racial minorities than the Constitution requires does not in and of itself constitute a fourteenth amendment violation.[14] Notions of state sovereignty demand that states retain broad-based discretionary power to manage their own heterogeneous populations.[15] States, in exercising this discretion, are free to develop statutory schemes and institutional policies that are not mandated by the Constitution. For example, the Constitution does not prevent states from granting additional protection to minority groups through legislation that prohibits privately practiced racial discrimination. The Supreme Court has reasoned that forbidding the repeal of such legislation would reduce severely state incentive to experiment with programs designed to benefit minority interests.[16] States would fear the possibility of federal pressure to continue potentially unsuccessful and problematic programs.[17]

In *Dayton Board of Education v. Brinkman*[18] the Supreme Court specifically held that a mere repeal of state policy does not violate the fourteenth amendment.[19] Minority students in *Dayton* sought relief from allegedly unconstitutional segregation in Dayton public schools that the students claimed the local school board had facilitated.[20] The students objected to the defendant school board's rescission of resolutions that the previous school board had passed, which admitted the board's involvement in the creation of a segregated school system and called for the implementation of appropriate remedial measures.[21] According to the Court, the rescission did

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14. Crawford v. Board of Educ., 458 U.S. 527, 539 (1982).

15. *See id.*

16. *See id.*

17. States might be afraid that once they provide protection beyond what the fourteenth amendment requires, they could not return to the previously constitutional condition. A finding that legislation creating a constitutional condition is unconstitutional precisely because the legislation creates that condition makes little sense. Certainly, the purposes of the fourteenth amendment would not be advanced by an interpretation of the equal protection clause that either "discourage[s] the States from providing greater protection to racial minorities . . . [or] require[s] the States to maintain legislation designed to ameliorate race relations or to protect racial minorities but which has produced just the opposite effect." *Id.*

18. 433 U.S. 406 (1977).

19. Justice Marshall, in his *Crawford* dissent, argued that *Dayton* is the only Supreme Court decision which "squarely [holds] that a 'mere repeal' [does] not violate the Fourteenth Amendment." Crawford v. Board of Educ., 458 U.S. 527, 557 (1982) (Marshall, J., dissenting).

20. *Dayton*, 433 U.S. at 409.

21. *Id.* at 413.

not present an equal protection concern because it failed "to undo *operative regulations* affecting the assignment of pupils or other aspects of the management of school affairs but simply repudiated a resolution of a predecessor Board . . . ."[22] The Court then stated that the analytical framework for assessing the constitutionality of school board rescissions depends on whether the board was under a constitutional duty to act as it did.[23] If the board was not under such a duty, the Court indicated that the rescission of the action would not be a constitutional violation.[24] On the other hand, if the board had an affirmative duty to act, then its rescission would become part of a "cumulative violation" of the equal protection clause.[25]

On three occasions the Supreme Court explicitly rejected the argument that a rescission of racially related legislation merely repealed existing state policy and, therefore, constituted permissible state action.[26] The Court carefully explained that the rescission actually worked *more* than a mere repeal of racially related legislation because the rescission effectively denied minorities the equal protection of state law. In *Reitman v. Mulkey*,[27] for example, the Court held that a state constitutional amendment nullifying the effects of fair housing legislation "struck more deeply and more

22. *Id.* at 413-14 (citation omitted) (emphasis added).

23. *Id.* at 414.

24. *Id.*

25. *Id.* (citing Brinkman v. Gilligan, 503 F.2d 684, 697 (6th Cir. 1974)).

Justice Marshall argued that one of the elements distinguishing *Dayton* from Court decisions finding that a repeal is more than a mere repeal and, therefore, is unconstitutional is that in *Dayton* "a governmental entity rescinded *its own* prior statement of policy without affecting any existing educational policy." *Crawford*, 458 U.S. 527, 557 (1982) (Marshall, J., dissenting) (emphasis in original). The Court may have reasoned only that the rescission did not affect any *existing* educational policy.

26. *See* Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) (discussed *infra* notes 77-124 and accompanying text); Hunter v. Erickson, 393 U.S. 385 (1969) (discussed *infra* notes 44-64 and accompanying text); Reitman v. Mulkey, 387 U.S. 369 (1967) (discussed *infra* notes 27-35 and accompanying text). In these three cases "the alleged rescission was accomplished by a governmental entity other than the entity that had taken the initial action, and resulted in a *drastic alteration of the substantive effect of existing policy.*" Crawford v. Board of Educ., 458 U.S. 527, 557 (1982) (Marshall, J., dissenting) (emphasis added).

27. 387 U.S. 369 (1967). The plaintiffs brought suit under two sections of California's Civil Code that prohibited discrimination in the conveyance of property. CAL. CIV. CODE §§ 51, 52 (West 1981). The defendants argued that a constitutional amendment, which the state adopted after the plaintiffs filed their complaint, voided their cause of action. *Reitman*, 387 U.S. at 372. The trial court granted the defendant's motion for summary judgment. Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966). The Supreme Court, on appeal, considered the constitutionality of the amendment. *Reitman*, 387 U.S. at 372.

widely" than a mere repeal because the state amendment encouraged and authorized people in the housing market to practice racial discrimination.[28] Specifically, the amendment, submitted to the people in a statewide ballot, authorized the State of California to permit individuals to refuse to sell, lease, or rent real property to anyone the seller disliked.[29] According to the Court, after the passage of this amendment, the state constitution no longer embodied a racially neutral housing policy because persons wishing to discriminate on the basis of race could rely on express constitutional authority to justify their actions.[30] For this reason, the Court concluded that the amendment did not merely repeal an existing law forbidding private racial discrimination, but involved the State in impermissible discriminatory housing practices and, therefore, violated the fourteenth amendment.[31]

The dissent[32] found that the amendment merely repealed prior California legislation prohibiting private racial discrimination in the housing market and, consequently, presented no constitutional problem.[33] The amendment, according to the dissent, "runs no more afoul of the Fourteenth Amendment than would have California's failure to pass any such antidiscrimination statutes in the first instance."[34] Thus, even though the Court split five to four on the question whether the amendment was a "mere repeal," eight justices[35] agreed that the mere repeal of state legislation granting

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28. *Reitman*, 387 U.S. at 377.

29. CAL. CONST. art. I, § 26 (repealed Nov. 5, 1974). The amendment, which the legislature submitted to the citizens of California as proposition 14 at the 1964 general election, read in pertinent part:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

Id.

30. *Reitman*, 387 U.S. at 377.

31. *See id.* at 380-81. If the amendment merely repealed existing state laws, no equal protection problem would have existed. The Court devoted the principal part of its opinion to describing the elements of the amendment that differentiated it from a "mere repeal."

32. Justice Black, Justice Clark, and Justice Stewart joined in Justice Harlan's dissent.

33. *Reitman*, 387 U.S. at 389 (Harlan, J., dissenting).

34. *Id.* Failure to pass antidiscriminatory housing legislation is not actionable because the fourteenth amendment imposes no obligation on the state to remedy purely private racial discrimination. *Id.* at 388. The fourteenth amendment provides that "[n]o *State* shall . . . deny to any person . . . the equal protection of its laws." U.S. CONST. amend. XIV, § 1 (emphasis added). Purely private racial discrimination, by definition, does not include the state and, thus, does not invoke the fourteenth amendment.

35. Justice Douglas did not address the issue in his concurring opinion. *See Reitman*,

minority groups greater protection than the fourteenth amendment requires is not actionable under the equal protection clause.

Thus, the Court has indicated clearly that the repeal of a state law or policy that the Constitution did not require fails to present an equal protection problem. The decision to repeal such state action and to return to a previous constitutional position runs afoul of the Constitution only when the repeal, in reality, is not a mere repeal. The Court, in declaring alleged "mere repeals" unconstitutional, has relied on two distinct equal protection theories. First, in *Reitman* the Court held that a state constitutional amendment encouraged and authorized private racial discrimination and, therefore, did more than merely repeal existing fair housing legislation.[36] The Supreme Court, however, never has relied on *Reitman* as controlling authority. Second, in *Hunter v. Erickson*[37] the Court held that a state initiative worked more than a mere repeal of fair housing legislation because the initiative restructured the political system in a way that placed special burdens on minority interests.[38] The Court did not rely expressly on *Hunter* until *Washington v. Seattle School District No. 1*.[39] Arguably, this recent decision, by applying *Hunter* to a significantly different fact situation, greatly decreases the likelihood that a state can establish that its action simply repealed an existing law.

