

“Reverse *Carolene Products*,” the End of the Second Reconstruction, and Other Thoughts on *Schuette v. Coalition to Defend Affirmative Action*

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In 2003, the Supreme Court upheld the constitutionality of affirmative-action preferences in public university admissions in *Grutter v. Bollinger*.¹ Michigan activists opposed to these preferences responded by successfully pursuing a state constitutional amendment via a referendum question known as the Michigan Civil Rights Initiative or Proposition 2.² Proposition 2 banned the use of race- and sex-based preferences by state entities, including universities.

A group of plaintiffs successfully challenged Proposition 2 in federal court. The U.S. Court of Appeals for the Sixth Circuit, sitting en banc, held in an 8–7 ruling that it violated the Fourteenth Amendment’s Equal Protection Clause by selectively altering the political process in ways that disfavored members of minority groups, a transgression of the “political process doctrine.”³ The Supreme Court agreed to hear an appeal.

The case was styled *Schuette v. Coalition to Defend Affirmative Action*, and informed observers expected the Court to overrule the Sixth Circuit.⁴ A majority of the justices have barely tolerated affirmative

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¹ 539 U.S. 306, 325 (2003).

² See Barbara A. Perry, *The Michigan Affirmative Action Cases* 166–70 (2007).

³ *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012) (en banc).

⁴ See, e.g., David E. Bernstein, *Schuette v. Coalition to Defend Affirmative Action and the Failed Attempt to Square a Circle*, 8 NYU J.L. & Lib. 210 (2013); Stuart Benjamin, *Litigation Strategy and Coalition to Defend Affirmative Action v. Regents, The Volokh Conspiracy* (Nov. 15, 2012), <http://www.volokh.com/2012/11/15/litigation-strategy->

action preferences by government entities and only in narrow circumstances.⁵ It seemed unlikely that the Court would ban a state from forbidding what the Court only very grudgingly permitted.⁶ The Court's conservative majority, moreover, would almost certainly agree that holding that a state constitutional amendment banning government race-based classifications violates the federal Equal Protection Clause "would be to torture the English language to the point where constitutional text is absolutely meaningless."⁷

Nevertheless, Court watchers were held in suspense. Would the Court distinguish this case from other political process doctrine cases, thus leaving the underlying doctrine intact, or would it dispense with the doctrine entirely? As expected, the Court overruled the Sixth Circuit. The political process doctrine, however, managed to survive, albeit in diminished form.

Justice Anthony Kennedy, joined by Chief Justice John Roberts and Justice Samuel Alito, wrote a narrow plurality opinion retaining the doctrine but rejecting its application to Proposition 2. Justice Antonin Scalia, concurring for himself and Justice Clarence Thomas, would have eliminated the doctrine. Justice Stephen Breyer, in a lone concurrence, argued that the political process precedents were inapplicable in *Schuette*. Unlike those precedents, *Schuette* only involved transferring political authority from the state university bureaucracy to a referendum, not transferring authority from ordinary legislation to a referendum. Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, wrote a lengthy and heartfelt dissent defending not just the political process doctrine but racial preferences more broadly. Justice Elena Kagan was recused.

and-coalition-to-defend-affirmative-action-v-regents/ ("I will bet anyone . . . that the Supreme Court will reverse the Sixth Circuit in Coalition to Defend Affirmative Action v. Regents."); Melissa Hart, *Schuette* Symposium: Keep it Simple, SCOTUSblog (Sept. 16, 2013), <http://www.scotusblog.com/?p=169437> ("[T]he Supreme Court is not going to affirm the Sixth Circuit's decision.").

⁵ See Bernstein, *supra* note 4, at 215–16.

⁶ *Id.*

⁷ Ilya Shapiro, It's Constitutional for Voters to Stop Their Government from Discriminating Based on Race, Cato at Liberty (Apr. 22, 2014), <http://www.cato.org/blog/its-constitutional-voters-stop-their-government-discriminating-based-race>.

The Plurality Opinion

Justice Kennedy’s plurality opinion tries gamely to make some sense out of the rather incoherent political process doctrine. Kennedy begins with a discussion of *Reitman v. Mulkey*. *Mulkey* involved a California fair housing act that was overturned by a referendum that created a state constitutional amendment banning such laws. The Supreme Court, in a 5–4 decision, held that the referendum was an unconstitutional violation of the Fourteenth Amendment’s Equal Protection Clause because its “design and intent” were to “establish a purported constitutional right to privately discriminate.” The result was to “significantly encourage and involve the State in private racial discriminations.”⁸

Justice Kennedy summarized *Mulkey* without further comment and then proceeded to discuss *Hunter v. Erickson*,⁹ a case “central to the arguments” in *Schuetz*.¹⁰ *Hunter* invalidated a referendum that amended the Akron, Ohio, city charter to overturn a fair housing law and require that any new such law be approved by referendum. *Hunter* held that, by singling out a category of antidiscrimination laws as requiring a special form of approval, the referendum illicitly “places special burdens on racial minorities within the governmental process.”¹¹

According to Justice Kennedy, “*Hunter* rests on the unremarkable principle that the state may not alter the procedures of government to target racial minorities. The facts in *Hunter* established that invidious discrimination would be the necessary result of the procedural restructuring. Thus, in *Mulkey* and *Hunter*, there was a demonstrated injury “on the basis of race that, by reasons of state encouragement of participation, became more aggravated.”¹²

Justice Kennedy hints at, but ultimately shies away from, an entirely plausible rationale for *Mulkey* and *Hunter*. It seems undeniable in retrospect that support for repeal of the fair housing laws in question—though it may have had some basis in libertarian attitudes and purely pragmatic concerns about property values—also had

⁸ *Reitman v. Mulkey*, 387 U.S. 369, 374, 381 (1967).

⁹ 393 U.S. 385 (1969).

¹⁰ *Schuetz v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1631 (2014).

¹¹ *Hunter*, 393 U.S. at 391.

