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The Case for LGBT Equality

REVIVING THE POLITICAL PROCESS DOCTRINE AND REPURPOSING THE DORMANT COMMERCE CLAUSE

Terri R. Day[†] *& Danielle Weatherby*[††]

INTRODUCTION

In February 2015, ultraconservative Arkansas Senator Bart Hester introduced Arkansas Senate Bill 202, the "Intrastate Commerce Improvement Act," and it quickly passed through both houses of the Arkansas legislature.[1] Dubbed "Hester's Law," S.B. 202 prohibits municipalities from carving out civil rights protections for populations that are not already protected by Arkansas state law.[2] As such, it ostensibly restricts cities like the progressive university community of Fayetteville from passing civil rights ordinances that extend antidiscrimination protections to the lesbian, gay, bisexual, and transgender (LGBT) community.[3]

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[1] S.B. 202, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); *see also* Jeff Guo, *That Anti-Gay Bill in Arkansas Actually Became Law Today. Why Couldn't Activists Stop It?*, WASH. POST (Feb. 23, 2015), http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/23/that-anti-gay-bill-in-arkansas-actually-became-law-today-why-couldnt-activists-stop-it/ [http://perma.cc/9XUB-MS73]; Julia Craven, *Arkansas House Votes in Favor of LGBT Discrimination*, HUFFINGTON POST (Feb. 13, 2015, 5:59 PM), http://www.huffingtonpost.com/2015/02/13/arkansas-lgbt-discrimination_n_6680802.html [http://perma.cc/6M2X-S7AB].

[2] Ark. S.B. 202; ARK. CODE ANN. §§ 14-1-401 to -403 (West 2015).

[3] Todd Gill, *Proposed Bill Would Prohibit Future Civil Rights Ordinances*, FAYETTEVILLE FLYER (Feb. 3, 2015), http://www.fayettevilleflyer.com/2015/02/03/proposed-bill-would-prohibit-future-civil-rights-ordinances/ [http://perma.cc/E7DA-694N]; Jeff Guo,

Hester's Law came as a reaction to a civil rights battle that played out the year before in Fayetteville.[4] Less than six months after the Fayetteville City Council passed Chapter 119, a local ordinance prohibiting discrimination on the basis of sexual orientation and gender identity, the voters repealed it in a December 2014 special election.[5] Hester's Law codified what seemed to be the ultimate will of the Fayetteville people—that antidiscrimination protections remain limited, protecting only those groups already covered by the Arkansas Civil Rights Act.

In an effort to circumvent the constraints of Hester's Law, Fayetteville attempted to pass another ordinance, known as the Uniform Civil Rights Protection,[6] this time referencing existing state protections for sexual orientation and gender identity in the Arkansas Anti-Bullying Act.[7] After the City of Fayetteville waged a second war in the epic battle over civil rights, the positive results of its efforts were challenged under Hester's Law.[8]

What Everybody Missed During the Fight over Religious Freedom Laws This Year, WASH. POST (Apr. 6, 2015), http://www.washingtonpost.com/blogs/govbeat/wp/2015/04/06/what-everybody-missed-during-the-fight-over-religious-freedom-laws-this-year/ [http://perma.cc/KR8C-FVUC].

[4] Gill, *supra* note 3; John Lyon, *New Law Seeks to Bar Anti-Discrimination Ordinances, but Interpretations Vary*, ARK. NEWS (July 22, 2015, 5:19 PM), http://arkansasnews.com/news/arkansas/new-law-seeks-bar-anti-discrimination-ordinances-interpretations-vary [http://perma.cc/9NT8-RKGY].

[5] Lyon, *supra* note 4.

[6] Fayetteville, Ark., Ordinance No. 5781 (June 16, 2015); Todd Gill, *New Civil Rights Ordinance Announced in Fayetteville*, FAYETTEVILLE FLYER (June 5, 2015), http://www.fayettevilleflyer.com/2015/06/05/new-civil-rights-ordinance-announced-in-fayetteville/ [http://perma.cc/4G72-WR28].

[7] Gill, *supra* note 6.

[8] *Id.*; *see also* Brenda Blagg, *Between the Lines: Cities Defy Lawmakers' Intent: Future of Local Laws May Still Rest in Legislators' Hands*, NORTHWEST ARK. DEMOCRAT-GAZETTE (July 29, 2015). On September 8, 2015, the people of Fayetteville voted the Uniform Civil Rights Protection Ordinance 5781 into city code. Bil Browning, *Fayetteville, Arkansas Voters Returned to Ballot Box over LGBT Civil Rights*, ADVOC. (Sept. 8, 2015, 9:10 PM), http://www.advocate.com/arkansas/2015/09/08/fayetteville-voted-lgbt-rights-again [http://perma.cc/P344-F5GV]. Days before the election, Protect Fayetteville, an organized group of opponents of Ordinance 5781, filed a lawsuit seeking an injunction of the election and arguing that 5781 violated Hester's Law and was therefore unenforceable. *Protect Fayetteville Files Lawsuit Challenging Validity of Civil Rights Ordinance*, 5NEWS (Aug. 31, 2015, 9:47 PM), http://5newsonline.com/2015/08/31/protect-fayetteville-files-lawsuit-challenging-validity-of-civil-rights-ordinance/ [http://perma.cc/56KG-L2HD]. Circuit Court Judge Doug Martin denied the group's request for an injunction immediately. *Id.* Months later, after the ordinance went into effect and the parties had time to adequately brief the court, Judge Martin dismissed the lawsuit, concluding that Ordinance 5781 did not violate the plain language of Hester's Law. Zuzanna Sitek, *Circuit Court Judge Upholds Fayetteville Civil Rights Ordinance*, 5NEWS (Mar. 1, 2016, 6:01 PM), http://5newsonline.com/2016/03/01/circuit-court-judge-upholds-fayetteville-civil-rights-ordinance/ [http://perma.cc/9HHK-CQCT]. His reasoning echoes the arguments advanced by the City of Fayetteville. He found that Hester's Law does not preclude the protection of LGBT individuals because it simply prohibits municipalities from creating protected classes *not covered in state law*, and there are already antibullying protections in state law for LGBT

Legislation resembling Hester's Law has been passed in Tennessee and is currently pending legislative approval in Texas and West Virginia.[9] In Montana, Michigan, Nebraska, and Oklahoma, bills like Tennessee's and West Virginia's have been considered but were postponed in committee.[10] These laws would add to the growing patchwork of robust free exercise laws and represent the fruits of the right-wing, religiously conservative effort to preempt the realm of LGBT civil rights.[11] Taking direct aim at the judiciary's efforts to uphold the constitutional rights of minorities like gays and lesbians, in the aggregate, these laws lead to a system of condoned discrimination under the guise of religious freedom and the political process.[12]

As state legislatures in the South and Midwest pass reactive laws that pit religion against civil rights, the residents of these states are on the defensive against LGBT rights, exercising their veto power at the ballot box through the political process.[13] As the narrative of Fayetteville's city ordinance indicates, the majority can override a minority of elected decision makers. The question is—should they?

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students. *Id.* Although Judge Martin did not rule on the constitutionality of Hester's Law, an appeal by the Protect Fayetteville group is now pending in the state's highest court.

[9] *See* TENN. CODE ANN. §§ 7-51-1801 to -1802 (West 2015); TENN. CODE ANN. § 4-21-102 (West 2012) (adding in a new definition of "Sex" to include only "the designation of an individual person as male or female as indicated on the individual's birth certificate"); *see also* H.B. 1556, 2015 Leg., 84th Sess. (Tex. 2015), http://www.capitol.state.tx.us/tlodocs/84R/billtext/pdf/HB01556I.pdf#navpanes=0 [http://perma.cc/66D5-N6VB]; S.B. 1155, 2015 Leg., 84th Sess. (Tex. 2015), http://www.legis.state.tx.us/tlodocs/84R/billtext/pdf/SB01155I.pdf#navpanes=0 [http://perma.cc/2YU6-W8HK]; H.B. 2881, 2015 Leg., 82d Reg. Sess. (W. Va. 2015), http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/pdf_bills/HB2881%20INTR%20PRINTED.pdf [http://perma.cc/W2A5-NN9C].

[10] H.B. 516, 62d Leg., Reg. Sess. (Mont. 2011) (died in committee); H.B. 5039, 96th Leg., Reg. Sess. (Mich. 2011) (died in committee); Leg. B. 912, 102d Leg., 2d Sess. (Neb. 2012) (indefinitely postponed); H.B. 2245, 53d Leg., 2d Sess. (Okla. 2012) (died in committee).

[11] Danielle Weatherby, *The Arkansas "Mini-RFRA" is Bad Policy*, 2015 ARK. L. NOTES 1669 (2015).

[12] *Id.*

[13] Sean Delaney, *Sterling Heights: Council Votes to Repeal Controversial Non-Discrimination Ordinance*, ADVISOR & SOURCE NEWSPAPERS (Sept. 17, 2014), http://www.sourcenewspapers.com/articles/2014/09/17/news/doc5419bacc89f78749199554.txt [http://perma.cc/WAR6-RWAF]; Todd Gill, *Voters Repeal Civil Rights Ordinance in Fayetteville*, FAYETTEVILLE FLYER (Dec. 9, 2014), http://www.fayettevilleflyer.com/2014/12/09/voters-repeal-civil-rights-ordinance-in-fayetteville/ [http://perma.cc/UPT4-LHUD]; Devin Kelly, *Anchorage Voters Favor Unions in Repealing Mayor Sullivan's Labor Law Rewrite*, ALASKA DISPATCH NEWS (Nov. 4, 2014), http://www.adn.com/article/20141104/anchorage-voters-favor-unions-repealing-mayor-sullivans-labor-law-rewrite [http://perma.cc/JN6B-FDSJ]; Sarah Parvini, *Springfield, Mo., Voters Repeal LGBT Anti-Discrimination Law*, L.A. TIMES (Apr. 8, 2015, 12:12 PM), http://www.latimes.com/nation/la-na-missouri-anti discrimination-law-20150408-story.html [http://perma.cc/CW9J-EJE4]; Amanda Terkel, *Chattanooga Voters Reject Law Extending LGBT Protections*, HUFFINGTON POST (Aug. 8, 2014, 2:59 PM), http://www.huffingtonpost.com/2014/08/08/chattanooga-lgbt_n_5662602.html [http://perma.cc/XZF2-KZD2].

Now that the U.S. Supreme Court has definitively recognized the right of same-sex couples to marry, legislators and citizens are actively utilizing the political process, through voter initiatives, to limit or extend the momentum ignited by the *Obergefell v. Hodges* decision.[14] Even before the Court announced its decision, voters and legislators on both sides of the debate were considering ways to further their political agendas surrounding the LGBT civil rights movement.[15]

Those efforts have taken several forms. The most notable are local nondiscrimination ordinances (NDOs), robust state religious freedom laws, and statewide initiatives to invalidate or block local expansion of antidiscrimination protections, particularly in the area of public accommodations.[16] Since 1974, there have

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[14] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[15] *See* Richard Fausset & Alan Blinder, *States Weigh Legislation to Let Businesses Refuse to Serve Gay Couples*, N.Y. TIMES (Mar. 5, 2015), http://www.nytimes.com/2015/03/06/us/anticipating-nationwide-right-to-same-sex-marriage-states-weigh-religious-exemption-bills.html?_r=0 [http://perma.cc/GPW7-6N2A] (explaining how bills that would allow businesses to discriminate against LGBT customers were considered in Arizona, Arkansas, Georgia, Colorado, Hawaii, Indiana, Michigan, Utah, West Virginia, and Wyoming); Tim Farley, *Marriage License Bill Targets Same-Sex Couples, Federal Government Intrusion*, RED DIRT REP. (Jan. 22, 2015), http://www.reddirtreport.com/red-dirt-news/marriage-license-bill-targets-same-sex-couples-federal-government-intrusion [http://perma.cc/LK2E-4MDP] (proposed Oklahoma bill would prohibit state-recognized marriages so that city clerks would not have to recognize same-sex marriages); Molly Hennessey-Fiske, *Texas Legislative Panel Votes to Restrict Same-Sex Marriage*, L.A. TIMES (Apr. 22, 2015, 6:15 PM), http://www.latimes.com/nation/nationnow/la-na-texas-same-sex-marriage-20150422-story.html [http://perma.cc/N6S3-DRQR]; James Nord, *Gay Marriage Supporters Unveil Proposed Legislation*, MINNPOST (Feb. 27, 2013), https://www.minnpost.com/politics-policy/2013/02/gay-marriage-supporters-unveil-proposed-legislation [http://perma.cc/F8B6-LFVN].

[16] *See, e.g.*, AUSTIN, TEX., CODE OF ORDINANCES § 2-1-148 (2011) (prohibiting discrimination on the bases of sexual orientation and gender identity, among other categories); SAN ANTONIO, TEX., CODE OF ORDINANCES § 2-550 (2013) (same); UTAH CODE § 34A-5-106 (West 2015) (prohibiting discrimination in housing and employment on the bases of sexual orientation and gender identity). *But see* H.B. 1228, 90th Gen. Assemb. Reg. Sess. (Ark. 2015) (broad religious freedom bill that would have allowed individuals and businesses to refuse services to LGBT patrons); ALA. CONST. amend. 622 (ratified 1999); ARIZ. REV. STAT. §§ 41-1493 to -1493.02 (2007) (mini religious freedom law); CONN. GEN. STAT. § 52-571b (2001) (same); FLA. STAT. §§ 761.01-761.05 (2015); S.B. 129, 153rd Gen. Assemb. (Ga. 2015) (same); IDAHO CODE §§ 73-401 to -404 (2000); ILL. COMP. STAT. § 775-35 (1998) (same); S.B. 101, 119th Gen. Assemb., Reg Sess. (Ind. 2015) (same); KAN. STAT. ANN. §§ 60-5301 to -5305 (West 2013) (same); LA. STAT. ANN. §§ 13:5231-5242 (2010) (same); S.B. 4 (Mich. 2015) (same); S.B. 2681, Reg. Sess. (Miss. 2014) (same); MO. REV. STAT. §§ 1.302-1.307 (2003) (same); N.M. STAT. §§ 28-22-1 to 5 (2015) (same); OKLA. STAT. tit. 272 §§ 51-251 to -258 (2000) (same): PA. CONS. STAT. § 214 (2002) (same); 42 R.I. GEN. LAWS §§ 42-80.1-1 to -3 (West 2014) (same); S.C. CODE ANN. §§ 1-32-10 to -60 (2014) (same); S.B. 2294, 108th Gen. Assemb. (Tenn. 2014) (same); TEX. REV. CIV. STAT. ANN. art. 5. §§ 110.001 to .012 (West 1999) (same); VA. CODE § 57-2.02 (2009) (same); H.B. 0083 (Wyo. 2015); *see also* Mike McPhate, *Mississippi Law on Serving Gays Proves Divisive*, N.Y. TIMES (Apr. 14, 2016), http://www.nytimes.com/2016/04/15/us/mississippi-gay-lgbt-discrimination-religion.html?emc=edit_tnt_20160414&nlid=48778543&tntemail0=y&_r=0 [http://perma.cc/GP89-5YL3]; Jonathan M. Katz & Eric Eckholm, *Anti-Gay Laws Bring Backlash in Mississippi and*

been at least 40 attempts at ballot initiatives to repeal LGBT-protective NDOs, half of which were successful.[17]

This article focuses on the interplay of these local and state initiatives, particularly on how the political process affects LGBT-inclusive nondiscrimination ordinances, where success was or could be feasible at a local level. The battle at the ballot box playing out in Arkansas is just one example of the tug-of-war between LGBT-protective successes at the local level and the state legislative or voter initiatives that reverse or preempt those local successes.