III. THE *Hunter* DOCTRINE

In *Hunter v. Erickson*[40] the Supreme Court struck down a referendum adopted by a majority of the voting electorate and articulated a new and potentially far-reaching equal protection doctrine. The *Hunter* doctrine provides that, absent a compelling state justification, state action that reallocates political decisionmaking power concerning a racial issue by placing new and unique procedural burdens on minority interests violates the equal protection clause. Crucial to the *Hunter* Court's analysis is the finding that the state action, though neutral on its face, embodies an explicitly racial classification[41] and, therefore, must overcome a heightened level of judicial scrutiny.

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387 U.S. at 381-87 (Douglas, J., concurring).

36. *Reitman*, 387 U.S. at 377.
37. 393 U.S. 385 (1969) (discussed *infra* notes 44-64 and accompanying text).
38. *Id.* at 391.
39. 458 U.S. 457 (1982) (discussed *infra* notes 77-124 and accompanying text).
40. 393 U.S. 385 (1969).
41. *Id.* at 391-92.

Except for the Court's summary affirmation of a district court decision that relied on *Hunter*,[42] until recently the Court had not invoked the *Hunter* doctrine expressly as grounds for holding state action unconstitutional. The recent application of *Hunter* in *Washington v. Seattle School District No. 1*[43] not only established the Court's commitment to the underlying equal protection analysis articulated in *Hunter*, but also reexposed the fundamental weaknesses of the *Hunter* decision. This part of the Note first analyzes the Court's holding in *Hunter* and then discusses the Court's recent application of *Hunter* to state school desegregation programs.

A. The Emergence of a New Equal Protection Theory: Hunter v. Erickson

In *Hunter v. Erickson*[44] the appellant, a black citizen of Akron, Ohio, alleged that the State of Ohio acted unconstitutionally in adopting an amendment to the Akron City Charter.[45] Because the amendment required that ordinances regulating the lease of real property on the basis of race must receive electoral approval, the appellant argued that Ohio denied her the equal protection of state law. The Court agreed with the appellant and reversed the Supreme Court of Ohio,[46] reasoning that the amendment created a

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42. *See* Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970) (three-judge court), *aff'd mem.*, 402 U.S. 935 (1971) (discussed *infra* notes 65-76 and accompanying text).

43. 458 U.S. 457 (1982).

44. 393 U.S. 385 (1969).

45. The amendment to the Akron City Charter read:

Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, 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 regnlar 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.

AKRON, OHIO, CITY CHARTER § 137 (1964).

46. The Supreme Court of Ohio rejected two constitutional challenges to the charter amendment. *See* State *ex rel.* Hunter v. Erickson, 12 Ohio St. 2d 116, 119-20, 233 N.E.2d 129, 131 (1967), *rev'd*, 393 U.S. 385 (1969). First, the court distinguished *Reitman* because the Akron legislative body retained the power to enact fair housing legislation in the future. *Id.* at 119, 233 N.E.2d at 131. In *Reitman*, however, the unconstitutional referendum completely removed similar power from the California legislature. *See Reitman*, 387 U.S. at 369. Second, in applying the rational basis test to the amendment's selective use of voter approval to ratify fair housing ordinances, the court concluded that the different treatment in the race-related ordinances was a "reasonable classification." 12 Ohio St. 2d at 120, 233 N.E.2d at 131. The Supreme Court, unlike the Ohio Supreme Court, analyzed the charter amendment under a heightened level of scrutiny.

constitutionally impermissible racial classification because it reallocated governing power unequally and, thereby, imposed special burdens on minority interests. This new equal protection theory became known as the *Hunter* doctrine.

The charter amendment that the appellant in *Hunter* challenged significantly affected the application of a fair housing ordinance that the Akron City Council had adopted previously. The ordinance provided greater protection to minority groups than the fourteenth amendment requires by prohibiting racial discrimination in the private housing market.[47] Less than four months after the ordinance went into effect, the voters of Akron expressed their strong opposition to the legislation by passing an amendment to section 137 of the city charter.[48] The charter amendment required that all ordinances regulating the sale or use of real property on the basis of race "must first be approved by a majority of the electors voting."[49] The amendment operated retroactively, thereby invalidating the fair housing ordinance unless and until it received voter approval.[50]

After determining that the fourteenth amendment applied to the housing referendum,[51] the *Hunter* Court stated that it would not rely on *Reitman*.[52] According to the Court, the Akron charter amendment differed from the *Reitman* amendment in one crucial respect: the Akron amendment embodied an explicitly racial classification.[53] The Court's finding that section 137, as amended, cre-

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47. *See* AKRON, OHIO, ORDINANCE 873-1964 (July 14, 1964). The Akron City Council enacted the ordinance to "assure equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry or national origin." *Id.* § 1.

In the initial complaint in state court, the appellant asserted that a real estate agent had refused to show her certain houses because the owners selling the houses "had specified they did not wish their houses shown to negroes." *Hunter*, 393 U.S. at 387. The appellant alleged that the owners' conduct violated the city ordinance. *See id.*

48. The Akron City Council passed and amended Ordinance No. 873-1964 in July 1964. State *ex rel.* Hunter v. Erickson, 12 Ohio St. 2d at 117, 233 N.E.2d at 130. The Akron voters adopted the charter amendment at the general election in November 1964. *Id.*

49. *See supra* note 45 (text of amendment).

50. State *ex rel.* Hunter v. Erickson, 12 Ohio St. 2d at 119-20, 233 N.E.2d at 131.

51. *See Hunter*, 393 U.S. at 389. Referenda inherently concern state action.

52. *Id. Reitman* held that a repeal of fair housing legislation by referendum was unconstitutional on equal protection grounds. *Reitman*, 387 U.S. at 373. For a discussion of *Reitman*, see *supra* notes 27-35 and accompanying text. The *Hunter* Court did not state that it could not rely on *Reitman*, but rather the Court felt that it did not have to apply *Reitman* to find the Akron amendment unconstitutional. *Hunter*, 393 U.S. at 389. The *Hunter* Court may have been eager to articulate a new equal protection doctrine.

53. *Hunter*, 393 U.S. at 389. According to the Court, the Akron amendment embodied an explicitly racial classification because the amendment treated "racial housing matters differently from other racial and housing matters." *Id.*

ated an explicitly racial classification was determinative in *Hunter* because equal protection analysis provides that state laws based on purely racial distinctions are constitutionally suspect and, therefore, must overcome the most rigid judicial scrutiny. Thus, when the Court found an explicitly racial classification in the charter amendment, the Court felt that the justifications which the city of Akron offered would not be sufficient to combat the equal protection challenge.[54] The Court's finding of an explicitly racial classification is significant because the Court's rationale in finding the explicitly racial classification is potentially more far-reaching than previous equal protection decisions.

The *Hunter* Court, realizing that section 137 treated similarly situated individuals equally, examined the amendment's actual impact to ascertain whether it embodied a constitutionally suspect racial classification. The Court determined that the amendment's requirement of voter approval[55] presented a procedural hurdle. Because the amendment did not address one particular racial or religious minority, the Court concluded that amended section 137 was neutral on its face.[56] The Court, nevertheless, found that, in practice, requiring mandatory approval by referendum of racial ordinances would disadvantage minority groups that otherwise would benefit from the adoption of antidiscrimination legislation.[57] According to the Court, section 137 established unequal treatment and an explicitly racial classification by forcing individuals who favor antidiscrimination legislation to surmount an additional procedural hurdle in the governing process.[58] The Court reasoned that

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54. The city's reasons for a racially based classification failed to impress the Court. *Id.* at 392. First, "a public decision to move slowly in the delicate area of race relations" was, according to the Court, a description of the charter amendment, not a justification for it. *Id.* Second, "[t]he amendment was unnecessary either to implement a decision to go slowly, or to allow the people of Akron to participate in that decision," *id.* (footnote omitted), because the electorate under state law had the power to initiate legislation, *id.* at 392 n.7. Last, the Court felt that the state's authority to distribute legislative power and the people's authority to retain power over certain subjects did not justify an unconstitutional legislative structure. *Id.* at 392.

55. AKRON, OHIO, CITY CHARTER § 137 (1964).

56. *Hunter*, 393 U.S. at 391. Even though § 137 was facially neutral, it related to race. State action that relates to race is inherently suspect. *See* Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 485 (1982). Section 137, by addressing a racial issue in an explicitly racial fasbion, rests on distinctions based on race and, therefore, is subject to strict judicial scrutiny. *Hunter*, 393 U.S. at 391-92.

57. *Hunter*, 393 U.S. at 390-91.