¹² *Schuetz*, 134 S. Ct. at 1632.

a substantial racist component. The Supreme Court in those cases could have but did not explicitly state that the referenda in question were both motivated by discriminatory intent and had discriminatory effects. This combination was later established as unconstitutional, even when applied to a decades-old state constitutional amendment that had mixed motives but included a significant element of racial bias.¹³ If such a constitutional amendment was illicit, surely the amendments at issue in *Mulkey* and *Hunter* were vulnerable to the same reasoning.

This theory would have saved Justice Kennedy from the quagmire of endorsing the implicit rationale in *Mulkey* and *Hunter* that private discrimination, and its toleration by state governments, is a *constitutionally* significant injury. Instead, he endorsed the view that private housing discrimination created “a demonstrated injury on the basis of race” that was aggravated by “procedural restructuring” involved in repealing fair housing legislation via referendum and constitutional amendment.¹⁴

If private housing discrimination creates constitutionally significant injury to racial minorities, it’s hard to explain why the mere failure to pass fair housing legislation wouldn’t also be a constitutional violation. While Kennedy undoubtedly wouldn’t go that far, his implicit endorsement of the notion that basic protections against discrimination are the proper “baseline” for judging referenda that take away such protections is not surprising, because he seemed to endorse just such a notion in *Romer v. Evans*.¹⁵ More surprising is

¹³ In *Hunter v. Underwood*, the Supreme Court invalidated an almost century-old provision of the Mississippi Constitution that banned certain classes of felons from voting after concluding that the provision in question “would not have been adopted by the convention or ratified by the electorate in the absence of the racially discriminatory motivation.” 471 U.S. 222, 231 (1985)

¹⁴ Schuette, 134 S. Ct. at 1632.

¹⁵ 517 U.S. 620, 631 (1996) (“Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State’s view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”). Admittedly, like much else in *Romer*, this isn’t 100 percent clear.

that Chief Justice Roberts and Justice Alito went along in *Schuette*. Perhaps this was the price for pulling together a narrow three-vote plurality opinion that satisfied Roberts’s strong preference for narrowing rather than overturning dubious precedents.

In any event, the plurality endorsed a relatively limited version of the political process doctrine: that a state’s alteration of political processes is unconstitutional when it will lead to government encouragement of or participation in “a demonstrated injury on the basis of race.” The problem is that the Court had previously endorsed a much broader version of the doctrine in the next case Kennedy takes up, *Washington v. Seattle School District No. 1*.¹⁶

In *Seattle School District*, the Seattle school board had adopted a busing program to encourage racial integration of Seattle schools. Opponents passed a state initiative that barred the use of busing for desegregation. The Supreme Court, picking up on language from Justice John Marshall Harlan II’s concurring opinion in *Hunter*, held that the initiative was unconstitutional based on very broad (and dubious) reasoning. The Court held that any time (1) a government policy “inures primarily for the benefit of the minority;” (2) minorities consider the policy to be “in their interest;” and (3) the state changes where “effective decision-making authority over that policy is placed,” then the change must be reviewed under strict scrutiny. Thus, any government action with a “racial focus” that makes it more difficult for racial minorities and for other groups to “achieve legislation that is in their interest” is presumptively unconstitutional.¹⁷

Despite Justice Sotomayor’s valiant attempt to rescue this line of reasoning in her dissent, it is entirely incoherent and unworkable in practice, as both Justice Kennedy and Justice Scalia, concurring in *Schuette*, point out. How does a court determine whether facially neutral legislation has a “racial focus”? Almost any significant piece of legislation will have a disparate negative or positive impact on racial minority groups and thus could be cast in racial terms. As

Does Justice Kennedy adopt that baseline because of how important such laws are, or because “everyone else” has them already, but if no one had them it wouldn’t be a big deal? Is he referring only to the fact that the amendment in *Romer* barred government from banning state-action discrimination against gays, or is he also referring to private discrimination? His opinion in *Schuette* supports the broader interpretations.

¹⁶ 458 U.S. 457 (1982).

¹⁷ *Id.* at 470–74.

Kennedy elaborates, “tax policy, housing subsidies, wage regulations, and even the naming of public schools, highways, and monuments are just a few examples of what could become a list of subjects that some organizations could insist should be beyond the power of voters to decide, or beyond the power of the legislature to decide when enacting limits on the power of local authorities or other governmental entities to address certain subjects.”¹⁸

Other problems with the *Seattle School District* formulation abound. What does it mean to say that minorities consider a policy to be in their interest? An overwhelming consensus of members of all minority groups? Some smaller majority of all minority groups? Does “minority groups” mean all groups that have been deemed eligible for protection as racial minorities under the Equal Protection Clause, or is it limited only to “people of color,” or only to so-called underrepresented minorities? Even if those issues could be resolved, what if there are disagreements among different minority groups? Do we expect African Americans and Hispanics to always perceive their interests the same way? How about Arabs and Jews, who have been recognized as “races” for the purposes of the 1866 Civil Rights Act and likely also receive protection as “racial” minorities under the Fourteenth Amendment?¹⁹ What if there is disagreement within a minority group? What if most Cuban Americans think a law is not in their interest, but most Mexican Americans think it is? Will the Hmong, who have quite poor socioeconomic indicators, have the same interests as much wealthier and better-educated Japanese Americans? As Justice Kennedy notes, the Supreme Court since *Seattle School District* has consistently (and properly) rejected the assumption that “members of the same racial group . . . [t]hink alike, share the same political interest, and will prefer the same candidate at the polls.”²⁰

The only plausible answer to these questions is that the views of members of the minority groups themselves must be largely irrelevant to the inquiry. Instead, a five-justice majority of the Supreme Court itself gets to decide what minority groups do (or at least *should*)

¹⁸ Schuette, 134 S. Ct. at 1635.

¹⁹ *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987).