The Arkansas story of push and pull is not the first time that statewide voter initiatives have blocked local efforts to expand LGBT rights. Over two decades ago, Colorado voters amended their state constitution to prohibit any government entity from extending nondiscrimination protections to individuals on the basis of sexual orientation.[18] While legislators in Arkansas, Tennessee, and other states may have drafted legislation like Hester's Law more artfully than the Colorado amendment struck down in *Romer v. Evans*, the two initiatives produced the same results. Since *Romer*, the Supreme Court has not considered the constitutionality of a law restricting the expansion of rights for the LGBT population. Just recently, however, the Court addressed the application of the political process doctrine in upholding a Michigan initiative that banned the use of race-sensitive admissions preferences after university governing boards had previously adopted such policies.[19] In *Schuette v. BAMN*, the Court upheld voters' rights to utilize the political process in deciding the "difficult and delicate" policy issue of affirmative action in college admissions.[20] The narratives of race-based protections and LGBT protections are closely bound.

Historically, courts have applied a judicially created doctrine in assessing the constitutional muster of voter initiatives that aim to change established political decisionmaking processes in ways that create greater hurdles for a minority group (and that

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North Carolina, N.Y. TIMES (Apr. 5, 2016), http://www.nytimes.com/2016/04/06/us/gay-rights-mississippi-north-carolina.html [http://perma.cc/8U3L-3YPH].

[17] LILLIAN FADERMAN ET AL., GREAT EVENTS FROM HISTORY: GAY, LESBIAN, BISEXUAL, AND TRANSGENDER EVENTS, 1848-2006 (2007); LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL 1-16 (2001); JOYCE MURDOCH & DEB PRICE, COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT (2001); LEIGH RUTLEDGE, THE GAY DECADES (1992).

[18] *See* Romer v. Evans, 517 U.S. 620 (1996).

[19] Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623 (2014).

[20] *Id.* at 1636, 1648.

group only) to attain beneficial legislation.[21] Pursuant to the political process doctrine,[22] government restructuring,[23] which affects a minority group's equal participation in the political process, triggers strict judicial review, even if intentional discrimination was not the motivation for the legislative restructuring.[24] In both *Romer* and *Schuette*, the Court declined to apply the political process doctrine.[25]

This article considers the political process doctrine and its application to laws like Arkansas's Hester's Law. Despite the fact that the Court has all but abolished the political process doctrine, the policy and theory supporting the doctrine still apply to laws that restructure the legislative process in a way that "change[s] the rules in the middle of the game" for an underrepresented minority group.[26]

Ultimately, the Court is unlikely to invalidate a legislative or voter initiative that bans local efforts to pass LGBT-inclusive NDOs pursuant to the political process doctrine.[27] Instead, this article suggests that courts analyzing the constitutionality of Hester-type laws should adopt a different analytical framework that links private discrimination in public accommodations to the Commerce Clause. While the recognition that private discrimination affects interstate commerce is not novel,[28] the application of this theory—which invokes the Dormant Commerce Clause—is a creative, albeit imperfect, way to fight the next wave of discrimination affecting the LGBT community.

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[21] Hunter v. Erickson, 393 U.S. 385, 390-93 (1969); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 470 (1982); *Schuette*, 134 S. Ct. at 1651-83 (Sotomayor, J., dissenting).

[22] Christopher E. D'Alessio, *A Bridge Too Far: The Limits of the Political Process Doctrine in* Schuette v. Coalition to Defend Affirmative Action, 9 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 103, 107 (2013) (defining the political process doctrine as a "less familiar [form] and more nuanced branch of the equal protection doctrine"). The traditional equal protection analysis focuses on discriminatory intent; the political process doctrine, on the other hand, looks at the discriminatory results of government restructuring. Specifically, it considers a change in political structure that places special burdens on the ability of the minority to achieve their goals. *Id.* (quoting Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1024 (1996)).

[23] Government restructuring is changing the level at which policy is made and enacted. For instance, Hester-type laws take the power and process to pass LGBT-protective NDOs away from the level of local government to a statewide level.

[24] *Schuette*, 134 S. Ct. at 1651-83 (Sotomayor, J., dissenting).

[25] Romer v. Evans, 517 U.S. 620, 626 (1996); *Schuette*, 134 S. Ct. at 1650 (Breyer, J., concurring).

[26] *Schuette*, 134 S. Ct. at 1653 (Sotomayor, J., dissenting).

[27] *Romer*, 517 U.S. at 625; *Schuette*, 134 S. Ct. at 1650 (Breyer, J., concurring).

[28] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 247 (1964).

Part I of this article frames the historical backdrop that built momentum for the civil rights movement affecting the LGBT community. Part II describes efforts to limit LGBT rights, including laws like Hester's Law and similar legislation in other southern states that restrict cities and local governments from creating nondiscrimination protections for LGBT residents and employees. Part III of this article explains the political process doctrine, which dictates that laws that restructure the political process to obstruct the ability of minorities to enact legislation violate the Equal Protection Clause.[29] While the application of the political process doctrine has been limited to race-based conduct and conduct restricting voting rights, Part IV considers the equal protection implications of laws like Hester's Law that aim to preempt intrastate civil rights laws.

In conclusion, this article suggests a novel analytical framework for analyzing the constitutionality of laws like Arkansas's Hester's Law. Pursuant to the Dormant Commerce Clause analysis, laws that restrict municipalities from carving out antidiscrimination protections for minority groups negatively affect interstate commerce and therefore, if challenged, should be found unconstitutional.

I. THE LGBT CIVIL RIGHTS MOVEMENT

A. The Rise of LGBT Advocacy

The modern-day LGBT civil rights movement rose in tandem with other new liberal social movements, such as Black Power and the anti-Vietnam War protests of the 1960s.[30] As other minority groups found their voice, so too did groups organizing around their nontraditional sexual identities or preferences.[31] This new radicalism is often attributed to the 1969 Stonewall riots, during which a group of LGBT patrons at a New York bar resisted a police raid.[32]

In the early morning of June 28, 1969, at the Stonewall Inn, a popular gay bar in Greenwich Village, New York, a police

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[29] *Schuette*, 134 S. Ct. at 1651-82 (Sotomayor, J., dissenting).

[30] John D'Emilio, "*After Stonewall*," *in* QUEER CULTURES 3-35 (Deborah Carlin & Jennifer DiGrazia eds., 2004).

[31] *Id.*

[32] *Id.*; Vern Bullough, *When Did the Gay Rights Movement Begin?*, HIST. NEWS NETWORK (Apr. 17, 2005), http://historynewsnetwork.org/article/11316 [http://perma.cc/V3NV-6NUV].

raid escalated and resulted in multiple patron arrests.[33] Police quickly lost control of the situation, and an angry crowd amassed outside, forcing the police to barricade themselves inside the bar.[34] Subsequent riots lasted for nearly a week.[35]

Following the Stonewall riots, LGBT groups such as the Gay Liberation Front and the Gay Activists Alliance began to organize,[36] and the first Pride Parade occurred in New York in 1970.[37] But as quickly as this movement grew, so too did the majoritarian denouncement of homosexuality.[38] In fact, the American Psychiatric Association's Diagnostic and Statistical Manual identified homosexuality as a mental illness until 1974, and gender dysphoria, the formal diagnosis for individuals who suffer from severe emotional distress due to their discontent with the sex they were assigned at birth, is still in the Manual.[39] Labeling this condition as a mental illness that does not afflict *every* gender-nonconforming individual has negative and stigmatizing connotations.

Today, LGBT individuals in America are undoubtedly a statistical minority group. The Williams Institute[40] estimates that between 5.2 and 9.5 million (about 2.2%–4.0%) of American adults identify as gay, lesbian, bisexual, or transgender.[41] While statistically underrepresented, LGBT individuals suffer

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[33] *American Experience: Introduction: Stonewall Uprising*, PBS, http://www.pbs.org/wgbh/americanexperience/features/introduction/stonewall-intro/ [http://perma.cc/4PVH-UZAN] (last visited May 10, 2016).

[34] *Id.*

[35] *Id.*

[36] D'Emilio, *supra* note 30.

[37] *American Experience: Timeline: Milestones in the American Gay Rights Movement*, PBS, http://www.pbs.org/wgbh/americanexperience/features/timeline/stonewall/ [http://perma.cc/WP5H-VPBJ] (last visited May 10, 2016).

[38] Andrew Belonsky, *The Gay Pride Issue*, QUEERTY (June 18, 2007), http://www.queerty.com/the-gay-pride-issue-20070618 [http://perma.cc/9KQD-2LJP].

[39] *See* AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) (defining "gender dysphoria," which communicates the emotional distress that can result from "a marked incongruence between one's experienced/expressed gender and assigned gender"); Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89 (2015); Alice Dreger, *Why Gender Dysphoria Should No Longer Be Considered a Medical Disorder*, PAC. STANDARD (Oct. 18, 2013), http://www.psmag.com/health-and-behavior/take-gender-identity-disorder-dsm-68308 [http://perma.cc/E8FC-DPPY].

[40] The Williams Institute is a national think tank at UCLA Law School that conducts "independent research on sexual orientation and gender identity law and public policy." *Mission*, WILLIAMS INST., http://williamsinstitute.law.ucla.edu/mission/ [http://perma.cc/AAY4-TJMU] (last visited May 10, 2016).

[41] Gary J. Gates, *LGBT Demographics: Comparisons Among Population-Based Surveys*, WILLIAMS INST. (Sept. 2014), http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-demogs-sep-2014/#sthash.mH3OgkAQ.dpuf [http://perma.cc/TA6G-8KA6].

discrimination in the workplace, in housing transactions, and in places of public accommodation at a rate far exceeding that of their gender-conforming and heterosexual peers.[42] For this reason, there is a great need for LGBT-protective antidiscrimination laws and laws granting equal rights to same-sex couples.[43] The U.S. Supreme Court's recent marriage equality decision is a step in the right direction, but LGBT advocates, and this article, submit that it did not go far enough.[44]

B. The Long Road to Marriage Equality

Although the Supreme Court in *Obergefell v. Hodges* held that bans on same-sex marriage violate the fundamental right to marry recognized under the Due Process Clause of the Fourteenth Amendment,[45] the broader issues surrounding LGBT discrimination are far from settled.[46] Shortly after the Supreme Court announced its decision, state legislatures, politicians, and local governmental entities began proposing legislation to limit or block the application of the *Obergefell* ruling.[47] Even before the Court announced its decision, Republican presidential candidates boldly announced that they would fight a ruling favoring same-

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[42] M.V. LEE BADGETT ET AL., WILLIAMS INST., BIAS IN THE WORKPLACE: EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION (2007) (reporting that 15%–43% of gay and transgender workers have experienced some form of discrimination on the job and that 7%–41% of gay and transgender workers have been verbally or physically assaulted or had their workplace vandalized); *see also* Weatherby, *supra* note 39.

[43] *See* Weatherby, *supra* note 39.

[44] Samantha Allen, *LGBT Leaders: Gay Marriage Is Not Enough*, DAILY BEAST (June 26, 2015, 10:35 AM), http://www.thedailybeast.com/articles/2015/06/26/same-sex-marriage-is-legal-now-what.html [http://perma.cc/35PF-2MK2]; Editorial Board, *The Challenges That Remains After Marriage Equality*, N.Y. TIMES (July 29, 2015, 2:30 PM), http://www.nytimes.com/2015/07/29/opinion/the-challenges-that-remain-after-marriage-equality.html?ref=topics [http://perma.cc/DMR9-W25U]; Eric Schnurer, *Equality for All*, U.S. NEWS & WORLD REP. (June 29, 2015, 2:30 PM), http://www.usnews.com/opinion/blogs/eric-schnurer/2015/06/29/gay-marriage-decision-should-have-been-all-about-constitutional-equality [http://perma.cc/JE62-NCGJ].

[45] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[46] Allen, *supra* note 44; Editorial Board, *supra* note 44; Schnurer, *supra* note 44.

[47] *See, e.g.*, *Texas Attorney General Says Judges Can Deny Same-Sex Marriage Licenses*, U.S.A. TODAY NETWORK KVUE-TV, AUSTIN (June 29, 2015, 2:37 PM), http://www.usatoday.com/story/news/nation-now/2015/06/29/paxton-state-workers-can-deny-marriage-licenses-same-sex-couples/29456745/ [http://perma.cc/WL7S-HFCP]; Kate Abbey-Lambertz, *Michigan Governor Signs Controversial Religious Freedom Adoption Law*, HUFFINGTON POST (June 11, 2015, 2:59 PM), http://www.huffingtonpost.com/2015/06/10/michigan-adoption-bill-lgbt-parents_n_7553952.html [http://perma.cc/D6DY-N24B]; Jackie Beran, *State Legislative Responses to* Obergefell v. Hodges, BALLOTPEDIA (Jan. 25, 2016), http://ballotpedia.org/State_legislative_responses_to_Obergefell_v._Hodges [http://perma.cc/K25T-572N] (detailing the legislation drafted and proposed in Arkansas, Florida, Kentucky, Michigan, Ohio, Tennessee, Utah, and Wisconsin, all in reaction to the Court's June 26, 2015, marriage equality decision).

sex marriage.[48] And in response to the *Obergefell* decision, U.S. Senator and Republican presidential candidate Ted Cruz proposed a constitutional amendment requiring retention votes (votes to retain the judge by the electorate) for Supreme Court Justices.[49] Even when a federal court in Alabama ruled in 2015 that same-sex couples had the right to marry, the elected state high court—led by marriage equality-opponent Chief Justice Roy Moore—told judges in the state to defy the federal order.[50]

But because the Supreme Court's decision granting marriage equality to same-sex couples is the beginning, not the end, of the same-sex marriage struggle, it is important to trace the history of same-sex marriage litigation from its inception in *Baker v. Nelson*[51] to *Obergefell v. Hodges*.[52] With respect to LGBT rights, the United States has been significantly behind other nations, particularly in granting marriage equality to same-sex couples.[53] As early as the mid-1970s, many states began adopting constitutional bans on same-sex marriages through either ballot

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[48] Eric Bradner, *GOP Hopefuls Weigh In on Gay Marriage*, CNN (Jan. 25, 2015, 1:11 PM), http://www.cnn.com/2015/01/25/politics/gop-2016-gay-marriage/ [http://perma.cc/ZBV7-5KCE].

[49] Mollie Reilly, *Ted Cruz Wants to Be Able to Vote Out Supreme Court Justices*, HUFFINGTON POST (June 26, 2015, 7:35 PM), http://www.huffingtonpost.com/2015/06/26/ted-cruz-supreme-court_n_7675528.html [http://perma.cc/MQ7Z-TJT6].