58. The Court described the unequal treatment as follows:

> Section 137 thus drew a distinction between those groups who sought the law's protection against racial, religious or ancestral discriminations in the sale or rental of

this "special burden" had particular impact on racial minorities because they invariably would lose the referendum and, therefore, would be unable to benefit from fair housing ordinances. Thus, the Court held that because "the law's impact falls on the minority,"[59] the amendment embodied an explicitly racial classification that was subject to heightened scrutiny.[60]

Justice Black issued a vigorous dissent.[61] Because the charter amendment merely rescinded existing fair housing legislation, Black felt that the amendment was constitutionally sound. Justice Black believed that the majority had granted itself the authority to deny Ohio the power to repeal its own laws.[62] Justice Black ac-

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real estate and those who sought to regulate real property transactions in the pursuit of other ends. Those who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule . . . [b]ut for those who sought protection against racial bias, the approval of the City Council was not enough. A referendum was required . . . .

Id. at 390.

59. *Id.* at 391.

60. *Id.* at 391-92.

In a concurring opinion, Justices Harlan and Stewart agreed with the majority that amended § 137 of the Akron City Charter violated the equal protection clause. *Id.* at 395-96 (Harlan, J., concurring). Unlike the majority, however, the concurrence did not rely on the explicitly racial classification theory to justify applying a heightened level of scrutiny to a facially neutral state law. According to the concurrence, a state law that restructures internal governing processes falls into one of two categories for the purposes of equal protection analysis. Either the state law has "the clear purpose of making it more difficult for racial and religious minorities to further their political aims," *id.* at 393, or the state law attempts "to allocate governmental power on the basis of [a] general principle," *id.* at 395. The concurrence opined that laws in the first category are discriminatory on their face and are subject to strict judicial scrutiny, while laws in the second category are neutral and, therefore, are not subject to attack on equal protection grounds. *Id.* at 393-95. Because the electorate adopted § 137 to give minority groups a harder time achieving fair housing legislation, the concurrence concluded that § 137 belonged in the first category. *Id.* at 395. Thus, according to the concurrence, the amendment was discriminatory on its face and bore a heavy burden of justification. *Id.*

The concurrence recognized that established governing bodies or deeply rooted democratic principles frequently prohibit minority groups from successfully lobbying their interests. The concurrence pointed to the bicameral legislature, the executive veto, and the generally arduous task of amending state constitutions as examples of areas in which minorities had little influence. *Id.* at 394-95. These practices, however, do not present equal protection prohlems because they are grounded in neutral principles. *Id.* Section 137, in contrast, did not rest on neutral principles. Unlike the majority, the concurrence did not argue that special practical burdens resulting from the reallocation of governing power disadvantaged racial groups. Instead, the concurrence contended that the discriininatory intent behind § 137 embodied a constitutionally suspect classification. *See id.* at 395. The majority did not address the discriminatory intent issue.

61. *Id.* at 396. (Black, J., dissenting).

62. *Id.* at 396-97. Justice Black declared: "Although the Court denies the fact, I read its opinion as holding that a city that 'wields state power' is barred from repealing an existing ordinance that forbids discrimination in the sale, lease, or financing of real property

cused the Court of using the equal protection clause to force the state "to keep on its books and enforce what the Court favors as a fair housing law."[63] Even more appalling to Justice Black was the Court's implicit holding that a charter amendment conditioning the enactment of an ordinance on a city-wide referendum—an undeniably democratic procedure—somehow rendered the charter amendment constitutionally defective.[64]

B. A Summary Reaffirmation of the Hunter *Doctrine:* Lee v. Nyquist

The Supreme Court, in affirming *Lee v. Nyquist*[65] without opinion, tacitly reinforced the validity of its year old *Hunter* decision. The plaintiffs in *Lee*[66] challenged the constitutionality of a New York law that removed from locally appointed school boards the power to assign students for purposes of achieving racial equality.[67] Applying *Hunter*, the three-judge district court had held that the law created an impermissible racial classification and thereby

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'on the basis of race, color, religion, national origin or ancestry . . . .'" *Id.* at 396.

The majority, however, had followed *Reitman* in maintaining that the amendment was more than a mere repeal of an existing state law. The Court emphasized that 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 ordinance could take effect.*" *Id.* at 389-90 (footnote omitted) (emphasis added). Thus, contrary to Justice Black's allegation, the Court did not believe that it had held that a "mere repeal" of an existing ordinance violated the equal protection clause. *Id.* at 390 n.5.

63. *Id.* at 396 (Black, J., dissenting).

64. *Id.* at 397. Black concluded: "There may have been other state laws held unconstitutional in the past on grounds that are equally as fallacious and undemocratic as those the Court relies on today, but if so I do not recall such cases at the moment." *Id.*

65. 318 F. Supp. 710 (W.D.N.Y. 1970) (three-judge court), *summarily aff'd mem.*, 402 U.S. 935 (1971).

66. The five plaintiffs were parents of children attending public schools in Buffalo, New York. They brought suit on behalf of themselves, their children, and other individuals similarly situated to enjoin the enforcement of a New York education law that the plaintiffs alleged unconstitutionally prohibited an appointed school board from instituting mandatory student reassignment programs to eliminate racial imbalance in Buffalo public schools. *See id.* at 712.

67. The challenged statute, § 3201(2) of the New York Education Law, provided in pertinent part:

Except with the express approval of a board of education having jurisdiction . . . 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; and no school district, school zone or attendance unit . . . shall be established, reorganized or maintained for any such purpose . . . .

1969 N.Y. Laws 1306, ch. 342.

denied the plaintiffs the equal protection of New York law.[68]

The district court found that section 3201(2) of the New York Education Law placed "burdens on the implementation of educational policies designed to deal with race on the local level."[69] The court reasoned that the law prohibited the Commissioner of Education and local school boards from implementing plans for the assignment of students to achieve racial equality.[70] According to the court, the New York legislature's reallocation of governing power was a new and unique hurdle to individuals favoring desegration programs. Section 3201(2) required proponents of mandatory pupil reassignment programs to seek approval from a locally elected school board, rather than to petition the commissioner to act under his broad grant of authority. No other class of educational policy encountered this procedural barrier.[71] Relying on *Hunter*, the district court concluded that this distinction in the political process operated as a racial classification.[72] Because New York could offer no compelling reason for its explicitly racial classification,[73] the court held section 3201(2) repugnant to the equal protection clause of the fourteenth amendment.

Even though the district court quoted *Hunter* extensively in its opinion, the court incorrectly articulated the *Hunter* doctrine. At one point, for example, the district court stated that "[t]he principle of *Hunter* is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of

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68. *Lee*, 318 F. Supp. at 710. Preliminarily, the district court determined that its decision need not rest on *Reitman*, although the plaintiffs had made a good argument for applying *Reitman*. *Id.* at 716-18. The court concluded, as the Supreme Court had concluded in *Hunter*, 393 U.S. at 385, that an analysis under *Reitman* was unnecessary because the challenged state law embodied an explicitly racial classification. *Lee*, 318 F. Supp. at 718.

69. 318 F. Supp. at 719.

70. *Id.*

71. *See id.* at 718-19. The *Lee* court indicated that before the enactment of § 3201(2), aggrieved parties could petition the commissioner to order local school boards to act in accordance with state educational policies. *Id.* at 719. After the enactment of § 3201(2), however, petitions concerning assignment for integration purposes became ineffective. The district court viewed § 3201(2) as creating "a single exception to the broad supervisory powers the State Commissioner of Education exercises over local public eduction." *Id.* at 718.

72. *Id.* at 719.

73. *Id.* at 719-20. The State argued that because the statute limited authority over desegregation policy to school boards directly elected by the people, the statute would assure the "community acceptance necessary for the effectuation of local school desegregation." *Id.* at 720. Not only was the statute impermissible to the extent that it acceded to local racial hostility, but according to the court, New York could not justify the statute because the State could not show that it could accomplish its purpose other than by a statute embodying a racial classification. *Id.*

problems involving racial matters and [the treatment] afforded other problems in the same area."[74] The *Hunter* Court, however, did not find a constitutionally suspect racial classification in the Akron amendment *solely* because it treated racial housing ordinances differently from nonracial housing ordinances. The Supreme Court emphasized that the explicitly racial nature of the classification arose because the state had restructured its political decisionmaking process for racial housing ordinances by placing special procedural burdens on proponents of this minority concern. In *Hunter* the burdensome treatment afforded racial ordinances established an explicitly racial classification. The Supreme Court, nevertheless, by summarily affirming the district court's decision in *Lee*,[75] indicated that the *Hunter* doctrine potentially applies in many equal protection contexts.[76]

C. *An Express Reaffirmation of the* Hunter *Doctrine:* Washington v. Seattle School District No. 1

Recently, in *Washington v. Seattle School District No. 1*[77] the Court struck down Washington "Initiative 350," a statewide referendum that prohibited local school boards from busing children to integrate public schools. Citing *Hunter* and *Lee* as controlling,[78] the Court held that the referendum reallocated governing power inequitably by placing unique burdens on programs designed to help minorities. The Court, therefore, ruled that the referendum violated the equal protection clause.