²⁰ Schuette, 134 S. Ct. at 1634 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1983)).

think is in their interest. As Justice Kennedy concludes, if the Court were to attempt this inquiry, it would inevitably rely on demeaning stereotypes, classifications of questionable constitutionality on their own terms.²¹

Indeed, obvious difficulties with such a venture are revealed in *Schuette* itself. Justice Sotomayor argues that affirmative-action preferences are clearly in the interest of the minority groups that receive preferences,²² while Justices Scalia (joined by the Court’s only African American justice) and Chief Justice Roberts take a strong opposing view.²³

Instead, Justice Kennedy cautions that *Seattle School District* must be “understood as a case in which the state actions in question . . . have the serious risk, if not purpose of causing specific injuries on account of race.” *Seattle School District*, he says, “rests on the unremarkable principle that the state may not alter the procedures of government to target racial minorities. The facts in *Seattle* established that invidious discrimination would be the necessary result of the procedural restructuring.”²⁴

Kennedy’s narrower rationale would indeed explain the *Seattle School District* result. However, as both Justices Scalia and Sotomayor object, the *Seattle School District* opinion betrays no indication that the Court saw the case as involving the narrow issue of targeting minorities through political restructuring, rather than as involving the invalidation of legislation that inures to the benefit of minorities via political restructuring. Kennedy should have therefore overturned *Seattle School District*, while retaining *Mulkey* and *Hunter*.

Instead, he reinterprets *Seattle School District* in two significant ways. First, in an extremely dubious bit of revisionism, he suggests that while there was no finding of de jure segregation in Seattle, “it appears as though school segregation in the district in the 1940’s and 1950’s may have been the partial result of school board policies.”²⁵ Oddly enough, he cites Justice Breyer’s dissenting opinion in the

²¹ *Id.* at 1635.

²² *Id.* at 1660 (Sotomayor, J., dissenting).

²³ *Id.* at 1638–39 (Roberts, C.J., concurring); *id.* at 1644 n.6 (Scalia, J., concurring).

²⁴ *Id.* at 1633.

²⁵ *Id.* at 1634.

Parents Involved case for that proposition.²⁶ That's odd both because Justice Kennedy and the other justices in the *Schuette* plurality were in the majority in that case, and because if there in fact had been significant evidence of de jure segregation in Seattle, the majority opinion should have addressed it.

Kennedy could have more plausibly simply suggested that the Court decided the case in 1982 with the background knowledge that segregation patterns in public schools in any major city in the United States were unlikely to be as yet largely free from the implicit influence of state action that encouraged residential and therefore school segregation nationwide. Such government action included federal mortgage policies that "redlined" black neighborhoods, the siting of roads and highways to separate black and white neighborhoods, zoning policies, and so on.

He then could have raised his second reinterpretation of *Seattle School District*, one that rests on firmer ground. Kennedy notes that both sides in *Seattle School District* accepted the notion, since called into question by *Parents Involved*, that race-conscious student assignments for the purpose of achieving integration were legally permissible, even in the absence of a finding of prior segregation by law. In other words, *Seattle School District* could be seen as the Supreme Court's rejecting a state's attempt to skew the political process to prevent a subdivision from addressing "the very racial injury in which the State was complicit"—that is, school segregation that resulted from housing segregation created by a combination of state and private action.²⁷

One might accuse the *Schuette* plurality of hypocrisy, as arguably the Court's ruling in *Parents Involved* also prevented Seattle from addressing the continuing pattern of housing segregation that led to school segregation, but by order of the Supreme Court rather than via referendum. Kennedy himself, however, recognized in his concurrence in *Parents Involved* that long-standing patterns of segregation could be overcome through affirmative government action intended to destabilize those patterns, so long as the government didn't

²⁶ *Id.* at 1633 (citing *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 807–08 (2007) (Breyer, J., dissenting)).

²⁷ *Id.* at 1633.

classify individuals by race.²⁸ That would distinguish, for example, a school system that lawfully created a magnet school to encourage integration from one that unlawfully assigned students by race. That doesn't quite explain Roberts's and Alito's willingness to join Kennedy's reasoning in *Schuette*. Perhaps it means that they agree with his concurrence in *Parents Involved* even though they did join it; perhaps it means that they believe that by 2007 school segregation patterns could no longer be fairly traced to discriminatory government policies abandoned decades earlier; or perhaps they have no good rationale to explain the possible discrepancy in their opinions.

In any event, given the reasoning noted above, the outcome of *Schuette* was dependent on whether the denial of affirmative action preferences in Michigan universities amounted to the “infliction of a specific injury of the kind at issue in *Mulkey* and *Hunter* and in the history of the Seattle schools.”²⁹ Kennedy concluded that “there is no precedent for extending these cases to restrict the right of Michigan voters to determine that race-based preferences granted by Michigan governmental entities should be ended.”³⁰ Later in the opinion, he added that, unlike *Mulkey* and *Hunter*, the political restriction at issue in *Schuette* was not “designed to be used, or is likely to be used, to encourage infliction of injury by reason of race.”³¹

This leaves Justice Kennedy's opinion vulnerable to the following criticism: it makes little sense to hold that (1) a referendum invalidating a ban on *private* housing discrimination as in *Mulkey* and *Hunter* inflicts a constitutionally cognizable injury on minorities even though private action is not covered by the Equal Protection Clause, but (2) when a referendum invalidates a policy that allowed *state* universities to adopt admissions policies that mitigate the vast “underrepresentation” of black and Hispanic students in *public* colleges, no constitutionally cognizable injury can be recognized.

Justice Kennedy counters that racially neutral admissions standards that happen to disfavor minority applicants do not inflict a racial injury as housing discrimination does but simply fail to grant

²⁸ *Parents Involved*, 551 U.S. at 788–89 (Kennedy, J., concurring).

²⁹ *Schuette*, 134 S. Ct. at 1636.

³⁰ *Id.*

³¹ *Id.* at 1638.