[50] Alan Blinder & Richard Pérez-Peña, *Gay Marriage in Alabama Begins, but Only in Parts*, N.Y. TIMES (Feb. 9, 2015), http://www.nytimes.com/2015/02/10/us/alabama-supreme-court-same-sex-marriages.html?_r=0 [http://perma.cc/6D2U-PJEC]; *see also* Ariane de Vogue, *Alabama Chief Justice: Same-sex Marriage Ban Still in Effect*, CNN, http://www.cnn.com/2016/01/06/politics/roy-moore-alabama-supreme-court/ [http://perma.cc/67J8-F7SE] (Jan. 6, 2016, 4:11 PM) (quoting the Chief Justice of the Alabama Supreme Court, Roy Moore, as stating, "Until further decision by the Alabama Supreme Court, the existing orders of the Alabama Supreme Court that Alabama probate judges have a ministerial duty not to issue any marriage license contrary to the Alabama Sanctity of Marriage Amendment or the Alabama Marriage Protection Act remain in full force and effect"). In May 2016, however, the Alabama Judicial Inquiry Commission filed six charges with the state's Court of the Judiciary related to Chief Justice Moore's order, and under Alabama law, Chief Justice Moore has been suspended without pay pending a hearing on the charges. Kent Faulk, *What Now for Suspended Alabama Chief Justice Roy Moore?*, AL.COM (May 10, 2016, 5:30 AM), http://www.al.com/news/birmingham/index.ssf/2016/05/suspended_alabama_chief_justic.html [http://perma.cc/9VP9-EESN].

[51] Baker v. Nelson, 409 U.S. 810 (1972) (mem.) (issuing a one-line summary decision dismissing the case and stating that prohibiting same-sex couples from marrying did not present a substantial federal question).

[52] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[53] Akbar Shahid Ahmed, *Other Countries on the U.S. Finally Getting Marriage Equality: Been There, Done That*, HUFFINGTON POST (June 27, 2015, 12:59 PM), http://www.huffingtonpost.com/2015/06/26/us-gay-marriage-world-reactions_n_7673164.html [http://perma.cc/U64Q-TQTZ]; *Gay Marriage Around the World*, PEW RES. CTR. (June 26, 2015), http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/ [http://perma.cc/CC4S-CA26] (explaining that nearly two dozen countries, including Great Britain, Spain, France, Portugal, Denmark, Belgium, Argentina, Brazil, South Africa, and New Zealand legally recognize same-sex marriage).

referendums or other legislation.[54] These same-sex marriage bans carried significant popular support.[55] By the mid to late 1990s, 33 states and the District of Columbia had implemented measures limiting the state-recognized institution of marriage to a union between one man and one woman.[56]

As same-sex marriage bans became the majority legal position in the country, LGBT advocates began fighting for marriage equality.[57] Several early decisions helped shape the body of same-sex marriage jurisprudence. In 1971, the U.S. Supreme Court summarily dismissed an appeal of the Minnesota Supreme Court's decision in *Baker v. Nelson* and upheld a state law that limited marriage to persons of the opposite sex.[58] Since the case came to the Court through mandatory appellate review (as opposed to writ of certiorari), the dismissal was "on the merits" and arguably became binding precedent for other courts considering the constitutionality of same-sex marriage bans.[59]

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[54] Nancy Kubasek et al., *Amending the Defense of Marriage Act: A Necessary Step Toward Gaining Full Legal Rights for Same-Sex Couples*, 19 AM. U. J. GENDER SOC. POL'Y & L. 959, 964 n.32 (2011) (listing the 38 states that banned same-sex marriage either by constitutional amendment (Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Idaho, Kansas, Louisiana, Michigan, Missouri, Mississippi, Nebraska, Montana, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin) or by statute (Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Maryland, Minnesota, Pennsylvania, Washington, West Virginia, and Wyoming)). Many states originally had a statutory ban, but around 2003, many of the states that already had a statutory ban passed constitutional amendments.

[55] Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-jurisdictional Recognition of Controversial Domestic Relations*, 2008 BYU L. REV. 1855, 1911 (2008); Jane S. Schacter, *What Marriage Equality Can Tell Us About Popular Constitutionalism (and Vice-Versa)*, 52 HOUS. L. REV. 1147, 1174 (2015).

[56] *Same-Sex Marriage, State by State*, PEW RES. CTR. (June 26, 2015), http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/ [http://perma.cc/YFV8-EQBS].

[57] *Id.*

[58] Baker v. Nelson,191 N.W.2d 185 (Minn. 1971).

[59] Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1383 n.25 (2010).

> Although a summary dismissal is technically a dismissal on the merits, the Supreme Court has made clear that such a dismissal does not "have the same precedential value . . . as does an opinion of th[e] Court after briefing and oral argument on the merits." The Court has therefore suggested that although generally "inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so," this may not be the case "when doctrinal developments indicate otherwise." As discussed in detail in the text, both equal protection and due process doctrines, as related to the question of same-sex marriage, have evolved considerably since 1972, when *Baker* was dismissed. Accordingly, we agree with courts that have held that the dismissal in *Baker* does not bar lower federal courts from substantively considering the federal constitutional claims that case raised.

Following *Baker*, the number of legal challenges premised on marriage equality was limited. Most advocates believed they were bound by *Baker*.[60]

The legal landscape changed dramatically in 2013.[61] On June 26, 2013, the Supreme Court ruled in *United States v. Windsor* that section 3 of the federal Defense of Marriage Act was unconstitutional insofar as it limited the definition of marriage to one man and one woman.[62] The decision created federal marital protections for married same-sex couples.[63]

Following *Windsor*, a wave of legal battles challenging same-sex marriage bans percolated through the nation's state and federal courts.[64] Between 2013 and the Supreme Court's

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Id. (quoting Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 477 n.20 (1979) (citation omitted)); Hicks v. Miranda, 422 U.S. 332, 344 (1975); Andrew Janet, *Eat, Drink, and Marry: Why* Baker v. Nelson *Should Have No Impact on Same-Sex Marriage Litigation*, 89 N.Y.U. L. REV. 1777 (2014); Mark Strasser, *When a* Baker *Summary Dismissal Becomes Stale: On Same-Sex Marriage Bans and Federal Constitutional Guarantees*, 17 J. GENDER, RACE & JUST. 137, 137 (2014). *But see, e.g.*, Eric Berger, Lawrence*'s Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 806 n.282 (2012) (stating that "it is highly unlikely that the Court will consider its summary dismissal of the appeal in *Baker v. Nelson*").

[60] Lyle Denniston, *Gay Marriage and* Baker v. Nelson, SCOTUSBLOG (July 4, 2012, 4:52 PM), http://www.scotusblog.com/2012/07/gay-marriage-and-baker-v-nelson/ [http://perma.cc/7Z3T-L9QE]; *see, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding a Georgia law that made it a crime for adult gay couples to engage in homosexual acts in private); Hatcher v. Hatcher, 580 S.W.2d 475, 483 (1979) (stating that *Baker v. Nelson* set the precedent that "there are no 'equal protection' barriers to a state's requiring that husbands be males and wives be females"); Lockyer v. City and Cty. of San Francisco, 95 P.3d 459, 504 (Cal. 2004) (stating that *Baker v. Nelson* "prevents lower courts and public officials from coming to the conclusion that a state law barring marriage between persons of the same sex violates the equal protection or due process guarantees of the United States Constitution"); Hernandez v. Robles, 805 N.Y.S.2d 354, 369 (2005) (stating that "[t]he summary disposition in *Baker v. Nelson* control[led] the disposition of the state equal protection claim brought [in this case]").

[61] *See* Monica Hof Wallace & Christopher Gerald Otten, *Marriage Equality: The "States" of the Law Post* Windsor *and* Perry, 16 LOY. J. PUB. INT. L. 239 (2014); Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle": The Inevitability of Marriage Equality After* Windsor, 23 TUL. J.L. & SEXUALITY 17 (2014); Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in* United States v. Windsor, 2012-2013 CATO SUP. CT. REV. 117 (2013).

[62] Marcus, *supra* note 61; Wallace & Otten, *supra* note 61; Young & Blondel, *supra* note 61.

[63] United States v. Windsor, 133 S. Ct. 2675 (2013).

[64] *See, e.g.*, Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014); Perry v. Schwarzenegger, 591 F.3d 1147 (9th Cir. 2010); Hamby v. Parnell, 56 F. Supp. 3d 1056 (D. Alaska 2014); Connolly v. Jeanes, 73 F. Supp. 3d 1094 (D. Ariz. 2014); Majors v. Horne, 14 F. Supp. 3d 1313 (D. Ariz. 2014); Burns v. Hickenlooper, No. 14-CV-01817-RM-KLM, 2014 WL 3634834 (D. Colo. July 23, 2014); Brenner v. Scott, 999 F. Supp. 2d 1278 (N.D. Fla. 2014); Rolando v. Fox, 23 F. Supp. 3d 1227 (D. Mont. 2014); Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014); Wolf v. Walker, 986 F. Supp. 2d 982 (W.D. Wis. 2014); Guzzo v. Mead, No. 14-CV-200-SWS, 2014 WL 5317797 (D. Wyo. Oct. 17, 2014); *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); Brinkman v. Long, No. 2013CV032572, 2014 WL 6805822 (Colo. Dist. Ct. July 14, 2014); Kerrigan v. Comm'r of Pub. Health, 957 A.2d

consideration of the issue in *Obergefell v. Hodges*, the nation's courts heard nearly 60 challenges to same-sex marriage bans.[65] In the overwhelming majority of these 60 cases, courts upheld marriage equality, finding that same-sex marriage bans violate the guarantees inherent in the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[66] Prior to *Obergefell*, 37 states and Washington, D.C., recognized same-sex marriage, in part as a result of those cases striking down same-sex marriage bans.[67]

Remarkably, among the 37 states in which same-sex couples could marry pre-*Obergefell*, 20 of those states were bound by precedent set by federal judges appointed under Article III of the U.S. Constitution.[68] While courts in Massachusetts, Connecticut, Iowa, New Jersey, Hawaii, and California ruled in favor of marriage equality, all of the deciding judges were also

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407 (Conn. 2008); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Garden State Equal. v. Dow, 79 A.3d 1036 (N.J. 2013); Griego v. Oliver, 316 P.3d 865 (N.M. 2013).

[65] *See, e.g.*, *Bostic*, 760 F.3d 352; *Perry*, 591 F.3d 1147; *Hamby*, 56 F. Supp. 3d 1056; *Connolly*, 73 F. Supp. 3d 1094; *Majors*, 14 F. Supp. 3d 1313; *Burns*, No. 14-CV-01817-RM-KLM, 2014 WL 3634834; *Brenner*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014); *Rolando*, 23 F. Supp. 3d 1227; *Bostic*, 970 F. Supp. 2d 456; *Wolf*, 986 F. Supp. 2d 982; *Guzzo*, No. 14-CV-200-SWS, 2014 WL 5317797; *In re Marriage Cases*, 183 P.3d 384; *Brinkman*, No. 2013CV032572, 2014 WL 6805822; *Kerrigan*, 957 A.2d 407; *Goodridge*, 798 N.E.2d 941; *Garden State Equal.*, 79 A.3d 1036; *Griego*, 316 P.3d 865.

[66] *See, e.g.*, *Bostic*, 760 F.3d 352; *Perry*, 591 F.3d 1147; *Hamby*, 56 F. Supp. 3d 1056; *Connolly*, 73 F. Supp. 3d 1094; *Majors*, 14 F. Supp. 3d 1313; *Burns*, No. 14-CV-01817-RM-KLM, 2014 WL 3634834; *Brenner*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014); *Rolando*, 23 F. Supp. 3d 1227; *Bostic*, 970 F. Supp. 2d 456; *Wolf*, 986 F. Supp. 2d 982; *Guzzo*, No. 14-CV-200-SWS, 2014 WL 5317797; *In re Marriage Cases*, 183 P.3d 384; *Brinkman*, No. 2013CV032572, 2014 WL 6805822; *Kerrigan*, 957 A.2d 407; *Goodridge*, 798 N.E.2d 941; *Garden State Equal.*, 79 A.3d 1036; *Griego*, 316 P.3d 865.

[67] Steven D. Schwinn, *Marriage Equality: Does the Fourteenth Amendment Require States to License a Marriage Between Two People of the Same Sex and to Recognize a Valid Out-of-State Marriage Between Two People of the Same Sex?*, 42 PREVIEW 261 (2015). The states that recognized same-sex marriage pre-*Obergefell* include Alabama (2015), Alaska (2014), Arizona (2014), California (2013), Colorado (2014), Connecticut (2008), Delaware (2013), Florida (2015), Hawaii (2013), Idaho (2014), Illinois (2014), Indiana (2014), Iowa (2009), Kansas (2014), Maine (2012), Maryland (2013), Massachusetts (2004), Minnesota (2013), Montana (2014), Nevada (2014), New Hampshire (2010), New Jersey (2013), New Mexico (2013), New York (2011), North Carolina (2014), Oklahoma (2014), Oregon (2014), Pennsylvania (2014), Rhode Island (2013), South Carolina (2014), Utah (2014), Vermont (2009), Virginia (2014), Washington (2013), West Virginia (2014), Wisconsin (2014), and Wyoming (2014), as well as the District of Columbia (2010). *Id.*; *see Winning the Freedom to Marry Nationwide: The Inside Story of a Transformative Campaign*, FREEDOM TO MARRY, http://www.freedomtomarry.org/pages/how-it-happened [http://perma.cc/6KEL-SHQW] (last visited May 10, 2016).

[68] *See Winning the Freedom to Marry Nationwide*, *supra* note 67; Billy Corriher & Eric Lesh, *Marriage Equality Cases Languish Before Elected Judges*, L.A. TIMES (June 1, 2015, 5:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-corriher-lesh-gay-marriage-lawsuits-20150601-story.html [http://perma.cc/FU5J-9MY3].

appointed.[69] "Like federal judges with life tenure, they felt at liberty to side with equal marriage rights for same-sex couples, even if in so doing they were siding against the majority."[70]

A sharp and revealing contrast existed in states like Texas and Arkansas, where elected judges had been called upon to decide the controversial and politically polarizing same-sex marriage debate.[71] In Texas and Arkansas, where judges run for office and have to worry about their political careers, the plaintiffs in the same-sex marriage cases waited for an unreasonably extensive amount of time for the judges' decisions.[72] Instead of taking a stand on the issue and risking disappointing their constituents, the Arkansas and Texas judges delayed their rulings, hoping that the U.S. Supreme Court would decide the issue once and for all and that they would escape unscathed.[73]

While the Texas Supreme Court had been mute, Arkansas's highest court had taken affirmative steps to avoid deciding the same-sex marriage issue.[74] After Arkansas Circuit Judge Chris Piazza ruled in May 2014 that the state's same-sex marriage ban was unconstitutional by comparing the same-sex marriage debate to the interracial marriage question decided by the Supreme Court in 1967's *Loving v. Virginia*,[75] 169 same-sex couples applied for marriage licenses in Pulaski County, Arkansas.[76] After the state appealed, the Arkansas Supreme Court swiftly stayed Judge Piazza's decision, placing the same-sex couples that obtained marriage licenses during the week after his decision in legal

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[69] Corriher & Lesh, *supra* note 68.

[70] *Id.*

[71] *Id.*

[72] Max Brantley, *Arkansas Supreme Court Injects More Delay into Same-Sex Marriage Case*, ARK. TIMES (Feb. 5, 2015, 9:27 AM), http://www.arktimes.com/ArkansasBlog/archives/2015/02/05/arkansas-supreme-court-injects-more-delay-into-same-sex-marriage-case [http://perma.cc/9QKF-FHJ3]; Robert T. Garrett, *Texas Supreme Court Declines to Take Up Same-Sex Divorce Judge Case*, DALL. MORNING NEWS (June 19, 2015, 11:38 PM), http://www.dallasnews.com/news/state/headlines/20150619-texas-supreme-court-declines-to-take-up-same-sex-divorce-judge-case.ece [http://perma.cc/TL9U-4N9C] (refusing to decide whether to affirm a divorce issued in 2010 for a same-sex couple). During the pendency of their appeal, one of the spouses died. *But see* Paul J. Weber, *Texas Supreme Court Upholds Divorce of Same-Sex Couple*, BOS. GLOBE (June 20, 2015), https://www.bostonglobe.com/news/nation/2015/06/19/texas-supreme-court-upholds-divorce-same-sex-couple/KRf39pNifGEVJeknf3hItJ/story.html [http://perma.cc/334W-56MK].