The Seattle school board, threatened with legal action by several community groups that were dissatisfied with ongoing desegregation programs,[79] had developed the "Seattle Plan" to cure the

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74. *Id.* at 718 (footnote omitted).

75. Although the district court misstated the *Hunter* doctrine, the court focused on the proper criteria in its analysis. Apparently, the Supreme Court chose not to issue an opinion for this reason.

76. An important distinction exists between the charter amendment in *Hunter* and the educational statute in *Lee*. The charter amendment in *Hunter expressly* established different political treatment of racial housing ordinances by conditioning their enactment on the approval of a majority of the voting electorate. The educational statute in *Lee*, on the other hand, restricted the power of local education officials and *implicitly* established a different political procedure for school desegregation petitions. The *Lee* court effectively required individuals to submit their petitions to a locally elected school board. Thus, *Lee* extends the *Hunter* doctrine to implicitly created procedural burdens on minority interests.

77. 458 U.S. 457 (1982).

78. *Seattle School District* is the only Supreme Court decision that relies on *Hunter*.

79. *Seattle School District*, 458 U.S. at 460 n.2.

racial imbalance that resulted from segregated housing patterns.[80] Local residents, opposed to the extensive use of busing and mandatory student reassignments that the plan proposed, drafted Initiative 350 and placed it on the Washington ballot at the next general election.[81] Unlike the statute in *Lee*,[82] Initiative 350 did not explicitly forbid busing for desegregation, but rather permitted busing for every purpose except desegregation.[83] A provision in Initiative 350 generally prohibited mandatory student assignments, but also contained a list of exceptions. The exceptions identified reasons that students could be bused, but failed to list as a reason the desire to remedy racial imbalance.[84] By omitting this reason from the list of permissible purposes for mandatory student assignment programs, Initiative 350 effectively created a statutory scheme identical to the scheme that the *Lee* court had held unconstitutional.[85]

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80. *See id.* at 460-61. The Seattle Plan, "which makes extensive use of busing and mandatory reassignments, desegregates elementary schools by 'pairing' and 'triading' predominantly minority with predominantly white attendance areas, and by basing student reassignments on attendance zones rather than on race." *Id.* at 461. The plan took effect during the 1978-1979 academic year and substantially reduced the number of racially imbalanced schools in the district. *See* Seattle School Dist. No. 1 v. Washington, 473 F. Supp. 996, 1007 (W.D. Wash. 1979), *aff'd*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982).

81. *See Seattle School District*, 458 U.S. at 461-62. Before drafting Initiative 350, the organization, Citizens for Voluntary Integration Committee (CiVIC), brought an action in state court to enjoin the Seattle school board from implementing the Seattle Plan. The state court's refusal to grant an injunction prompted CiVIC to approach the Washington electorate with a referendum. *Id.* at 462.

82. 1969 N.Y. Laws 1306 ch. 592; *see supra* note 67.

83. Initiative 350 provided in pertinent part:

> Notwithstanding any other provision of law, after the effective date of this act no school board, school district, educational service district board, educational service district, or county committee, nor the superintendent of public instruction, nor the state board of education, nor any of their respective employees, agents or delegates shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence within the school district of his or her residence and which offers the course of study pursued by such student, except in the following instances:
>
> (1) If a student requires special education, care or guidance, he may be assigned and transported to the school offering courses and facilities for such special education, care or guidance;
>
> (2) If there are health or safety hazards, either natural or man made, or physical barriers or obstacles, either natural or man made, between the student's place of residence and the nearest or next nearest school; or
>
> (3) If the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities.

WASH. REV. CODE ANN. § 28A.26.010 (1982).

84. *Seattle School District*, 473 F. Supp. at 1013.

85. *See id.*; *Lee*, 318 F. Supp. at 716.

The Seattle, Tacoma, and Pasco school boards brought suit in federal district court to enjoin the State of Washington from enforcing the initiative.[86] The district court held Initiative 350 unconstitutional on three distinct grounds. First, the court declared that, like the legislation in *Hunter* and *Lee*, Initiative 350 discriminated on its face because it effectively embodied an explicitly racial classification.[87] Because the State could not convince the court that the State had a compelling reason for the classification, the initiative established an invidious and unconstitutional discrimination.[88] Second, the court reasoned that even if Initiative 350 did not embody an explicitly racial classification, it failed the discriminatory intent test that *Washington v. Davis*[89] made applicable in assessing equal protection challenges to facially neutral legislation.[90] Last, the court held that the initiative was over-inclusive because a mandatory student reassignment program cannot remedy even de jure segregation.[91] The court of appeals, relying only on the district court's first rationale, affirmed in a split decision.[92] The Supreme Court granted certiorari to consider whether the two lower courts had applied the *Hunter* doctrine properly.

The Court concluded that the State had reallocated its power in a way that placed impermissible structural burdens on the protection of minority interests. The Court based its conclusion on two distinct but equally important findings:[93] (1) Initiative 350 was racially conscious legislation that affected minority interests;[94] and (2) the initiative restructured the political system by placing unique and special procedural burdens on those interests and,

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86. The referendum affected only these three school districts because no other district in Washington used comprehensive integration programs to desegregate schools. *Seattle School District*, 458 U.S. at 464 n.7.

87. *Seattle School District*, 473 F. Supp. at 1013.

88. *Id.* at 1012-13. Even though the district court claimed that it relied primarily on this ground in holding Initiative 350 unconstitutional, *id.* at 1012, the court disposed of this issue rather hastily. Ironically, the court of appeals struggled at length with the applicability of *Hunter* and *Lee*, and ultimately relied only on the explicitly racial classification in affirming the district court decision. *Seattle School District*, 633 F.2d at 1343-46.

89. 426 U.S. 229 (1976) (discussed *supra* note 11).

90. *Seattle School District*, 473 F. Supp. at 1013-16.

91. *Id.* at 1016. By prohibiting school boards from implementing student reassignment programs aimed at curing constitutionally impermissible segregation, Initiative 350 effectively may deny school boards the power needed to satisfy their constitutional obligations. *See id.*

92. Seattle School District No. 1 v. Washington, 633 F.2d 1338 (9th Cir. 1980).

93. The *Seattle School District* Court arguably adhered to a two-step analysis. *See Seattle School District*, 458 U.S. at 470-84.

94. *See id.* at 471-74.

thereby, embodied a constitutionally suspect classification.[95]

First, the Court determined that because Initiative 350 had a racial focus and primarily affected minority interests, the initiative fell under the *Hunter* doctrine. The State argued that the initiative differed from the specific procedural burden erected in the path of minority interests in *Hunter*[96] because Initiative 350 did not mention assignments for integration; the initiative, therefore, was not race-related legislation.[97] The Court dismissed the State's argument, reasoning that "despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes."[98] Having established that the Citizens for Voluntary Integration Committee purposely drafted Initiative 350 to hamper desegregation efforts,[99] the Court stated that mandatory desegregation, like fair housing, is peculiarly racial in nature and intended to benefit minorities. The Court then determined that state action affecting mandatory desegregation was precisely the kind of issue that *Hunter* examined.[100]

Second, the Court considered the extent to which Initiative 350 affected existing state political power and decisionmaking. Before the enactment of the initiative, responsibility for developing and setting educational policy, including the decision about which students to bus, was in the hands of the local school boards.[101] The initiative removed the school boards' power to assign students for integration purposes and, thereby, "worked a major reordering of the State's educational decisionmaking process."[102] According to the Court, individuals that favor racially

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95. *See id.* at 470, 474-82.

96. *See supra* notes 55-60 and accompanying text.

97. *See Seattle School District*, 458 U.S. at 471.

98. *Id.* at 471.

99. The Court did not reach the issue of discriminatory intent because the Court characterized Initiative 350 as legislation with an explicitly racial classification. *See id.* at 485 & n.28.

100. *Id.* at 472-74. The Court's distinction between "the racial nature of an issue," *id.* at 471, and "the type of racial issue implicated by the *Hunter* doctrine," *id.* at 473, is fuzzy at best. The Court probably intended that the *Hunter* doctrine apply only to the repeal of racially related legislation that Congress enacted to *benefit* minorities.