“favored status to persons in some racial categories and not others.”³² This characterization, however, is exactly what’s disputed by many advocates of affirmative-action preferences in admissions. They see preferences as partially leveling a tilted playing field. So it turns out that a case that was not supposed to be about the constitutionality or desirability of affirmative action, but was only supposed to be about the “political process doctrine,” turned on the justices’ attitudes regarding affirmative action after all.³³

Alternative Paths Not Taken by the Plurality

All of this makes one wonder why Justice Kennedy didn’t take one of several easier and more defensible “outs.” First, as noted previously, the plurality could have simply overruled *Seattle School District* while leaving *Mulkey* and *Hunter* in place. That would have limited the political process doctrine to situations in which a referendum creates a constitutional amendment invalidating an antidiscrimination law.

Second, Kennedy could have distinguished *Mulkey*, *Hunter*, and *Seattle School District* from *Schuetz*. Each of the former three cases involved legislation—fair housing laws and busing for racial integration—that was intended to redress societal discrimination. By contrast, under existing Supreme Court precedent, government affirmative action preferences, in universities and elsewhere, are *illegal* if undertaken to redress societal discrimination.³⁴ Moreover, *Bakke* and *Grutter*, the cases allowing for affirmative action preferences in higher education, deferred not to affirmative-action legislation but to the educational judgment of university officials who concluded that ethnic diversity in their universities was essential for the educational process. *Mulkey*, *Hunter*, and *Seattle School District* are therefore distinguishable from *Schuetz* on the theory that overturning a hard-won political victory for minority rights via a referendum is a “racial

³² *Id.*

³³ Richard Lempert, *The Schuetz Decision: The Supreme Court Rules on Affirmative Action*, FixGov, April 25, 2014, <http://www.brookings.edu/blogs/fixgov/posts/2014/04/25-schuetz-affirmative-action-supreme-court-comment-lempert> (“The dirty secret of the jurisprudence of race is, as *Schuetz* suggests, that it is not so much a principled jurisprudence as it is an arena where most judges feel free to enact their personal values into law.”)

³⁴ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989).

injury,” while merely overturning what educational bureaucrats see as sound racial policy is not.

Justice Sotomayor’s Dissent

In her dissent, Justice Sotomayor argues that even if university preferences are constitutionally permitted only for diversity purposes, minority students are the primary beneficiaries of such policies. Therefore, making it more difficult for them to pursue preferences creates a racial injury. Yet the Supreme Court’s diversity rationale arguably suggests that the main benefit of achieving a critical mass of minority students through affirmative action preferences is that it improves the education of the non-minority students.³⁵ If white students benefit from “diversity”-based preferences at least as much as minority students, then there is no particular group being disadvantaged by Proposition 2’s ban on such preferences. In other words, Proposition 2 can’t be unconstitutional because it makes it more difficult for minority students to lobby for benefits for themselves, given that, as Justice Scalia points out, if a public university defended a racial preference policy “on the ground that it was *designed* to benefit primarily minorities . . . *we would hold the policy unconstitutional.*”³⁶

Nor is Sotomayor’s claim persuasive that Proposition 2 is unconstitutional because it allows white alumni to lobby for alumni preferences through the normal legislative process but prohibits minority students from doing so. The obvious doctrinal objection is that racial classifications are subject to strict scrutiny, but alumni classifications,

³⁵ Justice Sandra Day O’Connor’s opinion in *Grutter* hedges a bit but ultimately rests her opinion on the fact that a “critical mass of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.” *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). Not surprisingly, the diversity rationale has come under attack from those who advocate affirmative action preferences for “social justice” reasons. See, e.g., Richard T. Ford, *Racial Culture* 59, 64 (2005); Derrick Bell, *Diversity’s Distractions*, 103 *Colum. L. Rev.* 1622, 1622 (2003); Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 *Mich. L. Rev.* 1222, 1224–25 (1991); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 *N.Y.U. L. Rev.* 425 (2014); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 *Colum. L. Rev.* 928, 953 (2001).

³⁶ Schuette, 134 S. Ct. at 1640 (emphasis in original).

like the vast majority of classifications, are not.³⁷ Additionally, states can create policies that do not involve classifying individuals by race but encourage more “minority” admissions, such as admitting all students in the top X percent of their high school class.³⁸

Sotomayor also seems to mangle equal protection doctrine. Contrary to Justice Scalia’s claim that the political process doctrine runs counter to the accepted notion that the right not to be discriminated against is a personal, not a group right, Sotomayor writes that “there can be no equal protection violation unless the injured individual is a member of a protected group or a class of individuals.” Conceptually, there is no reason that an equal protection violation can’t involve a class of one. In fact, the Supreme Court has held several times that individuals not associated with a class can sue for equal protection violations.³⁹

Perhaps the most notable thing about Sotomayor’s opinion, however, is that, as Walter Olson puts it, she “gerrymanders the word race itself in a way convenient to her purposes, using it to include Hispanics (who, as official forms remind us, ‘can be of any race’), while breathing not one word about Asian-Americans.”⁴⁰ She treats it as self-evident that there are two and only two “racial minority” groups in the United States, African

³⁷ See Roger Pilon, Reflections on Schuette v. Coalition to Defend Affirmative Action, Cato at Liberty, Apr. 23, 2014, <http://www.cato.org/blog/reflections-schuette-v-coalition-defend-affirmative-action>. I explain why even “benign” racial classifications may warrant stricter scrutiny than non-racial classifications in Bernstein, *supra* note 4.

³⁸ Some argue that such policies are themselves unconstitutional violations of the Equal Protection Clause. I disagree, but even if they are, it’s not because they involve classifying individuals by race, but because they have discriminatory intent and discriminatory effects.

³⁹ *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441 (1923); *Allegheny Pittsburgh Coal Co. v. Comm. of Webster Cty.*, 488 U.S. 336 (1989); *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). In fairness, this part of her opinion is not exactly a model of clarity, and Sotomayor may have meant that there can be no equal protection violation based on race classification unless the individual discriminated against is a member of a classified group.