[73] Brantley, *supra* note 72; Garrett, *supra* note 72.

[74] Brantley, *supra* note 72; Garrett, *supra* note 72.

[75] Loving v. Virginia, 388 U.S. 1 (1967).

[76] Wright v. Arkansas, No. 60CV-13-2662, 2014 WL 1908815 (Ark. Cir. Ct. May 9, 2014); Gavin Lesnick, *Same-Sex Couples Marry in Pulaski County: McDaniel Seeks Stay*, ARK. ONLINE (May 12, 2014, 6:44 AM), http://www.arkansasonline.com/news/2014/may/12/crowd-gathers-pulaski-county-issues-first-same-sex/ [http://perma.cc/BG8F-B3BA].

limbo.[77] In November 2014, oral arguments were held before the state high court.[78] But by January 2015, the makeup of the court changed, creating questions surrounding which justices would decide the case.[79] When a majority of the court inexplicably opened a new case sua sponte to consider whom of the then presiding justices should hear the case, Justice Jim Hannah recused himself from the new case, claiming that the majority had "created out of whole cloth an issue to delay the disposition" of the marriage equality lawsuit.[80] Justice Paul Danielson also recused himself, writing that he could not ethically be "complicit in . . . depriving justice to any party before this court."[81]

After the U.S. Supreme Court's decision in *Obergefell* on June 26, 2015, the Arkansas Supreme Court released a three-sentence order dismissing the same-sex marriage case as moot.[82] Ultimately, the elected justices of the Arkansas Supreme Court were able to dodge the controversial same-sex marriage question by ducking behind the U.S. Supreme Court's opinion.

By election to the bench through popular vote, elected justices owe their jobs to the electorate. Through the courts' rulings, the majority of the populace essentially becomes the decisionmaker, albeit through the courts. While, arguably, decisions from elected judges may be more reflective of the will of the populace, all judges are trusted to make apolitical decisions in upholding the spirit of the Constitution.

Just as elected judges have to consider the electorate's views, so too do politicians. After *Obergefell*, politicians in southern conservative states voiced disapproval of the Court's decision. Texas Attorney General Ken Paxton described the Supreme Court ruling as "[a] judge-based edict that is not based

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[77] Max Brantley, *Arkansas Supreme Court on Marriage Case: Delay, Delay, and a Change of Heart*, ARK. TIMES (June 28, 2015, 1:23 PM), http://www.arktimes.com/ArkansasBlog/archives/2015/06/28/arkansas-supreme-court-moved-from-support-to-opposition-to-a-quiet-fold-on-marriage-equality-sources-say [http://perma.cc/L2BR-9CWW] (providing a timeline of the Arkansas State same-sex marriage litigation).

[78] *Id.*

[79] Max Brantley, *UPDATE: Justices Hannah and Danielson Recuse from New Marriage Case; Cite Delaying Tactic, Ethical Concerns*, ARK. TIMES (Apr. 8, 2015, 3:58 PM), http://www.arktimes.com/ArkansasBlog/archives/2015/04/08/marriage-case-gets-curioser-justice-danielson-recuses-from-new-case [http://perma.cc/9MLL-WFR5].

[80] Letter from Chief Justice Jim Hannah to Justice Paul Danielson (Apr. 8, 2015), http://www.arktimes.com/ArkansasBlog/archives/2015/04/08/marriage-case-gets-curioser-justice-danielson-recuses-from-new-case [http://perma.cc/9MLL-WFR5] (reprinting the letter from Chief Justice Hannah).

[81] Letter from Justice Paul E. Danielson to Chief Justice Jim Hannah (Apr. 8, 2015), http://www.arktimes.com/ArkansasBlog/archives/2015/04/08/marriage-case-gets-curioser-justice-danielson-recuses-from-new-case [http://perma.cc/9MLL-WFR5] (reprinting the letter from Justice Danielson).

[82] Smith v. Wright, CV-14-427, 2015 Ark. Lexis 504 (Ark. June 26, 2015).

in the law."[83] Alabama's Chief Justice Moore called the decision "federal tyranny."[84] Louisiana Governor Bobby Jindal scoffed, "Marriage between a man and a woman was established by God, and no earthly court can alter that."[85] These comments were likely motivated by the political desire to remain in the good graces of the electoral majority. Ultimately, politicians represent their constituents, and at the end of their terms, they must seek reelection—a factor that drives many of their decisions (and positions) while in office. While elected officials should be accountable to their voters, the judiciary is intended to serve as a check on the political branch, enforcing constitutionally protected liberty interests even when such enforcement furthers a countermajoritarian position. This system of checks and balances, however, breaks down when some judges are elected.

C. Building on Obergefell*'s Momentum: A Move Toward Nationwide Equality*

Like any other controversial civil rights issue, the response to the *Obergefell* decision was sharply divided. While the marriage equality opponents used their political platforms to denounce the Court's decision, invoking their conscience[86] and the argument that no five Justices can decide an issue that is ultimately within the province of a higher being,[87] Democratic leaders in Congress rallied together to build on the momentum of the Court's decision.[88] Only a month after the *Obergefell* decision, U.S. Senator Jeff Merkley from Oregon and Rhode Island

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[83] Eliott C. McLaughlin, *Most States to Abide by Same-Sex Marriage Ruling, but . . .*, CNN (June 30, 2015, 8:20 AM), http://www.cnn.com/2015/06/29/us/same-sex-marriage-state-by-state/ [http://perma.cc/QE9G-QC6S]. Attorney General Paxton emphatically warned that

> no court, no law, no rule, and no words will change the simple truth that marriage is the union of one man and one woman. Nothing will change the importance of a mother and a father to the raising of a child. And nothing will change our collective resolve that all Americans should be able to exercise their faith in their daily lives without infringement and harassment.

Id.

[84] *Id.*

[85] *Id.* (quoting Governor Bobby Jindal).

[86] Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2014); Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703 (2014).

[87] *See* Nejaime & Siegel, *supra* note 86.

[88] Brandon Lorenz, *Historic Marriage Equality Ruling Generates Momentum for New Non-Discrimination Law*, HUM. RTS. CAMPAIGN (July 7, 2015), http://www.hrc.org/blog/entry/historic-marriage-equality-ruling-generates-momentum-for-new-non-discrimina [http://perma.cc/2RVF-FQ6B].

Representative David Cicilline (who is openly gay) introduced the Equality Act, a comprehensive, broadly sweeping piece of legislation that would prohibit discrimination on the basis of sexual orientation and gender identity in eight categories.[89] If passed, the Equality Act would amend the Civil Rights Act of 1964 to prohibit discrimination on the basis of sexual orientation and gender identity in places of public accommodation, housing, public education, employment, and other areas where discrimination on other protected bases is already prohibited.[90]

As justification for the bill, cosponsor Representative Cicilline pointed out that "[i]n most states, a same-sex couple can get married on Saturday, post pictures on Facebook on Sunday, and then risk being fired from their job or kicked out of their apartment on Monday."[91] Cicilline urged Congress to recognize that "[a] majority of states in our country do not have laws that protect LGBT individuals against discrimination. . . . We need a uniform federal standard that protects all LGBT Americans from discrimination."[92]

Despite the need for such a protection, it is unlikely that Congress will pass the Equality Act.[93] Given the Republican majority and the track record for other, narrower pieces of LGBT-friendly legislation, the Equality Act seems doomed from the start.[94] Indeed, the narrower Employment Non-Discrimination Act (ENDA) prohibited discrimination on the same bases, but exclusively in the employment context.[95] The ENDA was first introduced in Congress in 1994, and different iterations of the bill have been considered almost every year since.[96] It has failed every time, however, in great part due to its opponents' concern that it is overly broad.[97] Certainly, if the ENDA, which only applies to

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[89] Equality Act, S. 1858, 114th Cong. (2015); Equality Act, H.R. 3185, 114th Cong. (2015); Sophia Tesfaye, *"The Equality Act": Democrats Push Bill Banning LGBT Discrimination*, SALON (July 23, 2015, 11:24 AM), http://www.salon.com/2015/07/23/the_equality_act_democrats_push_bill_banning_lgbt_discrimination/ [http://perma.cc/63U3-6ESR].

[90] Tesfaye, *supra* note 89; Dana Beyer, *The Equality Act, Part One—Introduction*, HUFFINGTON POST: GAY VOICES (July 27, 2015, 12:48 PM), http://www.huffingtonpost.com/dana-beyer/the-equality-act-part-one_b_7880612.html [http://perma.cc/ZE3D-X6PU].

[91] Tesfaye, *supra* note 89 (quoting Rep. David Cicilline).

[92] *Id.* (quoting Rep. David Cicilline).

[93] *See id.*

[94] *See id.*

[95] Beyer, *supra* note 90.

[96] Ed O'Keefe, *ENDA, Explained*, WASH. POST (Nov. 4, 2013), http://www.washingtonpost.com/news/the-fix/wp/2013/11/04/what-is-the-employment-non-discrimination-act-enda [http://perma.cc/GC3V-D6PN].

[97] *Id.*

the workplace, is too broad for opponents of LGBT rights, the Equality Act will be a nonstarter.[98]

II. STATE AND LOCAL EFFORTS TO EXPAND OR CONTRACT LGBT CIVIL RIGHTS

A. Preempting Local Civil Rights in Arkansas

In response to the adoption of LGBT-protective ordinances and in anticipation of the Court's same-sex marriage decision, states began passing legislation that prohibits municipalities from carving out antidiscrimination protections for members of the LGBT community. Fearing that sexual orientation would be labeled as a suspect or quasi-suspect class, these state initiatives were intended to block the efforts of progressive local communities.[99]

Following the efforts of the progressive-minded university town of Fayetteville to prohibit discrimination on the bases of sexual orientation and gender identity, Arkansas Senator Bart Hester sponsored Senate Bill 202, the Intrastate Commerce Improvement Act.[100] It was swiftly passed by the state assembly and, although never officially signed into law by Governor Asa Hutchinson, became law in 2015.[101] The Intrastate Commerce Improvement Act, nicknamed Hester's Law, prohibits a municipality or political subdivision of the state from "adopt[ing] or enforc[ing] an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law."[102] Its purpose is "to improve intrastate commerce by ensuring that businesses, organizations and employers doing business in the state are subject to uniform

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[98] *See, e.g.*, Justin Wm. Moyer, *Why Houston's Gay Rights Ordinance Failed: Fear of Men in Women's Bathrooms*, WASH. POST (Nov. 4, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/11/03/why-houstons-gay-rights-ordinance-failed-bathrooms/ [http://perma.cc/L2QZ-HX9V] (explaining that Houston's LGBT civil rights measure failed in large part due to the concern surrounding transgender individuals' use of the restroom that corresponds to their gender identity).

[99] *See, e.g.*, Equal Access to Intrastate Commerce Act, H.B. 600, 107th Gen. Assemb. (Tenn. 2011); Intrastate Commerce Improvement Act, S.B. 202, 90th Gen. Assemb., Reg. Sess. (Ark. 2015).

[100] S.B. 202, 90th Gen. Assemb. (Ark. 2015).

[101] Guo, *supra* note 1*; see also* ARK. CONST. art. IV, § 15 (stating that "if any bill shall not be returned by the Governor within five days, Sunday excepted, after it shall have been presented to him, the same shall be a law in like manner as if he signed it").

[102] ARK. CODE ANN. § 14-1-403(a) (West 2015).

nondiscrimination laws and obligations."[103] Because Arkansas antidiscrimination laws do not currently protect members of the LGBT community, this law effectively preempts the rights of local government to create such protections.[104]

On February 9, 2015, the Eureka Springs City Council passed Ordinance 2223, a local law prohibiting discrimination on the basis of sexual orientation, gender identity, and gender expression in housing, employment, and places of accommodation within the city.[105] Ordinance 2223 passed unanimously after the City Council members hurried through the requisite three readings in one night and unanimously resolved to oppose Hester's Law.[106] The Ordinance included an emergency clause to ensure that it took effect as soon as possible following its enactment.[107]

Following Eureka Springs's lead, the Arkansas cities of Little Rock, North Little Rock, Conway, and Hot Springs passed scaled-down nondiscrimination ordinances.[108] These weakened versions prohibited agencies and vendors that do business with each city from discriminating on the basis of gender identity and sexual orientation.[109] The day before Hester's Law took effect, Senator Bart Hester himself admonished, "I think their

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[103] *Id.* § 14-1-402(a).

[104] *Id. But see supra* note 9 and accompanying text (explaining that the state antibullying law protects elementary and secondary public school students from bullying on the bases of sexual orientation and gender identity).

[105] Bill Bowden, *Eureka Springs Quickly Passes Anti-Prejudice Law*, ARK. ONLINE (Feb. 10, 2015, 1:00 AM), http://www.arkansasonline.com/news/2015/feb/10/eureka-springs-quickly-passes-anti-prej/?f=latest [http://perma.cc/U2UG-YHPJ]; Eureka Springs, Ark., Ordinance No. 2223 (Feb. 9, 2015), http://www.cityofeurekasprings.us/images/stories/ordinance/ORDINANCE%20NO.%202223%20-%20CIVIL%20RIGHTS%20ADMINISTRATION.pdf [http://perma.cc/SU94-KMQ2] (stating that "the City of Eureka Springs seeks to protect and safeguard the right and opportunity of all persons to be free from unfair discrimination based on real or perceived race, ethnicity, national origin, age, gender, gender identity, gender expression, familial status, marital status, socioeconomic background, religion, sexual orientation, disability and veteran status," and "therefore, be it ordained by the City Council of the City of Eureka Springs, Arkansas[,] . . . [t]hat all Ordinances or Resolutions, and parts thereof, in conflict with this Ordinance are hereby repealed to the extent of such conflict").

[106] Bowden, *supra* note 105.

[107] Eureka Springs, Ark., Ordinance No. 2223 (Feb. 9, 2015) ("Emergency Clause: That since there is a high likelihood that legislation of this type may become unavailable to Arkansas cities and counties in the very near future; and since diversity is an aspect of Eureka Springs that attracts residents and visitors, impacting not only the economic well-being, and thereby the public peace, health and safety of the community, an emergency is hereby declared to exist and this Ordinance shall take effect and be in force from and after its passage and approval.").

[108] Little Rock, Ark., Ordinance 21,031 (Apr. 21, 2015); Conway, Ark., Ordinance O-15-24 (Feb. 24, 2015); Hot Springs, Ark., Ordinance O-15-16 (2015); North Little Rock, Ark., Ordinance O-15-19 (2015).