101. *Id.* at 477-79.

102. *Id.* at 479. The dissent argued that because the State of Washington was ultimately responsible for its educational policy, the initiative merely worked a change in state educational policymaking and did not restructure Washington's political process. *Id.* at 498 & n.13 (Powell, J., dissenting).

By indicating that the reallocation of decisionmaking authority to another level of government brought *Seattle School District* squarely within the *Hunter* doctrine, *id.* at 474, the Court chose not to limit *Hunter* to its facts. The Court indicated its desire to expand

balanced schools "now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board."[103] The Court found that Initiative 350 did not provide for a simple reallocation of decisionmaking power over school desegregation programs, but rather created an inequitable reallocation that placed significant and undeniable burdens on minority interests and, therefore, established a constitutionally suspect racial classification.[104]

According to the Court, proponents of racially balanced schools must "surmount a considerably higher hurdle than persons seeking comparable legislative action."[105] Even though proponents of desegregation programs cannot be classified by race,[106] the Court found that Initiative 350 subjected only minority groups to a debilitating disadvantage.[107] The Court concluded that because the school boards implemented desegregation programs to benefit minority interests, and because the State reallocated decisionmaking power to place additional procedural burdens on citizens championing the minority cause, Initiative 350 embodied a suspect racial classification that the State could justify only by demonstrating a compelling interest.[108]

Hunter by stating that "[t]he evil condemned by the *Hunter* Court was not the particular political obstacle of mandatory referenda imposed by the Akron charter amendment; it was, rather, the comparative structural burden placed on the political achievement of minority interests." *Id.* at 474 n.17.

103. *Id.* at 474.

104. *Id.* at 479-80, 483. The Court indicated that Initiative 350 "burdens all future attempts to integrate Washington schools in districts throughout the State, by lodging decisionmaking authority over the question at a new and remote level of government." *Id.* at 483.

105. *Id.* at 474.

106. *Id.* at 472. The Court admitted that both blacks and whites not only support integration efforts but also benefit from exposure to racially diverse student populations. *See id.*

107. Once the Court found that Initiative 350 unfairly burdened minority groups, the Court had established the explicitly racial classification.

108. *Id.* at 485 & n.28. The Court dismissed the argument that Washington v. Davis, 426 U.S. 229 (1976) (discussed *supra* note 11), required a finding that the electorate enacted Initiative 350 with a discriminatory purpose. *See Seattle School District*, 458 U.S. at 484-87. While the legislation in *Washington v. Davis* and Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (discussed *supra* note 11), considered classifications facially unrelated to race, Initiative 350 and the charter amendment in *Hunter* "dealt in explicitly racial terms with legislation designed to benefit minorities." *Seattle School District*, 458 U.S. at 485. The *Seattle School District* Court, however, did indicate that a discriminatory purpose likely existed because "singling out the political processes affecting racial issues for

The dissent[109] strongly criticized the Court's unprecedented invasion into a state's authority to allocate decisionmaking power. According to the dissent, the State had not restructured its political system to place special burdens on minority interests; the State merely had changed existing educational policy. The dissent, therefore, found that although the *Hunter* doctrine was a viable constitutional limitation on the exercise of state power, the doctrine did not apply to this case.[110] The dissent asserted that the majority's holding declared unconstitutional an integration policy that the local school board originally could have implemented without running afoul of the equal protection clause.[111] In addition, the dissenters warned that this decision would create difficulties for future electorates and state legislatures trying to overturn programs adopted by state-created, local decisionmaking entities.[112]

The dissent pointed out that the majority opinion was internally inconsistent. Seattle certainly had no constitutional obligation to alleviate the de facto racial imbalance in its schools and, therefore, could have continued its neighborhood school policy without running afoul of the fourteenth amendment.[113] In an attempt to enhance the quality of education, however, Seattle provided additional protection to minority students by eliminating racial imbalance in state schools through a mandatory busing program. The dissent reasoned that equal protection theory clearly established that if the desegregation plan did not accomplish its objectives, or if the school board otherwise had become dissatisfied with the plan's operation, the board could have terminated the

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uniquely disadvantageous treatment inevitably raises dangers of impermissible motivation." *Id.* at 486 n.30.

109. Justice Rehnquist, Justice O'Connor, and Chief Justice Burger joined Justice Powell in dissent.

110. *See Seattle School District*, 458 U.S. at 488-501 (Powell, J., dissenting).

111. *Id.* at 494. Justice Powell emphasized:

> The people of the State legitimately could decide that unlimited mandatory busing places too great a burden on the liberty and privacy interests of families and students of all races. It might decide that the reassignment of students to distant schools, on the basis of race, was too great a departure from the ideal of racial neutrality in state action. And, in light of the experience with mandatory busing in other cities, the State might conclude that such a program ultimately would lead to greater imbalance in the schools.

Id. at 495 n.9.

112. *Id.* at 494-95.

113. *Id.* at 491-92; *see* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 417 (1977) (discussed *supra* notes 18-25 and accompanying text); Swann v. Board of Educ., 402 U.S. 1, 28 (1971) (discussed *supra* note 11).

program and reestablished the original, racially neutral, constitutionally permissible neighborhood school policy.[114] According to the dissent, the majority had held that identical action by the electorate embodied a racial classification repugnant to the equal protection clause.[115] The dissent believed that the majority's result was bizarre and nonsensical.[116]

The dissent also argued that because Initiative 350 did not embody a racial classification, the Court had applied the *Hunter* doctrine erroneously.[117] The initiative, according to the dissent, subjected neither black students nor white students to local school board desegregation programs and, therefore, established "a policy of racial neutrality in student assignments."[118]

In addition, the dissent argued that Initiative 350, unlike the amendment in *Hunter*, did not restructure the governing process to place *unique* burdens on minority interest.[119] Although the Constitution did not require the State to establish local school boards, the State had decided to delegate some of its decisionmaking authority to these entities. According to the dissent, Initiative 350

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114. *Seattle School District*, 458 U.S. at 494 & n.8 (Powell, J., dissenting). The decision to repeal a program designed to eliminate de facto segregation and reestablish a previously constitutional condition is not unconstitutional. Once a state goes beyond the requirements of the Constitution, the equal protection clause does not compel the state to retain its additional provisions. The mere repeal of additional provisions is constitutionally unsound only if it actually works more than a mere repeal. *See supra* notes 14-17 and accompanying text. Furthermore, the equal protection clause does not prohibit a local school board from selectively using mandatory busing for all purposes except desegregation. *See* Diaz v. San Jose Unified School Dist., 705 F.2d 1129 (9th Cir. 1983) (discussed *infra* notes 129-35 and accompanying text).

115. *Seattle School District*, 458 U.S. at 494 (Powell, J., dissenting). The majority agreed that a school board decision not to bus for integration purposes and to return to a prior constitutional condition merely would have repealed school board policy and, therefore, would not be subject to scrutiny under the equal protection clause. *See id.* at 483, 485 n.29. The statewide referendum, according to the Court, was more than a mere repeal of existing school board policy. *Id.* at 483. The referendum, unlike the school board decision, required electorate approval of future integration busing programs. The majority argued that this procedural hurdle primarily burdened racial minorities, *id.* at 484, and thus, under *Hunter*, was an explicitly racial classification subject to strict judicial scrutiny, *id.* at 485 & n.28.

116. *Id.* at 494-95 (Powell, J., dissenting).

117. *See id.* at 495 & n.9.

118. *Id.* at 494. Justice Powell added that Initiative 350 "is neutral on its face, and racially neutral as public policy." *Id.* at 495. The dissent's public policy argument focused on the mutual benefits to both blacks and whites stemming from integrated school systems. *Id.* The majority did not take issue with the dissent on this point, even though the majority did find that the initiative burdened peculiarly "minority oriented" interests. *See id.* at 485-87.

119. *Id.* at 497-98 & n.13 (Powell, J., dissenting).

merely removed decisionmaking authority over mandatory student assignment from local school boards and returned it to the State—a permissible shift in state educational policy.[120] Even assuming that this reallocation burdened minority interests, the dissent felt that "it simply does not place *unique* political obstacles in the way of racial minorities . . . . [C]ertainly racial minorities are not uniquely or comparatively burdened by the State's adoption of a policy that would be lawful if adopted by any school district in the State."[121]

Last, the dissent argued that the Court's decision impermissibly interfered with traditional political processes.[122] The dissent noted that absent unlawful segregation, the desirability of mandatory student reassignment was an issue for the political process.[123] In *Seattle School District*, individuals dissatisfied with local school board policy invoked this process to establish a new policy and program. Initiative 350, according to the dissent, was simply an example of the state's political process at work.[124]

IV. LIMITATIONS ON THE *Hunter* DOCTRINE

On three occasions federal courts expressly have refused to apply the *Hunter* doctrine to invalidate allegedly unconstitutional state action.[125] The courts emphasized that the *Hunter* doctrine is theoretically a narrow equal protection principle that applies only to state action which fits two limiting criteria. First, the courts held that the state action must reallocate governing power or

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120. *See id.* at 498.