⁴⁰ Walter Olson, Further Thoughts on Schuette v. Coalition, Cato at Liberty, Apr. 24, 2014, <http://www.cato.org/blog/further-thoughts-schuette-v-coalition>; see also Ilya Somin, Asian-Americans, Affirmative Action, and the “Political Restructuring” Doctrine: Does the Doctrine Work When There Are Minority Groups on Both Sides of the Issue?, Volokh Conspiracy, Apr. 22, 2014, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/22/asian-americans-affirmative-action-and-the-political-restructuring-doctrine-does-the-doctrine-work-when-there-are-minority-groups-on-both-sides-of-the-issue>.

Americans and Hispanics. It’s bizarre to treat Hispanics but not Asians as a racial group. Hispanic Americans (like Americans in general) can be descended from Europeans, indigenous people, Africans, Asians, or any combination of those. The idea that a white American whose father is of German descent and whose mother is a Chilean immigrant of Italian ancestry is in the same “racial” category as a Peruvian immigrant of pure Incan descent and an Afro-Costa Rican immigrant should offend the common sense of anyone who takes a moment to think about it. Moreover, 36 percent of Hispanics consider themselves to be white, and only about a quarter choose to identify themselves as “Hispanics” or “Latinos,” preferring instead an identity based on their country of origin.⁴¹ While there are many white Hispanics—not just Hispanics with only partial Hispanic ancestry, but descendants of Spanish and Portuguese immigrants, descendants of Europeans who settled in Latin America, Sephardic Jews, and so on—there are by definition no “white Asians.”

Justice Sotomayor’s opinion nevertheless ignores Asian Americans entirely for the obvious reason that their success in winning admission to universities undermines the statistics she cites that show a sharp decline in “minority” (not including Asian) enrollment in states that ban racial preferences.⁴² Indeed, racial preferences in elite university admissions typically operate to the detriment of applicants of Asian descent⁴³ because they are “overrepresented” at selective universities. So, Asian Americans might well want to lobby for a state constitutional amendment like Proposition 2; indeed, Democratic Asian-American

⁴¹ Paul Taylor et al., *When Labels Don’t Fit: Hispanics and Their Views of Identity*, Pew Research Ctr., Jun. 16, 2014, <http://www.pewhispanic.org/2012/04/04/when-labels-dont-fit-hispanics-and-their-views-of-identity>.

⁴² Schuette, 134 S. Ct. at 1678–80 (Sotomayor, J., dissenting).

⁴³ Thomas J. Espenshade & Alexandria Walton Radford, *Evaluative Judgments vs. Bias in College Admissions*, *Forbes.com*, Aug. 12 2010, <http://www.forbes.com/2010/08/01/college-admissions-race-politics-opinions-best-colleges-10-espenshade-radford.html>; Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 *Soc. Sci. Q.* 293, 293–99 (2005); David R. Colburn et. al., *Admissions and Public Higher Education in California, Texas, and Florida: The Post-Affirmative Action Era*, 4 *InterActions: UCLA J. Educ. & Info. Stud.* 4 (2008), available at <http://escholarship.org/uc/item/35n755gf>; Daniel E. Slotnick, *Do Asian-Americans Face Bias in Admissions at Elite Colleges?*, *N.Y. Times The Choice Blog*, Feb. 8, 2012, http://thechoice.blogs.nytimes.com/2012/02/08/do-asian-americans-face-bias-in-admissions-at-elite-colleges/?_r=0 (citing a study showing that holding other variables equal, Asian American applicants need SAT scores 140 points higher than whites to be admitted to elite colleges).

legislators in California, facing pressure from Chinese-American constituents, recently stifled an attempt to overturn California's state constitutional ban on affirmative action preferences.⁴⁴

If Justice Sotomayor's opinion had been the majority, those who oppose alumni preferences would be allowed to pass a constitutional amendment by referendum banning such preferences, but Asian Americans would be prohibited from seeking a constitutional amendment banning preferences that they oppose. That means that by Sotomayor's own reasoning, if her opinion had attracted five votes it would have deprived Asian Americans of their constitutional rights under political process theory.

Justice Sotomayor's implicit view of race in *Schuette*—that it includes a group with a common linguistic but not racial heritage (Hispanics) but not Asians—also undermines the following widely-quoted language from her dissent:

And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, "No, where are you really from?", regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: "I do not belong here."⁴⁵

"Race matters" is an odd rallying cry from a justice who for all intents and purposes treats Asian Americans as indistinct from whites. Nor does she provide a rationale for limiting the scope of her concerns for minority groups to African Americans and Hispanics. Are Hispanics and African Americans more likely to be asked where they are from or spoken to in a foreign language than are Asians? Do they

⁴⁴ Frank Stoltze, *Friction Lingers among Asian-Americans over Affirmative Action Debate*, KPCC, Apr. 17, 2014, <http://www.scpr.org/blogs/politics/2014/04/17/16398/friction-lingers-among-asian-americans-over-affirm>.

⁴⁵ *Schuette*, 134 S. Ct. at 1676.

suffer more slights, snickers, and silent judgments than Indian Sikhs wearing traditional headdresses, or, for that matter, Hasidic Jewish men with side-curls and fur hats, Mennonites, and Amish in traditional dress, or Arab women in hijabs? Unlike fair-skinned Hispanics who blend in with the general “white” population, Hasidim, Mennonites, and Arab Muslims are not eligible for affirmative action preferences—nor, in university admissions, are Sikhs or other Asians.⁴⁶

In fact, judging from her opinion, the breadth of Justice Sotomayor’s “race matters” concern is not some discernibly logical or empirical theory about for whom “race” or, for that matter, “different appearance from the mainstream” matters. Rather, being a “racial minority” is implicitly defined by an arbitrary combination of artificial census categories, university affirmative action admissions policies, and a sense of which minority groups, broadly construed, are not “making it.” The “making it” factor is itself highly problematic, given that some subgroups of the Asian category, not to mention some whites (as in Appalachia), have much worse socioeconomic indicators than some subgroups of Hispanics.