[109] Little Rock, Ark., Ordinance 21,031; Conway, Ark., Ordinance O-15-24; Hot Springs, Ark., Ordinance O-15-16; North Little Rock, Ark., Ordinance O-15-19.

ordinances are null and void. I think that's very clear."[110] Little Rock City Attorney Tom Carpenter disagreed. Pointing to places in state law that seek to offer limited protections to individuals on the basis of sexual orientation and gender identity, like in the state's antibullying law, Tom Carpenter rebuked, "They're not in conflict . . . . There's nothing mentioned in the city's ordinance that's not already protected under state law."[111]

After the Hot Springs Board of Directors passed an NDO prohibiting the city and its vendors from discriminating on the basis of sexual orientation and gender identity, state representative Mickey Gates of Hot Springs requested a formal opinion from Attorney General Leslie Rutledge as to whether Act 137 prohibits a city from enforcing "an ordinance that conflicts with the act but that was passed before the act took effect."[112] Attorney General Rutledge answered the question in the affirmative.[113]

B. Other Measures Aimed at Preempting LGBT Rights

States like Montana, Michigan, Nebraska, and Oklahoma have considered, but failed to pass, Hester-type laws.[114] In similar fashion, Tennessee's Equal Access to Intrastate Commerce Act, passed in 2011, prohibits local governments from adopting ordinances or other legal measures that "impose on or make applicable to any person an anti-discrimination practice, standard, definition, or provision that shall deviate from, . . . supplement, . . . [or] change" existing state law antidiscrimination protections.[115] The Equal Access to Intrastate Commerce Act was applied retroactively, voiding any local

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[110] John Lyon, *New Law Seeks to Bar Anti-Discrimination Ordinances, but Interpretations Vary*, ARK. NEWS (July 22, 2015, 5:19 PM), http://arkansasnews.com/news/arkansas/new-law-seeks-bar-anti-discrimination-ordinances-interpretations-vary#sthash.4u8n4VLa.dpuf [http://perma.cc/CH4P-6T6D]; *see also* David Koon, *Testing the Discrimination Law, Where We Go Next on the State's LGBT Fairness Ordinances*, ARK. TIMES (May 28, 2015), http://www.arktimes.com/arkansas/testing-the-discrimination-law/Content?oid=3871873 [http://perma.cc/G9VH-6T5A].

[111] Lyon, *supra* note 110.

[112] *Id.*

[113] *Id.*

[114] H.B. 516, 62d Leg., Reg. Sess. (Mont. 2011) (died in committee); H.B. 5039, 96th Leg., Reg. Sess. (Mich. 2011) (same); Legis. B. 912, 102d Leg., 2d Sess. (Neb. 2012) (indefinitely postponed); H.B. 2445, 53d Leg., 2d Sess. (Okla. 2012) (died in committee). The authors suspect that other states will follow suit.

[115] TENN. CODE ANN. § 7-51-1802 (2015).

measure that was passed in a way that would violate the Act prior to its effective date.[116]

The proposed Intrastate Commerce Improvement Acts in Texas and West Virginia, which are currently undergoing the legislative process, are nearly identical.[117] They would prohibit municipalities from "adopt[ing] or enforc[ing] a local law that creates a protected classification or prohibits discrimination on a basis not contained in" state law.[118] If passed, the Texas and West Virginia Intrastate Commerce Improvement Acts would essentially disallow municipalities from passing laws that expand or provide greater civil rights protections than existing state law.[119] While it seems that the will of the people should rule in a representative democracy, the majority of the Court disagreed in *Obergefell* with respect to the rights of same-sex couples to marry.[120]

III. A TALE OF TWO POLITICAL PROCESSES

A. "We the People"

In the Court's recent decision recognizing that the fundamental right to marry extends to same-sex couples, the four dissenting Justices criticized the majority's ruling in favor of same-sex marriage for removing the issue from public

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[116] Equal Access to Intrastate Commerce Act, Op. Att'y. Gen. No. 11-36, 2011 WL 3013844 (Apr. 21, 2011).

[117] *Compare* H.B. 1556, 2015 Leg., 84th Sess. (Tex. 2015) (as of November 12, 2015, the Bill was referred to the House Urban Affairs Committee), *and* S.B. 1155, 2015 Leg., 84th Sess. (Tex. 2015) (as of November 12, 2015, the Bill was referred to the Senate State Affairs Committee), *with* H.B. 2881, 2015 Leg., 82d Reg. Sess. (W. Va. 2015) (as of November 12, 2015, the bill was recommitted to governmental organization upon first reading).

[118] Tex. H.B. 1556; Tex. S.B. 1155; W. Va. H.B. 2881.

[119] Tex. H.B. 1556; Tex. S.B. 1155; W. Va. H.B. 2881.

[120] Obergefell v. Hodges, 135 S. Ct. 2584, 2591 (2015) (recognizing that "[w]hile the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right").

debate.[121] In his dissent, Chief Justice Roberts defined the issue in *Obergefell* as "*who decides* what constitutes 'marriage.'"[122]

The dissenting Justices decried the fact that the five Justices joining in the majority opinion had changed "the meaning of marriage that has persisted in every culture throughout human history."[123] Viewing the majority decision as "[s]tealing th[e] issue from the people,"[124] the dissenting Justices lamented that the decision stills public debate on "a question the Constitution leaves to the people."[125]

Whether couched in criticisms of judicial policymaking, federalism, the creation of new rights, or redefining an understanding of marriage that is as old as human civilization, the recurring themes of the dissenting opinions view *Obergefell* as a defeat for the democratic process.[126] Justice Scalia called the Court's opinion a "threat to American democracy."[127]

According to Justice Thomas, the political process protects liberty.[128] He has posited that as a representative democracy, "we the people's" liberty is most secure when government acts through its elected officials or by popular vote.[129] This notion of political process is at odds with a view of individual liberty that does not depend upon the consent of the majority.[130]

Writing for the majority, Justice Kennedy responded to the dissenters' insistence that the majority erroneously silenced public debate in deciding the issue.[131] Indeed, Justice Kennedy catalogued the extensive public debate in all aspects of society on

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[121] *Id.* at 2625 (Roberts, C.J., dissenting) (opining that "by deciding [the same-sex marriage] question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide"). After scolding the majority of the Court for removing the "issue from the political process," Justice Scalia stated, "With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the 'reasoned judgment' of a bare majority of this Court—we move one step closer to being reminded of our impotence." *Id.* at 2627, 2631 (Scalia, J., dissenting).

[122] *Id.* at 2612 (Roberts, C.J., dissenting).

[123] *Id.* at 2611 (Roberts, C.J., dissenting).

[124] *Id.* at 2612 (Roberts, C.J., dissenting).

[125] *Id.*

[126] *Id.* at 2625-28 (Roberts, C.J., and Scalia, J., dissenting).

[127] *Id.* at 2626 (Scalia, J., dissenting).

[128] *Id.* at 2631-33 (Thomas, J., dissenting).

[129] *Id.* at 2637 (Thomas, J., dissenting).

[130] Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623, 1636 (2014) ("The freedom secured by the Constitution consists . . . of the right of the individual not to be injured by the unlawful exercise of governmental power.").

[131] *Obergefell*, 135 S. Ct. 2595-97.

the issue of same-sex marriage.[132] From referenda and legislative debates to discussion in public and private institutions and the halls of academia, Justice Kennedy rebuffed the dissenters' criticism, pointing out that the issue had been thoroughly discussed, studied, and litigated.[133] Ultimately, in deciding the issue, Justice Kennedy emphasized that individual fundamental rights cannot wait for the political process to recognize or bestow those rights.[134] "[F]undamental rights may not be submitted to a vote; they depend on the outcome of no elections."[135]

The debate about which public controversies should be subject to contests at the ballot box or legislative consent is not unique to the issue of same-sex marriage.[136] Just last term, the Court addressed the right of the voting majority to ban affirmative action in admissions to public educational institutions.[137] Reviewing the constitutionality of Michigan's amendment to its state constitution banning affirmative action, in *Schuette* the Court determined that this controversial issue should be left to the wisdom of the voting public.[138] Prior to Proposal 2, independent university boards of trustees decided all admissions policies, including those based on race.[139] Under the proposal, however, affirmative action admissions policies would be totally banned by law and would no longer be at the discretion of university trustees. In deciding the constitutionality of Michigan's Proposal 2—now Article I, section 26, of the state constitution—the plurality and dissenting opinions set forth very different approaches to the question of constitutionality.[140] The majority of Michigan voters had voted to ban race-based admissions policies (and only those policies) through "a higher plane of the existing political process"—a constitutional amendment.[141] The dissenting opinion argued that such interference in the political process to create greater hurdles for race-favorable admissions policies should trigger strict scrutiny review under an equal protection analysis in this context, the political process doctrine.[142] Unlike the same-sex marriage

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[132] *Id.*

[133] *Id.*

[134] *Id.* at 2591.

[135] *Id.* at 2606 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

[136] Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623, 1637 (2014).

[137] *Id.* at 1630.

[138] *Id.* at 1637-38.

[139] *Id.* at 1626, 1662.

[140] *Id.*

[141] *Id.* at 1662 n.7 (Sotomayor, J., dissenting).

[142] *Id.* at 1662.

question, however, the *Schuette* plurality decided that the issue should be left to the "will of the people" and that the vote to amend Michigan's constitution to ban affirmative action in college admissions did not implicate constitutional concerns.[143] Therefore, section 26 of Michigan's constitution stands.[144]

B. Judicially Created Doctrine

Invoking the judicially created doctrine that courts have traditionally applied to laws that are alleged to disenfranchise African-Americans, this article posits that the injuries caused by Hester-type laws are precisely the injuries the doctrine was designed to protect and thus mandate the application of the doctrine here.

Pre-*Schuette*, the Court viewed ballot initiatives that targeted minorities in a way that negatively impacted their equal access to the political process with much less deference than the Court afforded the Michigan voters.[145] In rare cases, the Supreme Court has applied strict scrutiny to government restructuring that impedes minorities' equal participation in the political process.[146]

An example of governmental restructuring that had a discriminatory effect on a racial minority was challenged in *Hunter v. Erickson*.[147] In *Hunter*, the citizens of Akron, Ohio, voted to amend the City Charter in a way that nullified an antidiscrimination housing ordinance.[148] The amendment to the City Charter "prevented the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the city's voters."[149] The Court found the Charter Amendment unconstitutional because it "place[d] special burdens on racial [and other] minorities within the governmental process."[150] The Charter's amendment singled out antidiscrimination housing ordinances and required the majority of voters' approval to adopt

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[143] *Id.*

[144] *Id.*

[145] *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006); Romer v. Evans, 517 U.S. 620 (1996).

[146] *Perry*, 548 U.S. at 517-18; *Romer*, 517 U.S. at 628-29; Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467 (1982); Hunter v. Erickson, 393 U.S. 385, 391 (1969).

[147] *Hunter*, 393 U.S. 385.

[148] *Id.* at 386-87.

[149] Ann K. Wooster, *Equal Protection and Due Process Clause Challenges Based on Racial Discrimination—Supreme Court Cases*, 172 A.L.R. Fed. 1, § 17 (2001) (interpreting *Hunter*, 393 U.S. 365).

[150] *Hunter*, 393 U.S. at 391.

such ordinances in the future.[151] Any other type of ordinance could be passed by the city council without the voting majority's pre-approval.[152] But because the Charter Amendment had a discriminatory effect on a minority group and denied equal access to the political process, the Court applied the political process doctrine, which triggers strict scrutiny judicial review.[153]

In a subsequent case applying the political process doctrine, the Court in *Washington v. Seattle School District No. 1* invalidated a state initiative that banned busing as a means to desegregate schools in the district.[154] The initiative targeted busing for purposes of desegregation only; the school district maintained authority to bus children for other purposes.[155] The result of this initiative was to "remov[e] the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body."[156] After the initiative, proponents of busing had to "seek relief from the state legislature, or from the statewide electorate."[157] This was much more onerous than the previous process, which gave authority for such decisions to the school board.[158] As in *Hunter*, the Court recognized that "[t]he sovereignty of the people is itself subject to . . . constitutional limitations."[159]

The judicially created political process doctrine marries equal protection and First Amendment jurisprudence,[160] "focus[ing] on the discriminatory effect of government restructuring."[161] Just as the Akron voters amended the City Charter, nullifying an existing antidiscrimination housing ordinance and requiring special hurdles to enact future antidiscrimination housing ordinances in the city, Seattle voters removed authority to implement a desegregation busing plan from the local school board.[162] These laws, which changed the rules of political decisionmaking "in the middle of the game"[163] and negatively affected minorities, were subject to strict

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151 *Id.* at 389-90.
152 *Id.* at 390.
153 *Id.* at 391.
154 Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).
155 *Id.*
156 *Id.* at 474.
157 *Id.*
158 *Id.*
159 Hunter v. Erickson, 393 U.S. 385, 392 (1969).
160 RODNEY A. SMOLLA, 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 13:43 (2014).
161 D'Alessio, *supra* note 22, at 108.
162 *Washington*, 453 U.S. at 474.
163 Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623, 1653 (2014).

scrutiny.[164] Therefore, actions that change a previously established political decisionmaking process, block meaningful access to the political process, and burden minorities from achieving beneficial legislation are presumptively unconstitutional.[165]

Even under rational basis review, the Court declared unconstitutional a Colorado initiative that amended the state constitution and banned antidiscrimination laws protecting persons on the basis of sexual orientation.[166] Like the amendment to the Akron City Charter and the Seattle initiative, the Colorado amendment restructured the political process, requiring those who would seek protection from discrimination on the basis of sexual orientation to persuade the majority of voters to repeal the constitutional amendment in order to pass favorable antidiscrimination laws.[167] The Colorado Supreme Court applied strict scrutiny review pursuant to the political process doctrine in analyzing the constitutionality of the amendment.[168] Although the U.S. Supreme Court agreed that the amendment was unconstitutional, it declined to follow the Colorado Supreme Court's reasoning.[169]

The newly enacted Hester's Law and others like it, which prohibit the enactment of local NDOs that grant protections extending beyond state law, have yet to be tested in the courts. It remains to be seen, however, whether a court would view a Hester-type law as being similar to the Michigan referendum or as more akin to the Akron charter amendment in *Hunter*, the state initiative in *Seattle*, or the Colorado constitutional

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[164] *Id.* at 1663.

[165] *Washington*, 458 U.S. at 467.

[166] Romer v. Evans, 517 U.S. 620, 637 (1996).

[167] *Id.*

[168] Evans v. Romer, 854 P.2d 1270, 1276-82 (Colo. 1993) (analyzing and holding that previous reapportionment cases decided by the U.S. Supreme Court support the conclusion that under the Equal Protection Clause, strict scrutiny applies to legislation that infringes on any group's fundamental right to participate equally in the political process, regardless of whether the group is a suspect class or not).

[169] *Compare* Evans v. Romer, 882 P.2d 1335, 1342-49 (Colo. 1994) (holding that Amendment 2 violated the Equal Protection Clause under the strict scrutiny standard because none of the state's asserted governmental interests—(1) protecting the sanctity of religious, familial, and personal privacy; (2) ensuring that limited state resources are dedicated to the protection of suspect classes only; (3) allowing the people themselves to establish social and moral norms; (4) preventing government from supporting special interest groups' political objectives; and (5) determining factionalism within the government—were necessary and compelling state interests for which Amendment 2 was narrowly tailored to serve), *with Romer*, 517 U.S. at 630-35 (finding that Amendment 2 did not meet the rational basis standard because (1) it was at once too narrow in its identification of persons by a single trait and too broad in denying the identified group protection across the board, and (2) it lacked any identifiable legitimate purpose and was instead born out of animosity toward LGBT individuals).

amendment in *Romer*. Although the *Schuette* majority declined to apply the political process doctrine to the Michigan referendum,[170] the doctrine is not totally irrelevant to the constitutionality question for legislative acts such as Hester's Law. In theory, government action such as Hester's Law is exactly the type of government restructuring that the political process doctrine was designed to prevent, because it disenfranchises the LGBT community from obtaining beneficial legislation.