121. *Id.* at 497-98.

122. *Id.* at 495-96.

123. *Id.* at 496.

124. *Id.* Justice Powell forcefully asserted:

> Such a process is inherent in the continued sovereignty of the States. This is our system. 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. But there is no inherent unfairness in this and certainly no constitutional violation.

Id. (footnote omitted).

Justice Powell, like Justice Black in *Hunter*, *see supra* notes 61-64 and accompanying text, strongly believed that the Court improperly intruded into the state decisionmaking process. *See Seattle School District*, 458 U.S. at 498 & n.14 (Powell, J., dissenting); *Hunter*, 393 U.S. at 397 (Black, J., dissenting).

For additional commentary on *Seattle School District*, see *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 120-30 (1982).

125. *See* Crawford v. Board of Educ., 458 U.S. 527 (1982) (discussed *infra* notes 144-71 and accompanying text); James v. Valtierra, 402 U.S. 137 (1971) (discussed *infra* notes 136-43 and accompanying text); Diaz v. San Jose Unified School Dist., 705 F.2d 1129 (9th Cir. 1983) (discussed *infra* notes 129-35 and accompanying text).

restructure the decisionmaking process.[126] The courts have not determined whether the reallocation of judicial decisionmaking power falls within the scope of the *Hunter* doctrine or whether the doctrine is limited to the redistribution of executive or legislative power.[127] Second, the courts found that the state action must embody a racial classification. No specific reference to race is necessary if the action affects an issue essentially racial in nature.[128] This part of the Note discusses these two criteria and examines the way the courts have used them to limit the *Hunter* doctrine.

A. State Action Must Reallocate Government Power "Nonneutrally": Diaz v. San Jose Unified School District

The *Hunter* doctrine does not apply unless a state "nonneutrally" reallocates governing power. In *Diaz v. San Jose Unified School District*[129] school officials used wide-scale busing for numerous purposes,[130] but refused to consider busing as a means of eliminating racial imbalance in the schools.[131] The Ninth Circuit upheld the constitutionality of the district's selective busing program. The court reasoned that because the legislation did not attempt to redistribute school officials' decisionmaking authority, *Hunter* and *Seattle School District* did not apply.[132] According to the court, the plaintiffs[133] merely objected to the district's adoption of a neighborhood school policy.[134] Because the school district's policy did not violate the fourteenth amendment, the court held that the

126. *See, e.g., Diaz*, 705 F.2d at 1129.

127. *See Crawford*, 458 U.S. at 545 (Blackmun, J., concurring); *infra* text accompanying notes 161-63.

128. *See, e.g., Valtierra*, 402 U.S. at 137.

129. 705 F.2d 1129 (9th Cir. 1983). The parties did not appeal this decision to the Supreme Court.

130. *Id.* at 1132. According to the district court, officials bused approximately one-third of the student population in the San Jose Unified School District for purposes consistent with the district's neighborhood school policy. Diaz v. San Jose Unified School Dist., 412 F. Supp. 310, 324 (N.D. Cal. 1976); *see Diaz*, 905 F.2d at 1131-32.

131. *Diaz*, 705 F.2d at 1131-32.

132. *Id.* at 1132.

133. The plaintiffs were the parents of children with Spanish surnames attending public schools in the San Jose Unified School District. The plaintiffs filed a class action on behalf of themselves and similarly situated parents to compel desegregation. *Id.* at 1130.

134. *Id.* at 1132. The plaintiffs argued that because the school district permitted busing for all purposes except integration, minority interests received unequal treatment. The court, however, found neither a discriminatory motive nor evidence of invidious racial discrimination behind the policy and, therefore, rejected the plaintiffs' equal protection claim. Furthermore, the court indicated that the policy did not establish a racial classification under *Hunter*. *See id.*

plaintiffs' only recourse was "the political process which, in contrast to the process examined in *Seattle School District No. 1*, remains entirely open to them."[135]

B. State Action Must Embody a Racial Classification

1. *James v. Valtierra*

In *James v. Valtierra*[136] the Supreme Court reversed a district court decision and held that the *Hunter* doctrine did not apply because the challenged state legislation did not address a racial issue. The lower court,[137] relying on *Hunter*, found that an amendment to the state constitution that required state authorities to seek voter approval before using federal funds to develop low rent housing projects[138] denied blacks the equal protection of state law.[139] Because the ratio of minorities to whites occupying low income housing was approximately four to one in California,[140] the three-judge district court concluded that the mandatory referendum burdened only minority interests. The court held that imposing a special burden on minority interests clearly violated the *Hunter* doctrine.[141]

The Supreme Court determined that the district court erred by relying on *Hunter*. Crucial to the Court's analysis was its conclusion that public housing is not a peculiarly racial concern. The

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135. *Id.*

136. 402 U.S. 137 (1971).

137. *See* Valtierra v. Housing Auth., 313 F. Supp. 1 (N.D. Cal. 1970) (three-judge panel), *rev'd sub nom.* James v. Valtierra, 402 U.S. 137 (1971). The California district court consolidated two cases. The plaintiffs in the first case were eligible for low income public housing that was not available at the time of the Supreme Court decision. *Id.* at 3. The plaintiffs in the second case were similarly situated poor blacks on the waiting list for public housing. *Id.* The plaintiffs demonstrated at trial that Article XXXIV of the California State Constitution impeded efforts by state housing authorities to finance low rent housing. *Id.* The plaintiffs applied to the district court for an injunction to prevent the authorities from relying on the state constitutional provision as a reason for not requesting federal funds. *Id.*

138. Article XXXIV of the California State Constitution provided in pertinent part:

> No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire, the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

CAL. CONST. art. XXXIV, § 1.

139. Valtierra v. Housing Auth., 313 F. Supp. at 6. The district court also held that the amendment, by invidiously discriminating against "low income" persons, embodied a constitutionally suspect classification subject to strict judicial scrutiny. *Id.* at 4.

140. *Id.* at 5 n.2.

141. *See id.* at 5.

majority found that the amendment, unlike the housing legislation in *Hunter*, required community voters to approve *all* low rent housing projects, not just projects intended for minority occupants.[142] The amendment, therefore, did not rely on racial distinctions and could be invalidated only by extending *Hunter*, which the Court refused to do.[143]

2. *Crawford v. Board of Education*

On the same day that the Supreme Court decided *Seattle School District*, the Court also decided *Crawford v. Board of Education*.[144] In *Crawford* the Court held that a state statute adopted by referendum that prohibited state courts from enforcing mandatory busing and assignment plans neither invoked the *Hunter* doctrine[145] nor denied equal protection to minority groups.[146] Two Justices filed a concurring opinion to address the similarities and differences between this case and *Seattle School District*.[147] Justice Marshall, the sole dissenter, felt that *Seattle School District* was substantively similar to this case. Marshall argued that the amendment in *Crawford* embodied a *Hunter*-type suspect racial classification and the State could not demonstrate a compelling reason for the amendment.[148]

Proposition I,[149] an amendment to the due process clause of

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142. James v. Valtierra, 402 U.S. at 141.

143. *Id.* Thus, to apply the *Hunter* doctrine, the challenged state action must embody "distinctions based on race." *Id.* (quoting Hunter v. Erickson, 393 U.S. 385, 391 (1969)).

In dissent, Justice Marshall, with whom Justices Brennan and Blackmun joined, argued that Article XXXIV was invidiously discriminatory because it made distinctions based on poverty—a constitutionally suspect classification. Because the state offered no compelling reason for this classification, the dissent did not need to rely on *Hunter* to find a fourteenth amendment violation. *See* James v. Valtierra, 402 U.S. at 143-45 (Marshall, J., dissenting).

144. 458 U.S. 527 (1982).

145. *Id.* at 537 n.14, 540.

146. *Id.* at 535.

147. Justice Blackmun and Justice Brennan concurred with the Court's opinion. *See id.* at 545-47 (Blackmun, J., concurring).

148. *See id.* at 547-63 (Marshall, J., dissenting).