Justice Scalia’s Concurrence

Justice Scalia, concurring for himself and Justice Thomas, would have dispensed with the political process doctrine entirely as “[p]atently atextual, unadministrable, and contrary to our traditional equal-protection jurisprudence.”⁴⁷ According to Scalia, an equal-protection challenge to a facially neutral law can succeed only if the plaintiff proves “[discriminatory] intent and causation.”⁴⁸ *Hunter* should be overruled because the “Court neither found [that the referendum had targeted minorities] nor considered it relevant, bypassing the question of intent entirely, satisfied that its newly minted political-process theory sufficed to invalidate the charter

⁴⁶ While Asians are most likely to suffer discrimination in university admissions, the “geographic preferences” of elite universities also serve to ensure that universities don’t have “too many” Jews, Jews being concentrated in a few major metropolitan areas. Not that long ago, an acquaintance who is a bigwig in a very respected university’s alumni association was shocked when the admissions director told him that they were cutting down on admissions of Jews from the New York area because they had “too many” of them.

⁴⁷ Schuette, 134 S. Ct. at 1643.

⁴⁸ *Id.*

amendment.”⁴⁹ *Seattle School District*, Scalia argues, suffers from the same flaw, strongly rejecting Kennedy’s claim that the Court’s opinion was based on an implicit finding that school segregation in *Seattle School District* was in part a product of state action.

Justice Scalia lost on the broad issue, of course, so the political question doctrine remains viable but diminished. But is the doctrine defensible? In addition to the problems with the doctrine mentioned previously, minority advocates of fair housing policy, busing, and affirmative action have the same access to the referendum process to constitutionally require these policies as their opponents have to ban them, making “identification of a ‘neutral’ political structure . . . an artifact of the level of generality at which the equality principle was applied.”⁵⁰

A Limited Defense of the Political Process Doctrine: Reverse *Carolene Products* and the Second Reconstruction

One possible defense is that the doctrine serves as a sort-of reverse *Carolene Products*. Famous Footnote Four of that 1938 case suggested that the Court should engage in strict review of legislation that is the product of “prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”⁵¹ *Carolene Products*’s focus on judicial protection of minorities from legislation was quite logical in 1938, when African Americans were largely concentrated in the American South and were largely disenfranchised there, Asian immigrants were not permitted to become citizens, and other groups faced persistent gerrymandering to limit their political influence.

Carolene Products lost some of its salience as the African American population spread beyond the South, and even more so once the 1965 Voting Rights Act guaranteed minority voting rights. But African Americans still faced significant political disadvantages because they were largely isolated from the rest of the country via housing and school segregation, low rates of intermarriage, and the like. A

⁴⁹ *Id.* at 1642.

⁵⁰ Girardeau Spann, Racial Supremacy, SCOTUSblog, Sept. 11, 2013, <http://www.scotusblog.com/2013/09/schuetter-symposium-racial-supremacy/>.

⁵¹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

majority—even a non-prejudiced majority—will not take an isolated minority’s interests fully into account in the legislative process. Out of sight, as they say, is out of mind.

That disadvantage, however, is balanced out by the fact that an isolated minority group has significant advantages in organizing around issues of special interest to that group. Modern public-choice theory teaches us that, so long as they are able to participate fully in the political process, “discrete and insular minorities” often have a significant political advantage compared to a dispersed and disorganized majority, especially when it comes to issues of particular interest to the minority group. Once granted the right to vote in an electoral system that rewards concentrated interest groups, African Americans—like other organized interest groups from the Sugar Lobby to AIPAC to military veterans to realtors—could then use those advantages to secure legislation in their interest.

That theory perhaps explains the advent of the political process doctrine in *Hunter* in 1968: the Court was supplementing *Carolene Products*, which provided judicial protection from discriminatory legislation, with reverse *Carolene Products*, which protected the important right of African Americans to use their political muscle as other interest groups do, thereby to some degree balancing out their remaining disadvantages in the political system. African Americans and their political allies used their political muscle to achieve a fair housing law in Akron. The referendum invalidating this victory and making it more difficult to achieve future victories deprived them of the fruit of their electoral heft.

One could have argued that this is simply the way the political ball bounces—if dispersed majorities commonly passed referenda overturning ordinary legislation supported by concentrated interest groups. But such referenda were (and are) in fact quite rare. It’s therefore not terribly surprising that the Supreme Court saw the Akron referendum as imposing a racial injury. It denied African Americans not only the opportunity to procure favorable legislation but also denied the ability to counter-balance the disadvantages they faced from prejudice or indifference in the political sphere with the advantages of being an organizable minority group with distinct interests and priorities.⁵²

⁵² For conflicting views of the extent to which referenda trample on minority rights, see Barbara S. Gamble, Putting Civil Rights to a Popular Vote, 41 Am. J. Pol. Sci. 245

“Reverse *Carolene Products*” would also explain why *Seattle School District* came out the way it did, invalidating a busing policy implemented by elected officials, while in the same term the Court upheld a California referendum that overturned the use of busing as a judicially ordered remedy for desegregation.⁵³ The Court in the latter case did not feel the need to protect a policy that was not the product of the legislative process, but of judicial fiat.

Of course, as noted previously, the *Mulkey* and *Hunter* Courts could have simply ruled that the referenda in question had discriminatory intent and discriminatory effects. From approximately 1948 to 1972, however, and to some extent through 1982, the Supreme Court openly allied with the civil rights movement but tried to do so without either overtly accusing anti-civil rights forces of racism or massively disrupting the federal-state balance.

Even in its much-celebrated and path-breaking *Brown v. Board of Education* opinion, the Court took a conciliatory and subtle path, suggesting not that school segregation was a product of racism, but rather that it resulted from a lack of understanding of the negative effects of segregation on black students.⁵⁴ Relatedly, it’s widely recognized that the Court’s sudden willingness to incorporate the criminal procedure amendments via the Fourteenth Amendment was less a constitutional epiphany and more an attempt to provide procedural tools to help prevent predominately poor, black defendants from being railroaded. What the Court did not do was declare the entire criminal justice system racist and therefore explicitly raise its level of scrutiny for convictions of African Americans suspects, even in cases that arose in jurisdictions widely known for their racism.⁵⁵

Other examples of the Court’s manipulating doctrine to aid the cause of civil rights while not stepping on too many toes abound. In *Shelley v. Kraemer*, the Court could have announced that state courts could not be relied upon to fairly apply the rule against restrictions on alienability, and that the Court could not overlook the fact that

(1997) (a lot); Zoltan L. Hajnal et al., Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections, 64 J. Pol. 154 (2002) (not that much).