IV. THE POLITICAL PROCESS DOCTRINE AS APPLIED TO THE LGBT CIVIL RIGHTS MOVEMENT

While there have been many legal victories for the LGBT community,[171] most of those victories have been achieved at a local level through political decisionmaking—where the opportunity to participate in self-governance and influence policymakers is most direct[172]—or in federal courts.[173] Certainly, the closer a particular group is to the decisionmaker, the easier it becomes to obtain beneficial legislation at the local level.[174] But as battles to gain full civil rights for members of the LGBT community have been waged and won, voters at large have successfully overturned many of those hard-fought victories

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[170] Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623, 1643 (2014).

[171] *See, e.g.*, Stephen Peters, *HUGE LEGAL VICTORY: New Jersey Jury Finds That Anti-LGBT Conversion Therapy Is Fraud*, HUM. RTS. CAMPAIGN (June 25, 2015), http://www.hrc.org/blog/entry/huge-legal-victory-jury-finds-that-anti-lgbt-conversion-therapy-is-fraud [http://perma.cc/ND67-T4HX]; Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html?_r=0 [http://perma.cc/8DFH-4EBZ]; *BREAKING: Eureka Springs Votes to Uphold Ordinance Protecting LGBT Residents*, HUM. RTS. CAMPAIGN (May 13, 2015), http://www.hrc.org/blog/entry/breaking-eureka-springs-votes-to-uphold-ordinance-protecting-lgbt-residents [http://perma.cc/GFH2-BPYS]; HRC Staff, *Victory: San Antonio City Council Approves LGBT-Inclusive Updates to Ordinance*, HUM. RTS. CAMPAIGN (Sept. 5, 2013), http://www.hrc.org/blog/entry/victory-san-antonio-city-council-approves-lgbt-inclusive-updates-to-ordinan [http://perma.cc/BJP8-C33R].

[172] *See* Tony Merevick, *Cities, Small Towns Across America Attempt to Fill Gaps in LGBT Rights*, BUZZFEED LGBT (Aug. 18, 2014, 1:42 PM), http://www.buzzfeed.com/tonymerevick/cities-small-towns-across-america-attempt-to-fill-gaps-in-lg#.ktpR0G7Zb [http://perma.cc/YP2V-GR89].

[173] FreedomtoMarry.org reports that, of the 65 victories for same-sex marriage since the Court's landmark June 2013 decision in *United States v. Windsor*, "[f]orty-one pro-marriage rulings have been issued in federal court, eighteen have been issued in state court, and five have been issued by a federal appellate court." *Marriage Rulings in the Courts*, FREEDOM TO MARRY (Mar. 2, 2015), http://www.freedomtomarry.org/pages/marriage-rulings-in-the-courts [http://perma.cc/LP6P-YFKU].

[174] *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467 (1982); Hunter v. Erickson, 393 U.S. 385, 391 (1969); *Schuette*, 134 S. Ct. at 1632-33.

through statewide referendums.[175] Although there is no constitutional guarantee that voters will win, there is an implied right that guarantees equal participation in self-governance.[176]

When the voting majority blocks a minority group's equal access to self-governance by governmental restructuring, both the First Amendment and the Equal Protection Clause are implicated.[177] Similar to Akron's charter amendment, Seattle's desegregation busing ban, and Colorado's Amendment 2, Hester-type laws require the voting majority's approval for any governmental entity to adopt nondiscrimination ordinances.[178] But the Supreme Court has never applied the political process doctrine to cases other than those affecting racial minorities.[179] Only the Colorado Supreme Court[180] and a federal district court[181] have applied the political process doctrine to legislation that disadvantaged members of the LGBT community "by making it more difficult [for that group] to enact legislation on

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[175] *See* FADERMAN ET AL., *supra* note 17; KEEN & GOLDBERG, *supra* note 17, at 6; MURDOCH & PRICE, *supra* note 17.

[176] The Constitution "guarantees that the majority may not win by stacking the political process against minority groups permanently, forcing the minority alone to surmount unique obstacles in pursuit of its goals." *Schuette*, 134 S. Ct. at 1654 (Sotomayor, J., dissenting).

[177] SMOLLA, *supra* note 160, § 13:43 ("The 'political process doctrine' is a unique and often controversial doctrine of constitutional law that resides at the intersection of Equal Protection Clause jurisprudence, including the 'state action' doctrine, which normally requires governmental, as opposed to private, discrimination to trigger an Equal Protection Clause violation, and First Amendment principles, which protect robust public discourse in the political marketplace.").

[178] ARK. CODE ANN. §§ 14-1-401 to -403. (West 2015); TENN. CODE ANN. § 4-21-102 (West 2012); H.B. 1556, 2015 Leg., 84th Sess. (Tex. 2015); H.B. 2881, 2015 Leg., 82d Reg. Sess. (W. Va. 2015); H.B. 516, 62d Leg., Reg. Sess. (Mont. 2011) (died in standing committee); H.B. 5039, 96th Leg., Reg. Sess. (Mich. 2011) (same); Legis. B. 912, 102d Leg., 2d Sess. (Neb. 2012) (indefinitely postponed).

[179] *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967) (considering the constitutionality of a statewide referendum repealing sections of the California Civil Code that banned racial discrimination in the sale of residential property); *Hunter*, 393 U.S. 385 (considering the constitutionality of an amendment to the Akron City Charter by the city council requiring approval by a majority vote of the electors for the passage of any fair housing ordinance regulating use, sale, advertisements, transfer, listing assignment, lease, sublease, or financing of realty on basis of race, color, religion, national origin, or ancestry); *Seattle Sch. Dist. No. 1*, 458 U.S. 457 (considering the constitutionality of a referendum that prohibited racially integrated busing).

[180] Evans v. Romer, 854 P.2d 1270 (Colo. 1993) (*Evans I*) (granting preliminary injunction and applying strict scrutiny to Amendment 2, which prohibited any government entity from extending antidiscrimination protections on the basis of homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships); Evans v. Romer, 882 P.2d 1335 (Colo. 1994) (*Evans II*) (granting permanent injunction under same reasoning as *Evans I*).

[181] Equal. Found. of Greater Cincinnati, Inc. v. Cincinnati, 860 F. Supp. 417 (S.D. Ohio 1994), *rev'd by* Equal. Found. of Greater Cincinnati, Inc. v. Cincinnati, 128 F.3d 289 (6th Cir. 1997).

its behalf."[182] Since the few cases[183] in which the Supreme Court has invoked the political process doctrine involved challenges to laws that "'regulate[] a racial subject matter' . . . 'to the detriment of the racial minority,'"[184] application of this doctrine to laws placing special burdens on the LGBT community is purely theoretical.

In fact, the continued vitality of the political process doctrine as a whole is in question after *Schuette v. BAMN*.[185] In *Schuette*, the Court upheld an amendment to the Michigan constitution prohibiting public colleges and universities from using race-based preferences in admissions.[186] Prior to the statewide referendum, the Michigan constitution delegated plenary power, which included promulgating admissions policies for public universities, to independent boards of trustees.[187] In her dissent, Justice Sotomayor viewed section 26 of Michigan's constitution as "chang[ing] the rules in the middle of the game" in a way that allowed the voting majority to diminish a racial minority group's exercise of political power.[188]

Justice Sotomayor, joined by Justice Ginsburg, made a strong case for the continued vitality of the political process doctrine and why it applied to invalidate Michigan's Proposal 2, now Article I, section 26, of the Michigan constitution.[189] She

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[182] *Evans II*, 882 P.2d at 1341 n.4 (quoting *Equal. Found. of Greater Cincinnati*, 838 F. Supp. at 1241).

[183] *Seattle Sch. Dist. No. 1*, 458 U.S. at 470 (finding a statewide initiative enjoining a mandatory busing plan that integrated public schools unconstitutional because "the State allocate[d] governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process"); *Hunter*, 393 U.S. at 386 (finding an amendment to the city charter nullifying the city's antidiscrimination housing ordinance unconstitutional because preventing "the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority" of the city's voters violated the Equal Protection Clause); Reitman v. Mulkey, 387 U.S. 369 (1967) (affirming California Supreme Court's decision to strike down a state referendum that amended the state constitution to give absolute discretion to private persons to discriminate in housing, reasoning that the amendment involved the state in private discrimination, which violated the Fourteenth Amendment).

[184] D'Alessio, *supra* note 22, at 112 (quoting Amar & Caminker, *supra* note 22, at 1029); *see also* Amar & Caminker, *supra* note 22, at 1024.

[185] Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623 (2014).

[186] *Id.* at 1629 (upholding a statewide referendum, Proposal 2, to amend the state constitution to abolish "preferential treatment to, any individual or group on the basis of race . . . in the operation of . . . public education"). Proposal 2, now Article I, section 26, of Michigan's constitution, also bans preferential treatment on the basis of "sex, color, ethnicity, or national origin in the operation of public employment [and] public contracting." *Id.* at 1653 (Sotomayor, J., dissenting). However, the *Schuette* case only addressed the issue of public education.

[187] *Id.* at 1631, 1653.

[188] *Id.* at 1651-53 (Sotomayor, J., dissenting).

[189] *Id.*

regarded this doctrine as a "fundamental strand of our equal protection jurisprudence."[190] In her opinion, the doctrine continues to be a necessary tool in the equal protection arsenal to fight the "long and lamentable" history of the societal majority's attempts to block racial minorities' equal access to the political process.[191] Long after ratification of the Fifteenth Amendment, states obstructed minorities' right to vote—first with outright bans, then "with literacy tests, good character requirements, poll taxes, and gerrymandering."[192] According to Justice Sotomayor, Michigan's constitutional amendment is "the last chapter of discrimination."[193]

Like the Akron city charter amendment in *Hunter v. Erickson*[194] and the state initiative banning school busing for desegregation purposes in *Washington v. Seattle School District No. 1*,[195] Michigan's constitutional amendment removed race-based admissions policy decisions from the decisionmaking process.[196] The challenged initiatives in Akron, Seattle, and Michigan required the proponents of antidiscrimination housing ordinances, school desegregation, and race-based admissions policies to seek a constitutional or charter amendment or statewide voter approval to achieve favorable legislation on these race-sensitive issues.[197]

In Michigan, all other admissions policy decisions remained with each public university's eight-member governing board.[198] A Michigan citizen wanting favorable admissions policies for veterans or for children of alumni only had to convince a majority of the elected board members.[199] But after Michigan's constitutional amendment, citizens proposing race-based admissions preferences could only obtain such policies by amending the state constitution.[200]

Justice Sotomayor posited, "§ 26 reconfigured the political process in Michigan such that it is now more difficult for racial minorities, and racial minorities alone, to achieve legislation in their interest."[201] This is exactly the type of restructuring to which the Court applied strict scrutiny in its

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190 *Id.* at 1651 (Sotomayor, J., dissenting).
191 *Id.*
192 *Id.* at 1652 (Sotomayor, J., dissenting).
193 *Id.*
194 Hunter v. Erickson, 393 U.S. 385 (1969).
195 Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).
196 *Schuette*, 134 S. Ct. at 1651-53 (Sotomayor, J., dissenting).
197 *Id.* at 1653; *Hunter*, 393 U.S. 385; *Seattle Sch. Dist. No. 1*, 458 U.S. 457.
198 *Schuette*, 134 S. Ct. at 1629-31, 1645 (majority opinion).
199 *Id.* at 1653 (Sotomayor, J., dissenting).
200 *Id.*
201 *Id.* at 1662 n.7 (Sotomayor, J., dissenting).

previous political process doctrine cases.[202] As such, Justice Sotomayor concluded that the *Hunter* and *Seattle* precedents were indistinguishable from the *Schuette* case and that the political process doctrine should have applied to invalidate the Michigan constitutional amendment.[203]

The Justices joining the plurality opinion disagreed. In determining that the political process doctrine did not apply to the facts in *Schuette*, the Court limited the doctrine to "cases . . . in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race"—in other words, intentional discrimination.[204] In clear and perhaps oversimplified language, Chief Justice Roberts had earlier exclaimed that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[205] Following that logic, Justice Scalia opined that a facially neutral equal protection provision could not be a constitutional violation.[206] Justice Scalia's concurrence would have gone even further and put the death knell on the political process doctrine by overruling the cases in which the doctrine was first articulated.[207] Referring to the triggering prong of the political process doctrine, which requires the court to determine whether a law challenged on the basis of a change in policymaking authority concerns a racial matter, Justice Scalia stated that "[n]o good can come of such random judicial musing."[208]

Post-*Schuette*, it is unclear how much of the political process doctrine still survives. As a matter of legal precedent and theory, it is unlikely a court would apply the political process doctrine to laws that change the political decisionmaking authority with the purpose or likelihood of injuring the LGBT community's equal participation in self-governance. Despite the Court's narrow application of the doctrine, it was intended to remedy the injury resulting from the restructuring of governmental decisionmaking processes to the detriment of a disenfranchised community.[209] As discussed in Part II, this precise injury has

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[202] *Hunter*, 393 U.S. 385; *Seattle Sch. Dist. No. 1*, 458 U.S. 457.

[203] *Schuette*, 134 S. Ct. at 1667-68.

[204] *Id.* at 1638.

[205] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

[206] *Schuette*, 134 S. Ct. at 1640 (Scalia, J., concurring).

[207] *Id.* at 1641 (Scalia, J., concurring).

[208] *Id.* at 1643 (Scalia, J., concurring).

[209] *Id.* at 1662-63 (Sotomayor, J., dissenting).

afflicted the LGBT community over and over again, particularly in recent history.[210]

While the evidence is foolproof that the majority of society has inflicted this precise injury upon the LGBT community, the doctrinal "fit" of the political process doctrine to this group is problematic. First, the political process doctrine concerns race-based laws.[211] Discriminatory classifications based on race are suspect and subject to strict judicial scrutiny under an equal protection analysis.[212] Second, as the political process doctrine sits at the intersection of equal protection and the First Amendment, it promises equality at the ballot box. From Reconstruction to the present, the right to vote and to petition government decisionmakers has been crucial to achieving racial equality.[213] The political process doctrine prohibits "political restructurings that create one process for racial minorities and a separate, less burdensome process for everyone else."[214]

Unlike members of racial minorities, members of the LGBT community have not yet been systematically targeted with obstructionist measures to block their community from the ballot box.[215] Therefore, absent a longstanding history preventing members of the LGBT community from voting, the First Amendment concern embedded in the political process doctrine—protecting racial minorities' equal participation in self-governance—does not apply to the LGBT community.

The Equal Protection Clause of the Fourteenth Amendment is triggered when the government treats similarly

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[210] *See supra* notes 92-120 and accompanying text.

[211] The political process doctrine is triggered when (1) the law "regulates a racial subject matter . . . to the detriment of the racial minority" and (2) burdens the ability of minority groups to advocate for meaningful legislation in a way that does not burden majority voters. D'Alessio, *supra* note 22, at 111-12 (quoting Amar & Caminker, *supra* note 22, at 1029); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 485 (1982).

[212] *See* Fisher v. Univ. of Texas, Austin, 133 S. Ct. 2411, 2417 (2013); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 222 (1995); Miller v. Johnson, 515 U.S. 900, 920 (1995); Washington v. Davis, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race.").