149. Proposition I added a lengthy proviso to the California Constitution. Following the passage of Proposition I, the constitution provided in pertinent part:

> A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, *no court of this state may impose upon the State of California or any public entity, board, or official any obliga-*

the California Constitution, prevented state courts from ordering pupil assignment unless a federal court could take similar action under the fourteenth amendment to the United States Constitution.[150] The amendment invalidated a subsequent California superior court mandatory busing order.[151] The supporters of the busing

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tion 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 responsbility* upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

. . . .

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

CAL. CONST. art. I, § 7(a) (emphasis added).

150. Proposition I thus limited the power of state courts to order mandatory student assignment. *See supra* notes 9-13 and accompanying text (discussing when federal courts must fashion desegregation remedies and when they may not do so).

151. In 1963, the plaintiffs filed a class action suit on behalf of minority children attending school in the Los Angeles Unified School District in an attempt to convince the Los Angeles school board to adopt a voluntary desegregation program. Crawford v. Board of Educ., 17 Cal. 3d 280, 286-87, 551 P.2d 28, 31, 130 Cal. Rptr. 724, 727 (1976). The plaintiffs' efforts proved futile and the case went to trial in state court. Upon finding de jure segregation in the schools, the trial judge in 1970 ordered the board to implement a reasonably feasible desegregation plan. *Id.* at 287-88, 551 P.2d at 31-32, 130 Cal. Rptr. at 727-28. The school board, on appeal to the Supreme Court of California, asserted that the trial court had no authority to order an integration program because de facto and not de jure segregation existed in the local state schools and the federal constitution does not require a state to remedy de facto segregation. *Id.* at 289-90, 551 P.2d at 33, 130 Cal. Rptr. at 729.

The California Supreme Court held that the state constitution required the school board "to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin." *Id.* at 290, 551 P.2d at 34, 130 Cal. Rptr. at 730. The court then remanded the case to the trial court with instructions to develop an appropriate integration plan. *Id.* at 310, 551 P.2d at 48, 130 Cal. Rptr. at 744.

On remand, a new trial judge emphasized that "nothing short of a plan involving large-scale mandatory reassignment of pupils on a racial and ethnic basis would be satisfactory." Crawford v. Board of Educ., 113 Cal. App. 3d 633, 636, 170 Cal. Rptr. 495, 497 (1980). A plan meeting these criteria and implemented in the Fall of 1978 proved unacceptable to both the school board and the plaintiffs but continued in effect until the parties could agree on a new plan. *Id.* In May 1980 the board applied to the superior court to modify the mandatory busing plan in light of Proposition I, which the electorate had passed in November. *Id.* at 636-37, 170 Cal. Rptr. at 497-98. The superior court denied the board's application because the original trial court had found de jure segregation and, therefore, the proposition's restrictions did not apply. *Id.* at 637, 170 Cal. Rptr. at 498.

The California Court of Appeals reversed the superior court. The court reexamined the original trial court's finding of de jure segregation and concluded that "the racial imbalance and segregation which existed in many schools in the District . . . did not constitute a violation of the equal protection clause of the Fourteenth Amendment . . . in that [they] . . . did not result from Board acts performed with segregative intent and discriminatory pur-

order appealed to the United States Supreme Court alleging that Proposition I violated *Hunter*. The supporters contended that by severely limiting the power of state courts to implement desegregation programs, Proposition I restructured the state judicial system and placed a special burden on minority groups favoring integration.[152]

Because Proposition I did not embody a racial classification[153] and had not been enacted with a discriminatory purpose, the Court found that the proposition did not violate the equal protection clause.[154] The Court relied on the well-established principle that the mere repeal of a state desegregation program that the Constitution did not require does not contravene the fourteenth amendment.[155] The Court indicated that Proposition I was facially neutral because it conferred on both whites and blacks the benefit of neighborhood schooling and treated the races equally.[156] The Court rejected the appellant's *Hunter* argument that Proposition I, though facially neutral, in reality did not simply repeal a state-created right, but rather significantly restructured the state judicial apparatus so that individuals "seeking redress from racial isolation in violation of state law must be satisfied with less than full relief from a state court."[157] The Court asserted that Proposition I was "less" than a repeal of the California Constitution because the California Constitution still required school boards to take reasonable steps to reduce racial imbalance in state schools even absent a violation of the equal protection clause.[158] The Court also stated that the equal protection clause does not require identity of available judicial remedies.[159] Thus, a state may choose to limit busing for desegregation, but also adopt a more comprehensive busing

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pose." *Id.* at 649, 170 Cal. Rptr. at 506. The appeals court also upheld the constitutionality of Proposition I and concluded that it harred the superior court's order to the extent that the order required mandatory student busing and assignment schemes. *See id.* at 649-50, 656-57, 170 Cal. Rptr. at 506, 510.

152. *Crawford*, 458 U.S. at 536.

153. *Id.* at 537.

154. *Id.* at 545.

155. *Id.* at 535, 540-51; *see supra* notes 14-17 and accompanying text.

156. *Crawford*, 458 U.S. at 537.

157. *Id.* at 540 (quoting Transcript of Oral Argument at 6, *Crawford*).

158. *Id.* at 541.

159. *Id.* at 541-42. The Court gave *Hunter* only brief consideration, *id.* at 540-42, and failed specifically to articulate what portion of the *Hunter* doctrine the appellants did not satisfy. The Court offered most of its opinion in sweeping statements without any real explanation. For example, at one point the Court stated: "In this case the elements underlying the holding in *Hunter* are missing." *Id.* at 537 n.14. Later the Court similarly stated: "We do not view *Hunter* as controlling here . . . ." *Id.* at 540.

plan to further other permissible state purposes. The availability of busing, though unequal in fact, is not unequal in law.[160]

The concurrence issued a brief opinion to distinguish *Crawford* from *Seattle School District*.[161] According to Justice Blackmun, Proposition I was unlike the initiative in *Seattle School District* because the proposition did not restructure the political process addressing state-created minority entitlements.[162] To the contrary, the governing system remained unchanged and minority interests confronted no special burdens within the political process. Even though Proposition I removed enforcement authority from state courts, according to Justice Blackmun, the proposition did not work a structural change in the *political* process, but simply repealed the right to invoke a *judicial* busing remedy.[163]

The dissent argued that Proposition I, by prohibiting state courts from ordering mandatory student assignment and busing, was not a neutral repeal of a state constitutional right, but instead substantially reallocated power in a manner that *Hunter* and *Seattle School District* specifically condemned.[164] Justice Marshall reasoned that Proposition I invoked the *Hunter* doctrine because the proposition addressed a peculiarly racial issue. Mandatory busing, asserted Justice Marshall, "inures primarily to the benefit of the minority."[165] Turning again to the *Hunter* requirements that the *Seattle School District* Court had reaffirmed,[166] Justice Marshall determined that Proposition I not only worked a "substantial real-

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160. *See id.* at 540; *see also* Tigner v. Texas, 310 U.S. 141, 147 (1940).

161. *Crawford*, 458 U.S. at 545-47 (Blackmun, J., concurring).

162. *Id.* at 547.

163. *Id.* at 546.

164. *Id.* at 547-63 (Marshall, J., dissenting).

165. *Id.* at 553; *Seattle School District*, 458 U.S. at 472. The concurrence, by applying the *Hunter* doctrine, tacitly acknowledged the racial nature of Proposition I. The majority, however, never conceded that *Hunter* applied to the case. According to the Court, "[t]he benefit [Proposition I] seeks to confer—neighborhood schooling—is made available regardless of race in the discretion of school boards." *Crawford*, 458 U.S. at 537 (footnote omitted).

Justice Marshall responded by stating:

> Despite Proposition I's apparent neutrality, it is "beyond reasonable dispute," and the majority today concedes, that "court-ordered busing in *excess* of that required by the Fourteenth Amendment . . . prompted the initiation and probably the adoption of Proposition I." Because "minorities may consider busing for integration to be 'legislation that is in their interest,'" Proposition I is sufficiently "racial" to invoke the *Hunter* doctrine.

Id. at 554-55 (Marshall, J., dissenting) (citations omitted) (emphasis in original). Thus, Justice Marshall contended that whether the "benefits" of neighborhood schooling were racially neutral was irrelevant. *Id.* at 555 n.2.