⁵³ *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982).

⁵⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁵⁵ The late William Stuntz criticized the Court for not confronting racism in the criminal justice system more directly. William J. Stuntz, *The Collapse of American Criminal Justice* (2011).

restrictive covenants were part of a broader system of apartheid widely participated in by American governments.⁵⁶ After hinting at those rationales, the Court instead concluded that somehow the mere enforcement of a restrictive covenant was discriminatory state action, a view of discriminatory state action it has refused to adopt in any other context.

Similarly, the Court responded to Mississippi’s persecution of civil rights leaders not with a blanket refusal to uphold prosecutions emanating from Mississippi, but with the expressive association doctrine that provided a “neutral” (nonracial) means to prevent successful prosecutions.⁵⁷ When Mississippi went after national media outlets reporting on the civil rights movement via common-law tort lawsuits, the Court, rather than calling Mississippi out on its racism, instead created the most liberal libel law in the common-law world in *New York Times v. Sullivan*.⁵⁸ And when Virginia tried to shut down civil rights litigation by passing a statute codifying common-law bans on barratry, champerty, and maintenance, the Supreme Court didn’t hold that the statute was racially discriminatory. Instead, it held that those practices are protected by the First Amendment, at least when engaged in by “public interest” attorneys seeking to change government policy.⁵⁹

In 1982, the same year as *Seattle School District*, the Court expanded the scope of the First Amendment to protect NAACP Mississippi field director Charles Evers from a civil lawsuit arising from a boycott of white-owned businesses he organized in 1968 (the wheels of justice in Mississippi apparently turn very slowly). The Court held that peaceful activity related to the boycott was protected from civil lawsuit by the First Amendment. The Court also came to the counterintuitive conclusion that “peaceful conduct “ included the following threat by Evers: “If we catch any of you going into these racist stores, we’re going to break your damn neck.”⁶⁰

The Court also held that the 1868 Civil Rights Act, in providing “all persons with the same right to make and enforce contracts as

⁵⁶ 334 U.S. 1 (1948).

⁵⁷ NAACP v. Alabama, 357 U.S. 449 (1958).

⁵⁸ 376 U.S. 254 (1964).

⁵⁹ NAACP v. Button, 371 U.S. 415 (1963).

⁶⁰ NAACP v. Claiborne Hardware Co., 458 U.S. 886, 902 (1982).

white persons,” actually provided a private right of action against private discrimination.⁶¹ This nontextual interpretation of the act had escaped lawyers and civil rights activists for a century, including during debates over the 1964 Civil Rights Act.

More examples could be provided from cases involving the scope of federal jurisdiction, the availability of private rights of action against the government, and other issues. For approximately 34 years, the Supreme Court saw as part of its mission an alliance with the civil rights movement in general—and more specifically with the aspirations of African Americans for full and equal citizenship. But the Court did so not with fiery denunciations of southern or general American racism and by threatening to upend the entire system to combat that racism, but by inventing novel doctrines that allowed the movement to succeed incrementally. The advent of the political process doctrine should be understood in that context.

Whether and to what extent the Court’s tinkering with doctrine to serve civil rights goals was justified, and whether, for that matter, it didn’t go far enough and continue for a long enough time, as Justice Sotomayor seems to believe, are valuable questions beyond the scope of this article. For current purposes, (1) it’s perfectly understandable that the Court did what it did given that justice and history were clearly on the side of the civil rights movement, and that a more direct confrontation with racist state and local governments could have led to a much greater political backlash against the Court; and (2) any notion that the Court should revive its policy to help eliminate vestiges of America’s racist past would be far more defensible if the scope of concern were limited to American descendants of slaves and American Indians who live on reservations. These two groups have suffered the most persecution by and isolation from the American mainstream. Unlike groups dominated by post-1965 immigrants and their descendants, descendants of slaves and Indians on reservations have faced both wide-scale discrimination by government and private entities largely unmitigated by civil rights laws. Modern equal-protection doctrine, however, suggests an absolute symmetry among all “racial” groups under the Equal Protection Clause, and

⁶¹ See *Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

any attempt to create a rule applicable only to one or two groups would be swimming upstream against waves of precedent.

In any event, for several decades, the Court has been controlled by a majority that implicitly believes that the so-called Second Reconstruction ended with the passage of broad-based civil rights legislation and the increased acceptance and assimilation of minority groups. This majority has not been inclined to tinker with doctrine to favor minority groups, and indeed has, to the chagrin of its liberal critics, stood largely in opposition to the policies favored by most organized civil rights groups.

But the Rehnquist and Roberts Courts, whether from inertia or otherwise, have mostly retained the doctrines modified and invented by the Court in alliance with the civil rights movement, even when the underlying racial context has receded. *New York Times v. Sullivan* seems secure, as does the incorporation of the criminal procedure amendments and *NAACP v. Button*. *NAACP v. Claiborne Hardware* seems secure as well, though it arguably gives excessive protection to threatening speech. A broad version of the Court’s expansion of the 1868 Civil Rights Act was endorsed and codified by Congress in the 1991 Civil Rights Act.⁶² The expressive association doctrine has held up for over 50 years, though it’s in danger now that it’s being used primarily to provide constitutional protection for private discrimination against homosexuals, and is therefore unpopular among liberals. *Shelley v. Kraemer* has held up perhaps the least well, as it’s virtually a dead letter outside the defunct sphere of restrictive covenants.