[213] *See generally* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 30-34 (2004).

[214] *Schuette*, 134 S. Ct. at 1653; *see also* Allan J. Lichtman & J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 LA RAZA L.J. 1 (1993); Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1399 (2002).

[215] *See, e.g.*, Veith v. Jubelirer, 541 U.S. 267 (2004) (finding gerrymandering claims were nonjusticiable because they did not implicate equal protection race discrimination claims); Katzenbach v. Morgan, 384 U.S. 641 (1966) (striking down literacy tests as a voting requirement).

situated groups differently under the law.[216] When disparate treatment of similarly situated groups results from government classifications, courts review an equal protection challenge under one of three levels of judicial scrutiny.[217] If a fundamental right is not implicated and the discriminatory classifications do not affect a suspect or quasi-suspect class, judges review the challenged action under a rational basis standard.[218] Traditionally, judges give great deference to the legislature under rational basis review.[219] The challenger has the burden to show that the legislative classification at issue does not have "a rational relationship . . . [to] some legitimate governmental purpose."[220]

Further, the equal protection prong of the political process doctrine does not easily apply by analogy to the LGBT community. The substantive due process rationale employed by the Court in *Obergefell v. Hodges* did not change the fact that, to date, the Supreme Court has refrained from characterizing sexual orientation as a suspect or quasi-suspect class for equal protection purposes.[221]

Although the Supreme Court has denied explicitly applying heightened scrutiny to classifications that discriminate

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[216] U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding that the Equal Protection Clause is applicable to the federal government by "reverse incorporation" through the Fifth Amendment).

[217] *See* United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (summarizing the Court's equal protection jurisprudence); City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 451 (1985) (explaining the "continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other" (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting) (criticizing "the Court's rigidified approach to equal protection analysis"))).

[218] *City of Cleburne*, 473 U.S. at 451; Vance v. Bradley, 440 U.S. 93, 97 (1979); New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

[219] Minnesota v. Clover Leaf Creamery, Co., 449 U.S. 456, 464 (1981) ("[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." (quoting *Vance*, 440 U.S. at 111)).

[220] Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) (citing Heller v. Doe, 509 U.S. 312, 320 (1993)).

[221] *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *see also* Bowers v. Hardwick, 478 U.S. 186, 202-03 n.2 (1986) ("[U]nder the circumstances of this case, a claim under the Equal Protection Clause may well be available without having to reach the more controversial question whether homosexuals are a suspect class."), *overruled by* Lawrence v. Texas, 539 U.S. 558, 560 (2003) ("*Bowers* was not correct when it was decided, is not correct today, and is hereby overruled. This case does not involve minors, persons who might be injured or coerced, those who might not easily refuse consent, or public conduct or prostitution. It does involve two adults who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle. Petitioners' right to liberty under the Due Process Clause gives them the full right to engage in private conduct without government intervention.").

on the basis of sexual orientation,[222] its opinions suggest otherwise.[223] In *Romer v. Evans*,[224] *Lawrence v. Texas*,[225] and *United States v. Windsor*[226]—all cases challenging government classifications based on sexual orientation[227]—the Court applied "a more searching form of rational basis review."[228] These cases, which struck down a Colorado constitutional amendment blocking any government entity from extending nondiscrimination protections to homosexuals,[229] invalidated an antisodomy law,[230] and found the definition of marriage as between one man and one woman unconstitutional under the federal Defense of Marriage Act,[231] have created flux in the lower courts as to whether homosexuals constitute a quasi-suspect class for purposes of equal protection analysis.[232] Indeed, the Second and Ninth Circuit Courts of Appeals have extended heightened protections to classifications based on sexual orientation.[233]

The Supreme Court has defined a suspect class entitled to heightened scrutiny as one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or

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[222] *See* Patrick McKinley Brennan, *"The Pursuit of Happiness" Comes Home to Roost? Same-Sex Union, the* Summum Bonum*, and Equality*, 27 BYU J. PUB. L. 323, 335 (2013) ("[T]he U.S. Supreme Court has never held that sexual orientation is a suspect classification.").

[223] *See* M.K.B. Darmer & Tiffany Chang, *Moving Beyond the "Immutability Debate" in the Fight for Equality After Proposition 8*, 12 SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 1, 22 (2009); M. Katherine Baird Darmer, *"Immutability" and Stigma: Towards a More Progressive Equal Protection Rights Discourse*, 18 AM. U. J. GENDER SOC. POL'Y & L. 439, 448 (2010); Andrea L. Claus, *The Sex Less Scrutinized: The Case for Suspect Classification for Sexual Orientation*, 5 PHX. L. REV. 151, 152 (2011).

[224] Romer v. Evans, 517 U.S. 620 (1996) (striking down a Colorado constitutional amendment which forbid any state actor from applying nondiscrimination protections on the basis of sexual orientation).

[225] *Lawrence*, 539 U.S. 558 (invalidating an antisodomy law).

[226] United States v. Windsor 133 S. Ct. 2675 (2013) (invalidating the Defense of Marriage Act, which defined marriage as between one man and one woman).

[227] *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring). In striking down an antisodomy statute, parting from the majority's analysis under due process, Justice O'Connor applied an equal protection analysis, stating, "When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Id.*

[228] *Id.*; *see also* Darmer & Chang, *supra* note 223, at 22 (describing how the Court departed from its traditional rational basis standard of review and applied "rational basis with [a] bite").

[229] *Romer*, 517 U.S. at 623.

[230] *Lawrence*, 539 U.S. at 578-79.

[231] *Windsor*, 133 S. Ct. at 2682.

[232] *See, e.g.*, Marcus, *supra* note 61.

[233] *See, e.g.*, Windsor v. United States, 699 F.3d 169 (2d Cir. 2012), *aff'd*, *Windsor*, 133 S. Ct. 2675 (refusing to adopt the reasoning of the Second Circuit or the recognition that discrimination based on sexual orientation should be subject to heightened scrutiny); SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 476 (9th Cir. 2014) (applying a *Batson*-type analysis to preemptory juror challenge based on sexual orientation).

relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[234] Generally, the Court has recognized a group as suspect or quasi-suspect based on four factors: (1) "whether the class has been historically 'subjected to discrimination'";[235] (2) whether members of the group are defined by immutable or distinguishing characteristics;[236] (3) whether the group can be characterized as a minority or has suffered political powerlessness;[237] and (4) "whether the class has a defining characteristic that 'frequently bears [a] relation to ability to perform or contribute to society.'"[238] Of these four factors, the presence of an immutable characteristic and political powerlessness considerations are typically most controversial in analyzing whether the LGBT community constitutes a suspect or quasi-suspect class for purposes of equal protection analysis.[239]

"As to immutability, the relevant inquiry is not whether a person *could*, in fact, change a characteristic, but rather whether the characteristic is so integral to a person's identity that it would be inappropriate to require her to change it to avoid discrimination."[240] The most significant consideration in concluding whether a characteristic is immutable is "whether th[at] characteristic invites discrimination when it is manifest."[241]

Classifications based on gender,[242] religion,[243] and illegitimacy[244] are entitled to heightened constitutional protections according to Supreme Court jurisprudence. Like gender, religion, and illegitimacy, sexual orientation and gender identity are

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[234] Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)).

[235] *Windsor*, 699 F.3d at 181 (quoting Bowen v. Gilliard, 483 U.S. 587, 602 (1987)).

[236] *Id.* (citing *Bowen*, 483 U.S. at 602).

[237] *Id.*

[238] *Id.* (quoting City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985)).

[239] *See, e.g.*, John Nicodemo, Comment, *Homosexuals, Equal Protection, and the Guarantee of Fundamental Rights in the New Decade: An Optimist's Quasi-Suspect View of Recent Events and Their Impact on Heighted Scrutiny for Sexual Orientation-Based Discrimination*, 28 TOURO L. REV. 285 (2012).

[240] Love v. Beshear, 989 F. Supp. 2d 536, 546 (W.D. Ky. 2014) ("[T]hese characteristics are 'an integral part of human freedom' entitled to constitutional protection, as is sexual expression." (quoting Lawrence v. Texas, 539 U.S. 558, 577 (2003))).

[241] *Windsor*, 699 F.3d at 184.

[242] Califano v. Goldfarb, 430 U.S. 199, 239 (1977) (Rehnquist, J., dissenting); Frontiero v. Richardson, 411 U.S. 677, 682 (1973).

[243] Larson v. Valente, 456 U.S. 228, 244-46 (1982).

[244] Mathews v. Lucas, 427 U.S. 495, 503 (1976); Trimble v. Gordon, 430 U.S. 762, 765-66 (1977).

characteristics that are "integral part[s] of human freedom."[245] Also like those classifications, sexual orientation and gender identity are characteristics that suffer from a documented history of being the basis for discrimination.[246] Based on these qualities, in addressing the Defense of Marriage Act's explicit exclusion of same-sex marriage, the Second Circuit concluded that homosexuality is an immutable characteristic.[247]

Additionally, as to political powerlessness, the Circuit Court in *Windsor* concluded that, like gender, there is still "pervasive, although at times more subtle, discrimination [based on sexual orientation] . . . in the political arena."[248] The fact that the LGBT community has achieved some political victories is not dispositive.[249] The relevant inquiry is whether "minorities may be unable to protect themselves from discrimination at the hands of the majoritarian political process."[250] Arkansas's Hester's Law and others like it are a testament to the fact that members of the LGBT community are still politically powerless when it comes to protecting themselves from discrimination in the political arena.

The Supreme Court's decision in *Obergefell* recognized a fundamental right to marry for all couples despite their sexual orientation.[251] But it did not change the status of members of the LGBT community for purposes of equal protection analysis.[252] While *Obergefell* was a watershed decision furthering the dignity of same-sex couples' relationships and families, it left gaping holes in the legal landscape and did nothing to advance the extension of

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[245] *Love*, 989 F. Supp. 2d at 546 (quoting Lawrence v. Texas, 539 U.S. 558, 577 (2003)).

[246] BADGETT ET AL., *supra* note 42 (reporting that 15%–43% of gay and transgender employees suffer some form of discrimination on the job, 8%–17% of gay and transgender workers report being passed over or fired because of their sexual orientation or gender identity, 10%–28% received a negative performance review or were passed over for a promotion because they were gay or transgender, and 7%–41% of gay and transgender workers were verbally or physically abused or had their workplace vandalized).

[247] Windsor v. United States, 699 F.3d 169, 184 (2d Cir. 2012); *see also* Weatherby, *supra* note 39 (arguing that gender identity is an integral part of a transgender individual's personhood).

[248] *Windsor*, 699 F.3d at 184 (citing Frontiero v. Richardson, 411 U.S. 677, 685-86 (1973)).

[249] *Id.*

[250] *Id.*

[251] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

[252] Danielle Weatherby et al., *The Supreme Court Upholds Same-Sex Marriage: Expert Reaction—Marriage is a Fundamental Right*, CONVERSATION (June 27, 2015, 12:36 AM), https://theconversation.com/the-supreme-court-upholds-same-sex-marriage-expert-reaction-43961 [http://perma.cc/R829-MWMR] ("The court refrained from categorizing 'sexual orientation' as a suspect class (that is, a class of individuals who have been discriminated against historically). This means the court bypassed the dicey equal protection analysis that would have engendered a level of higher judicial scrutiny in analyzing a law as to whether it has violated the rights of a suspect class.").

antidiscrimination protections to LGBT individuals in other aspects of their lives.[253]

V. THE POST-*ROMER* AND POST-*SCHUETTE* CONSTITUTIONALITY OF HESTER-TYPE LAWS

Interestingly, while Justice Kennedy provided the swing vote in both *Obergefell* and *Schuette*, he took contrasting positions on the "political process" analysis in these decisions.[254] In *Obergefell*, Justice Kennedy focused on the fundamental right of marriage and the interest in bestowing the dignity of marriage to all loving couples and families.[255] He emphatically asserted that fundamental rights are not subject to voter approval.[256]

In contrast, writing for the plurality in *Schuette*, Justice Kennedy's opinion echoed some of the same language as Chief Justice Roberts's dissent in *Obergefell*.[257] Chief Justice Roberts framed the issue in *Obergefell* as who should make the "policy decision" of extending marriage rights to same-sex couples, not whether it is a good policy.[258] Likewise, Justice Kennedy framed the issue in *Schuette* as who decides whether to ban racial preferences in admissions, not on the permissibility or soundness of such a policy.[259]

Justice Kennedy tempered his endorsement of the political process to decide controversial issues like affirmative action in admissions by recognizing that the Constitution must protect "the

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[253] In an ideal and admittedly unrealistic world, were the Court to apply the political process doctrine to Hester-type laws, it would have to recognize that these laws are born out of animus to an unpopular group and apply rational basis "plus," as it did in *Romer v. Evans*. Notably, by applying the political process doctrine to LGBT rights, the Court would be able to further the progress made in *Windsor* without advancing the level of judicial suspicion of LGBT individuals as a class, since creating new suspect and quasi-suspect classes seems something the Court is reluctant to do. This application of the doctrine would result in a "best of both worlds" solution in which the rights of LGBT individuals outside the right to marry are protected, while allowing the Court to refrain from extending its jurisprudence beyond that which it is comfortable doing.

[254] *Compare Obergefell*, 135 S. Ct. 2584 (majority opinion), *with* Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623 (2014) (plurality opinion).

[255] *Obergefell*, 135 S. Ct. at 2594-2611.

[256] *Id.* at 2606 ("[F]undamental rights may not be submitted to a vote; they depend on the outcome of no elections." (quoting W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943))).

[257] *Schuette*, 134 S. Ct. at 1629-39.

[258] *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting).

[259] *Schuette*, 134 S. Ct. at 1638. The Court concluded that "[d]eliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate." *Id.*

right of the individual not to be injured by the unlawful exercise of governmental power."[260] Presumably, Justice Kennedy's two opinions can be reconciled by his recognition of same-sex marriage as a fundamental right guaranteed by the Constitution and race-based preferences as a "difficult and delicate" policy issue not constitutionally required.[261]

There is agreement, however, in Justice Kennedy's *Schuette* plurality opinion and Chief Justice Roberts's dissenting opinion in *Obergefell*. As Justice Kennedy said about Michigan's constitutional ban on race-based preferences, when a "difficult question of public policy" is at issue, the voters have the right to decide the question "through a lawful electoral process."[262] This is, in fact, the exact lens through which Chief Justice Roberts opined that the same-sex marriage bans at issue in *Obergefell* were constitutional.[263] The core of the Justices' differing opinions in *Obergefell* focused on whether same-sex marriage was an issue of public policy or an individual fundamental right that demands protection under the Constitution, even when a majority of voters disapprove.[264]

Ultimately, the constitutionality of legislative acts or voter initiatives that prevent local governments from extending nondiscrimination ordinances to members of the LGBT community may turn on whether these laws implicate public policy or are "inexplicable by anything but animus toward the class [they] affect[]."[265] Thus, if the Colorado *Romer* amendment and the Michigan *Schuette* amendment represent a continuum between unconstitutional and constitutional, where a Hester-type law falls between these two precedents is critical to the analysis.

A Hester-type law might be considered the "anti" antidiscrimination law. These laws block local efforts to extend antidiscrimination protections to groups that are not already

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[260] *Id.* at 1636.

[261] *Compare Obergefell*, 135 S. Ct. at 2604 ("The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."), *with Schuette*, 134 S. Ct. at 1636.