166. *See supra* text accompanying notes 93-95.

location of state power,"[167] but also placed "an enormous barrier between minority children and the effective enjoyment of their constitutional rights, a barrier that is not placed in the path of [individuals] who seek to vindicate other rights granted by state law."[168] Thus, according to the dissent, Proposition I, like the initiative in *Seattle School District*, embodied a suspect racial classification justifiable only by a compelling state interest.[169]

Justice Marshall attached little importance to the issues Justice Blackmun raised in his concurring opinion. The concurrence refused to hold Proposition I unconstitutional under *Hunter* and *Seattle School District* because the concurrence felt that the proposition restructured the judicial system, not the government as a whole. Justice Marshall strongly disagreed, declaring that the Court incorrectly distinguished *Hunter* and *Seattle School District* by holding that they concerned the reallocation of legislative power while Proposition I only redistributed "the inherent power of a court to tailor the remedy to the violation."[170] Because the voting electorate in *Hunter* and *Seattle School District* imposed substantial burdens on minority interests by inequitably reallocating power over a racially related issue, any attempt to distinguish the cases, according to Justice Marshall, was "an excessively formal exercise."[171]

V. ANALYSIS

The *Hunter* doctrine is an attractive equal protection theory. Under *Hunter*, facially neutral state action embodies an explicitly racial classification and requires strict judicial scrutiny if: (1) the

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167. *Crawford*, 458 U.S. at 555 (Marshall, J., dissenting). After the adoption of Proposition I, individuals no longer could petition state courts to enforce state constitutional rights that go beyond federal constitutional requirements. The proposition left individuals only the option of petitioning the state legislature or the electorate as a whole. "Clearly, the rules of the game have been significantly changed for those attempting to vindicate this state constitutional right." *Id.* at 555-56 (footnote omitted).

168. *Id.* at 559.

169. Justice Marshall concluded that the State of Washington did not offer a compelling interest. *Id.* at 559 n.6.

170. *Id.* at 560. Justice Marshall believed that the distinction should cut the other way:

> Indeed, Proposition I, by denying full access to the only branch of government that has been willing to address this issue meaningfully, is far worse for those seeking to vindicate the plainly unpopular cause of racial integration in the public schools tban a simple reallocation of an often unavailable and unresponsive legislative process.

Id. at 561.

171. *Id.* at 561. For additional commentary on *Crawford*, see *The Supreme Court, 1981 Term*, *supra* note 124, at 120-30.

state action addresses a procedure or policy that primarily benefits minority groups; (2) the state action redistributes power or decisionmaking authority over the minority interest; and (3) the reallocation places a new and unique procedural burden on racial minorities within the governing process.[172] The unequal and racially discriminatory application of a procedural burden intuitively deserves strict judicial scrutiny. The Supreme Court's interpretation and application of this doctrine in *Hunter* and *Seattle School District*, however, threatens to overextend the scope of the equal protection clause. State action in *Hunter* and *Seattle School District*, according to the Court, impermissibly burdened minority interests by subjecting only race specific programs to mandatory referenda.[173] This holding, despite its intuitive appeal, not only misuses the equal protection clause, but also poses a threat to basic democratic principles.

Hunter and *Seattle School District* are intuitively consistent with established equal protection notions of fairness. The state action in both cases undeniably created two different procedural routes for enacting policies and programs. The challenged actions required proponents of certain policies and programs to get approval from a majority of the voting electorate, but allowed other policies and programs to proceed merely on approval from the local government.[174] Arguably, in both cases the programs that the state singled out and subjected to referendum approval—fair housing in *Hunter* and mandatory busing for integration in *Seattle School District*—primarily benefited racial minorities. Furthermore, the mandatory referendum procedure reduced the chances for racial minority groups to enact legislation in their interest because minority concerns, by their nature, may not be the concerns of a majority of the voting electorate. Thus, state action in *Hunter* and *Seattle School District* intuitively invoked equal protection analysis because racial minorities, and arguably *only* racial minorities, received a unique procedural disadvantage. This equal protection argument, however, must yield to more basic principles of fairness necessary to our democratic system.

The American governmental scheme is founded on and guided by basic principles of fairness, including equality of rights, oppor-

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172. *See supra* notes 93-108 and accompanying text (discussing the *Hunter* requirements).

173. *See Seattle School District*, 458 U.S. at 479-80, 480 n.23; *Hunter*, 393 U.S. at 390-91.

174. *See supra* notes 47-50 & 79-85 and accompanying text.

tunity, and treatment. These principles require a representative democratic system, a system in which each individual may exercise his ruling power by vote. As a result, however, a majority of the electorate has the power to use the ballot box as a vehicle of oppression. Unlimited majoritarian power effectively can deny minority groups the rights, privileges, and opportunities that the Framers sought to protect. The Framers, mindful of the inherent dangers accompanying democratic government, sought to protect minority groups from majoritarian oppression by restricting and qualifying the majority's power. The equal protection clause, by forbidding invidious discrimination and arbitrary unequal treatment, limits the realm of permissible majoritarian action and, thereby, provides a framework for balancing and protecting fundamental democratic principles of fairness.

Like any constitutional doctrine designed to protect individuals against majority oppression, equal protection theory has limitations. Without limitations it could empower any individual voter whose cause is unsuccessful in a referendum to overturn that referendum simply because the majority imposed its will on what is clearly a minority concern. Taken to its logical extreme, then, the equal protection clause could establish a tyranny of the *minority* or, worse, of the *courts*, over the will of the people. Recognizing the need to balance the rights of the majority and minority to achieve the greatest fairness for each individual, the Framers and the courts have limited fourteenth amendment judicial review of majority voter decisions.

In *Hunter* and *Seattle School District* the Court ignored traditional and necessary limits on the reach of the equal protection clause so that the Court could impose its will on the majority. The Court never has held that under the fourteenth amendment a state must provide fair housing programs for its minorities[175] or school busing to ameliorate the effects of de facto school segregation.[176] Although these limits on the fourteenth amendment may seem arbitrary, they are consistent with traditional notions of the

175. The challenged state action in *Hunter* required referendum approval for fair housing programs for minorities. *See supra* notes 47-50 and accompanying text.

176. In *Seattle School District* the policy in question required majority approval for busing designed to desegregate schools that were segregated as a result of natural housing patterns. *See supra* notes 79-85 and accompanying text.

See *supra* notes 9-13 and accompanying text for a discussion of cases expressly holding that the fourteenth amendment does not require the states to correct de facto school segregation.

fair allocation of government power between the majority and the minority, and between the voters and the courts. The primary reason courts have given for not interfering with the states' treatment of de facto segregation—to encourage states to experiment and find the best solution[177]—demonstrates that the courts recognize de facto segregation as an inherently legislative issue. For the same reason, the issue of how best to provide adequate housing for minorities requires the unhampered fact-finding and debate of the legislative arena. In *Hunter* and *Seattle School District* the Court held unconstitutional voter initiatives that, at worst, would have denied the voters' states the power to effect legislation that they had no constitutional duty to effect and, at best, would have opened the legislative process to the whole electorate. Thus, the Court imposed its will on behalf of the minority in areas that the traditional notions of fairness embodied in the equal protection clause properly have left to majority rule.

The Court's rationale in *Hunter* and *Seattle School District*, however, threatens much greater harm to our governmental system than the mere imposition of the courts' will on the majority in cases of fair housing and school busing. The most damaging result of the referenda to minority interests in *Hunter* and *Seattle School District* would have been constitutional. The Court, therefore, had to find that the referendum requirement itself was unconstitutional. By definition, however, a referendum affords all similarly situated people an equal opportunity to vote. The referendum requirements in *Hunter* and *Seattle School District* did not threaten to disenfranchise certain voters by placing special procedural burdens on their right to vote.[178] Thus, only the potential substantive *results* of the referenda displeased the Court. Because the potential results of the referenda were beyond the Court's power to review, the only possible reading of *Hunter* and *Seattle School District* is that they expand the scope of equal protection analysis far beyond the traditional balance of democratic power and individual interests. The logical extension of the *Hunter* and *Seattle School District* rationale is that once a state invokes the basic democratic tool of decisionmaking—the referendum—to resolve an issue that the state has no constitutional duty to resolve, that state ironically has invited the courts, on behalf of minority

177. *See supra* notes 16-17 and accompanying text.

178. See *supra* notes 45 & 83 for the text of the challenged initiatives in *Hunter* and *Seattle School District*, respectively.

voters, to close the ballot box and impose the courts' will on the people.

VI. CONCLUSION

The *Hunter* doctrine does not conform with traditional equal protection theory. The doctrine severely limits a state's ability to repeal existing legislation that affords minority groups greater protection than the fourteenth amendment requires. By concocting a doctrine that subjects such repeals to judicial scrutiny, the Supreme Court unwisely discourages states from experimenting with various programs and policies designed to benefit minority groups. In addition, the Court's rationale 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. Ironically, the Court would shift the decisionmaking power only when the decision is made by referendum—the fundamental tool of democratic government.

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