The Future of the Political Process Doctrine

The political process doctrine made a certain amount of prudential sense when created in the late 1960s for the reasons discussed previously: the Court no doubt correctly believed that the repeal of fair housing legislation was motivated in substantial part by racism—though in keeping with its general *modus operandi*, it preferred to create new doctrine rather than take the more confrontational path of overtly condemning Akron’s electorate for intentional racism. Moreover, although the Court didn’t articulate it, the justices likely thought that the constitutional-amendment-by-referendum process

⁶² Civil Rights Act of 1991, 42 U.S.C. § 1981.

was grossly unfair to blacks for “reverse *Carolene Products*” reasons, preventing them from counteracting the political disadvantages of an isolated and unpopular minority with the advantages of a concentrated interest group.

The political process doctrine became entirely unstable once the issue of “what’s good for African Americans” and “what’s motivated by racism” became less clear. This had occurred both because of a huge decline since the 1960s in racist attitudes by whites and because the issues have changed from rectifying overt racial discrimination to more complex social policies. For example, in *Seattle School District*, the Court seemed convinced that busing for the purpose of racial integration was obviously in African Americans’ interest. A substantial minority of blacks opposed busing, however, and the resulting white flight and turn of many white Democrats against urban liberalism⁶³ likely left African Americans worse off than if busing had never been implemented.

Other policies, like school vouchers, tend to be opposed by black political elites while being embraced by a majority of black voters. Even with regard to affirmative action, not only is there debate over whether it serves African-American interests, but there are those, black and otherwise (including Justice Clarence Thomas), who oppose it precisely because they think it does grave harm.⁶⁴ And with African Americans far less isolated in American life than they were in 1968 or even 1982 (consider, for example, rising rates of intermarriage⁶⁵), the reverse *Carolene Products* rationale is less compelling now.

If the political process doctrine is unstable with regard to African Americans, for reasons discussed previously it becomes positively

⁶³ See Jonathan Reider, *Canarsie: The Jews and Italians of Brooklyn against Liberalism* (1985).

⁶⁴ See Richard H. Sander & Stuart Taylor, Jr., *Mismatch: How Affirmative Action Hurts Students It’s Intended to Help, & Why Universities Won’t Admit It* (2012).

⁶⁵ Since 1980, the percentage of African-American newlyweds marrying someone of a different race has more than tripled, to 17 percent. Carol Morrello, Intermarriage rates soar as stereotypes fall, *Wash. Post*, Feb. 16, 2012, http://www.washingtonpost.com/local/intermarriage-rates-soar-as-stereotypes-fall/2012/02/15/gIQAvyByGR_story.html. 87 percent of Americans now approve of black-white marriage, compared with 4 percent (not a misprint) in 1958. Frank Newport, In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958, *Gallup*, July 25, 2013, <http://www.gallup.com/poll/163697/approve-marriage-blacks-whites.aspx>.

incoherent and unworkable once one considers the diversity both among and within other “minority” groups.

So the Supreme Court is left with four options when it confronts the political process doctrine in the future. Option one is to either overrule *Seattle School District* or ignore it as an anomaly. Instead, the Court would limit the political process doctrine to the facts analogous to those of *Hunter*: a minority group and its allies manage to get a law or law passed protecting them from discrimination, but the majority overturns those laws via a constitutional amendment that changes the political process to their disadvantage. “Reverse *Carolene Products*” would be a plausible justification for this rule, though this rationale has become more problematic as racial isolation diminishes. This justification for *Hunter* would suit Justice Kennedy in particular because it provides a rationale for his notoriously opaque opinion in *Romer v. Evans*⁶⁶ and would allow the political process doctrine to be applied to “emerging” minority groups like homosexuals.

The second option is to strictly limit *Hunter* and *Seattle School District* to their facts, as interpreted by Justice Kennedy in *Schuette*. The doctrine would apply only when voters overturn government policy meant to mitigate an unambiguous “racial injury” identified by the Court. This category is likely to be vanishingly small, at best. Indeed, this version of the political process doctrine may put the political process doctrine in the *Shelley v. Kraemer* category of doctrines that briefly served to advance civil rights objectives but now are in essence defunct.

Third, if a liberal majority retakes the Court, it could follow Justice Sotomayor’s lead and adopt *Seattle School District* wholeheartedly (though Justice Breyer’s *Schuette* concurrence suggests that she needs at least two more votes). The Court could try to limit the doctrine to African Americans to make it more workable, but that wouldn’t really solve the underlying problems with the doctrine. In any event, it’s hard to see the Court’s self-described “wise Latina” leading

⁶⁶ It’s true that gays, unlike African Americans, are not a “suspect class” for constitutional purposes. Justice Kennedy, however, clearly would like to undermine a strict dividing line between suspect and nonsuspect classes in modern equal-protection doctrine. See Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. Pa. J. Const. L. 945, 948 (2004); Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, & Equality in *United States v. Windsor**, 2012–13 Cato Sup. Ct. Rev. 117, 139–40 (2013).

the charge to exclude “Hispanics,” the largest recognized minority group. By necessity, then, the political process doctrine would be used very selectively to overturn referenda that especially offend liberal sensibilities, as with affirmative action. This offense would be phrased in terms of “racial injury.”

Finally, the Court could follow Justice Scalia’s lead and reverse *Seattle School District* and *Hunter*. This path would have the virtue of forthrightness and clarity, but that goes against the grain of the Supreme Court’s jurisprudence on race, which has long preferred opacity and complication. Even more important, Justice Scalia is shy three votes for this reversal. Given Justice Kennedy’s need to protect *Romer* and Chief Justice Roberts’s penchant for narrow opinions (unconstrained, as we saw in *NFIB v. Sebelius*, by any reasonable canons of interpretation⁶⁷), he’s unlikely to get them any time soon. And so the political process doctrine, problematic though it may be, seems likely to survive for quite some time.

⁶⁷ See, e.g., Ilya Shapiro, Like Eastwood Talking to a Chair: The Good, the Bad, and the Ugly of the Obamacare Ruling, 17 *Tex. Rev. L. & Pol.* 1 (2013).