[262] *Schuette*, 134 S. Ct. at 1626, 1637.

[263] *Obergefell*, 135 S. Ct. at 2628 (Scalia J., dissenting).

[264] *See generally id.* If the Court deems a right as not fundamental, then rational basis review applies. In that circumstance, the ballot box, rather than the courts, are the recourse for change. Absent a fundamental right, the issue is one of policy rather than a constitutionally protected liberty interest. *See id.* at 2617 (Roberts, C.J., dissenting) (citing LEARNED HAND, THE BILL OF RIGHTS 42 (1958)) (referring to Justice Holmes's dissent in *Lochner v. New York*, 198 U.S. 45, 65 (1905), and criticizing the majority's analysis of same sex marriage under substantive due process as "elevat[ing] their own policy judgments to the status of constitutionally protected 'liberty'").

[265] Romer v. Evans, 517 U.S. 620, 632 (1996).

protected by state law. As in Arkansas, the majority of state laws do not prohibit LGBT status-based discrimination in public accommodations, housing, or employment.[266] Therefore, a Hester-type law invalidates and preempts any local efforts to pass nondiscrimination ordinances covering members of the LGBT community.[267]

Supporters of "anti" antidiscrimination laws, like Hester's Law, argue that the Constitution does not, and should not, require heightened equal protection status for members of the LGBT community.[268] Therefore, extending the umbrella of nondiscrimination laws to LGBT individuals is a matter of policy and, like *Schuette*, should be left to the voters or their elected representatives. Contrary to this position, blocking a minority group from a political process that is open to the majority, making it more difficult for the minority to effectuate

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[266] *See* HUM. RTS. CAMPAIGN, #32REASONS: STATES THAT LACK FULLY INCLUSIVE NON-DISCRIMINATION PROTECTIONS, http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/31reasons-comprehensive.pdf [http://perma.cc/NZ4T-5CMH] (last visited May 10, 2016) (showing that only 18 of the 50 states have laws prohibiting discrimination on the bases of sexual orientation and gender identity in housing and employment, meaning that an individual could get married to her same-sex spouse on one day and be fired from her job the very next day because of her sexual orientation).

[267] *See, e.g.*, ARK. CODE ANN. §§ 14-1-401 to -403 (West 2015).

[268] *See, e.g.*, Dave Price, *THE INSIDERS: Iowa Congressman Steve King*, WHO TV (Mar. 3, 2014, 10:53 AM), http://whotv.com/2014/03/02/the-insiders-iowa-congressman-steve-king/ [http://perma.cc/9KPY-ZAUX] (commenting on Arizona Governor Brewer's decision to veto S.B. 1062, which would have otherwise allowed businesses to deny services to persons based on the business owners' religious beliefs, U.S. Representative Steve King stated in a video interview, "There's nothing mentioned in [civil rights law] on self-professed behavior, and that is what [Brewer and other opponents of S.B. 1062] are trying to protect—[it] is special rights for [LGBTs'] self-professed behavior"); David Badash, *'Singled Out' GOP Lawmaker to End All LGBT Protections 'Because I Am Married to One Woman,'* NEW CIV. RTS. MOVEMENT (Feb. 12, 2015, 5:29 PM), http://www.thenewcivilrightsmovement.com/davidbadash/_singled_out_gop_lawmaker_to_end_all_lgbt_protections_because_i_am_married_to_one_woman [http://perma.cc/7DKA-FZEM] (addressing the issue of S.B.202, Arkansas State Senator Bart Hester commented that the bill was about standardizing civil rights across the State of Arkansas and that "I want everyone in the LGBT community to have the same rights I do. I do not want them to have special rights that I do not have"); Justin Lloyd, *Conservative Leader Sees Bigger Picture of Senate Bill 202*, ARK. TRAVELER (Feb. 25, 2015, 8:00 AM), http://www.uatrav.com/the_companion/article_e76b7f52-bbbb-11e4-b962-4fd43df4276f.html [http://perma.cc/8GDP-F6B9] (quoting Representative Charlie Collins, a supporter of S.B. 202, as stating that "the bill will stop current [cities] from passing laws from protecting new classes already created at the state or federal level"); Bryan Lowry, *Gov. Sam Brownback Rescinds Protected-Class Status for LGBT State Workers in Kansas*, KAN. CITY STAR (Feb. 10, 2015, 3:55 PM), http://www.kansascity.com/news/government-politics/article9694028.html [http://perma.cc/JA4F-SE8T] (explaining his decision to issue an executive order that rescinded previous protections afforded to LGBT state workers, Kansas Gov. Sam Brownback stated that the "Executive Order ensures that state employees enjoy the same civil rights as all Kansans without creating additional 'protected classes' as the previous [now-rescinded] order did").

positive legislation, is not a matter of policy; it is a violation of the Equal Protection Clause.

The future vitality of the political process doctrine is uncertain after *Schuette*. Nevertheless, the type of injury the political process doctrine was meant to remedy is exactly the type of harm caused by statewide initiatives that block local efforts to expand nondiscrimination protection to the LGBT community. Changing the political process "in the middle of the game"[269] in a way that makes minority participation more burdensome may ameliorate the majority's concern about its role in controversial policy matters. But it creates unintended equal protection consequences.[270] Certainly, the right to participate equally in the political process should not be subject to voter approval. For this reason, Hester-type laws would be presumptively unconstitutional under the political process doctrine.

The theory of the political process doctrine is not dead, even if the doctrine itself is on life support.[271] In our representative democracy, equal access to the political process is a right guaranteed by the Constitution,[272] not a policy, and it should not be conferred or circumvented by majoritarian rule.

The LGBT community has had its greatest political successes in obtaining LGBT-friendly legislation at the local level, where government decisionmakers are closest and most accountable to the voters. Local communities vary in how they value LGBT-protective laws. As Justice Scalia pointed out in his *Romer* dissent, "geographic concentration" of LGBT folks and sympathizers in a particular community may give "disproportionate political power" to LGBT-friendly voters.[273] Although Justice Scalia suggested that this is a negative result of local living patterns that the majority can counter, local power to affect local law is and always has been a very effective political process. Banning local efforts to achieve beneficial legislation imposes a "higher plane" of the political process[274] upon LGBT

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[269] Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623, 1653 (2014) (Sotomayor, J., dissenting).

[270] By changing the political process for LGBT individuals, these laws are essentially gaming the political process by allowing the majority to pursue their discriminatory interests and depriving LGBT individuals of equal protection under local laws, an arena where LGBT individuals might have a better chance of success in passing such laws.

[271] *Schuette*, 134 S. Ct. at 1653-54 (Sotomayor, J., dissenting).

[272] *Id.*

[273] Romer v. Evans, 517 U.S. 620, 647 (1996) (Scalia, J., dissenting).

[274] *Schuette*, 134 S. Ct. at 1662 n.7 (Sotomayor, J., dissenting).

members—and only LGBT members—to achieve favorable antidiscrimination laws.[275]

Proponents of Hester's Law assert that the law does not single out members of the LGBT community because the law equally affects other groups not already protected under state antidiscrimination laws. [276] But it is undeniable that Hester-type laws came either in anticipation of or as a reaction to the Court's historic marriage equality decision and other attempts to expand legal protections for the LGBT community.[277] While the sponsors of Hester-type laws may be more subtle in their drafting than those who drafted Amendment 2 in Colorado,[278] the suspicious

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[275] Without heightened scrutiny under equal protection analysis as applied to suspect and quasi-suspect classes, members of the LGBT community have no positive right under the Fourteenth Amendment to be exempt from discrimination by state law. *See* Strauder v. West Virginia, 100 U.S. 303 (1879). In striking down West Virginia's law prohibiting black men from serving on grand and petit juries, the Court reasoned that while the language of the Fourteenth Amendment is prohibitory, by implication, there is a positive right to be exempt from legal discrimination. *Id.*

[276] *See, e.g.*, Dominic Holden, *Arkansas Legislature Expected to Pass Law Allowing LGBT Discrimination*, BUZZFEED (Feb. 11, 2015, 9:17 PM), http://www.buzzfeed.com/dominicholden/arkansas-legislature-expected-to-pass-law-allowing-lgbt-disc#.jiygAyq89 [http://perma.cc/R7TW-9GT8] (commenting on concerns that S.B. 202 might be used to target LGBT individuals, Arkansas State Senator Bart Hester disagreed and stated that S.B. 202 treats everyone equally and that everyone may be singled out for discrimination in one way or another—that "[he is] singled out as a politician . . . [and] singled out because [he is] married to one woman").

[277] *See* Alex Reed, *Pro-Business or Anti-Gay? Disguising LGBT Animus as Economic Legislation*, 9 STAN. J. CIV. RTS. & C.L. 153, 187-212 (2013) (arguing that (1) the historical background against which similar bills enacted in Tennessee and proposed in Montana, Nebraska, Michigan, and Oklahoma, along with (2) the specific sequence of events leading up to the debate, introduction, or enactment of such bills, indicate that the advancement of such laws by the respective legislative bodies was motivated by a discriminatory purpose); Arkansas Tea Party, *Rally for True Marriage Senator Bart Hester*, YOUTUBE (Nov. 22, 2014), https://www.youtube.com/watch?v=PJGh5H3QxlI [http://perma.cc/4TMK-7A79] (speaking at the Rally for True Marriage, an event to rally against Judge Piazza's ruling on the same-sex marriage ban in *Wright v. Arkansas*, State Senator Bart Hester expressed his personal disapproval towards gay marriage—stating that the bible states clearly that "marriage is between one man and one woman" and that "[e]vil does not become good, wrong does not become right, and lies do not become trust, just because a few accept it. And we all know what truth is"); John Lyon, *Updated: House OKs Bills on Anti-Discrimination Ordinances, 'Conscience Protection,'* ARK. NEWS (Feb. 15, 2015, 11:02 AM), http://arkansasnews.com/news/arkansas/updated-house-oks-bills-anti-discrimination-ordinances-conscience-protection [http://perma.cc/76N5-ZD2A] (stating that in presenting S.B. 202 on the Senate floor, Representative Bob Ballinger asserted that the bill "would prevent ordinances like one the Fayetteville City Council approved in August that included prohibitions against discrimination based on sexual orientation or gender identity in housing, employment and public services"); John Lyon, *Updated: Bill Barring Discrimination Ordinances at City, County Level Becomes Law*, ARK. NEWS (Feb. 24, 2015, 3:30 PM), http://arkansasnews.com/news/arkansas/updated-bill-barring-discrimination-ordinances-city-county-level-becomes-law [http://perma.cc/JLJ9-TK55] (stating that the sponsors of S.B. 202 have said that the bill was in reaction to Fayetteville's Chapter 119).

[278] *See, e.g.*, Guo, *supra* note 1 (explaining how S.B. 202 tried to "wriggle around [*Romer v. Evans*]" by "carefully avoid[ing] mentioning gay people at all"); Press Release,

timing of the law and the sponsors' express articulation of disapproval of LGBT-protective legal efforts suggest that Hester's Law and others like it directly target LGBT individuals, just as Colorado's Amendment 2 did.[279]

Despite the spot-on doctrinal fit, the political process doctrine is judicially unavailable to halt majoritarian laws that encroach on the LGBT community's equal right to participate in the political decisionmaking process. As such, this article proposes a different analytical framework to achieve the same end.

VI. RETHINKING THE DORMANT COMMERCE CLAUSE AS APPLIED TO LEGISLATIVE BARRIERS TO LGBT-PROTECTIVE NDOS

A. The Civil Rights Cases *and* Heart of Atlanta

One palpable backlash to the *Obergefell* decision is the movement to legitimize, based on religious beliefs, discrimination against LGBT members in public accommodations and other public arenas.[280] Hester-type laws make this discrimination easier by ensuring that local communities do not pass NDOs protecting individuals based on sexual orientation and gender identity, thus perpetuating the separate and unequal treatment of LGBT individuals.

One solution to counteract this backlash to the nationwide legalization of same-sex marriage is for Congress to amend Title II of the Civil Rights Act of 1964, which prohibits discrimination on the basis of "race, color, religion, or national origin" in public accommodations, by adding protections based on sexual orientation.[281] But given the Republican majority in Congress and the fact that Congress has previously rejected similar LGBT-friendly proposals, this is unlikely to happen.[282]

Nat'l Ctr. for Lesbian Rights, Leading Civil Rights Legal Organizations Denounce Anti-LGBT Arkansas Bill, Call on Governor to Veto (Feb. 21, 2015), http://www.nclrights.org/press-room/press-release/leading-civil-rights-legal-organizations-denounce-anti-lgbt-arkansas-bill-call-on-governor-to-veto/ [http://perma.cc/68AK-MBRM] (stating that the "sponsors of SB 202 have used sweeping language . . . [in] a transparent attempt to hide from the courts the blatantly discriminatory reason why [S.B. 202] was adopted" and get around *Romer v. Evans*).

[279] Romer v. Evans, 517 U.S. 620, 624 (1996) ("Amendment 2 . . . prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians.").

[280] *See supra* Sections II.A, II.B.

[281] 42 U.S.C. § 2000a (2012).

[282] *See supra* Section I.C.

Well over a century ago, the Supreme Court considered Congress's power to prohibit private discrimination.[283] After the Civil War and the ratification of the Reconstruction Amendments, Congress enacted several civil rights laws to give "teeth" to the Thirteenth and Fourteenth Amendments.[284] The Civil Rights Act of 1875 prohibited race discrimination by private businesses.[285] In the *Civil Rights Cases*, a consolidation of several cases brought by African-American citizens who were excluded from public accommodations, the Court considered the constitutionality of the 1875 Act.[286] The Court limited the reach of the Fourteenth Amendment to state action only and held that Congress had no "direct and primary" authority under Section 5 of the Fourteenth Amendment to punish race discrimination by private actors.[287] The question of whether Congress could exercise this authority under its Commerce Clause powers was raised but not answered.[288]

The Court answered that question 70 years later.[289] In *Heart of Atlanta Motel v. United States*, the Court upheld Title II of the Civil Rights Act of 1964.[290] The Court distinguished the *Civil Rights Cases*, which invalidated the 1875 Act, from Title II of the 1964 Act.[291] In the 1964 Act, Congress limited the reach of Title II to specific categories of public accommodations.[292] One of the categories defined as public accommodations included establishments with "operations [that] affect commerce."[293] Thus, private discrimination in public accommodations could be prohibited under Congress's broad Commerce Clause powers.[294]

The distinction between these two Acts is the authority Congress invoked to justify its prohibition of private discrimination.[295] In *Heart of Atlanta*, the Court opened the door for Congress to regulate private discrimination under its Commerce Clause powers, in juxtaposition to the 1875 Act, which the Court struck down, concluding that Congress had no

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283 *See generally* United States v. Stanley (*Civil Rights Cases*), 109 U.S. (13 Otto) 3 (1883).

284 *See, e.g.*, Civil Rights Act of 1875, ch. 114, 18 Stat. 335-37.

285 *See id.*

286 *Civil Rights Cases*, 109 U.S. at 4.

287 *Id.* at 20.

288 *Id.* at 60 (Harlan, J., dissenting).

289 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

290 *Id.* at 245-46.

291 *Id.* at 250-53.

292 *Id.* at 247.

293 *Id.*

294 *Id.* at 276-77.

295 *Id.* at 245-62.

power under Section 5 of the Fourteenth Amendment to prohibit private discrimination.[296]

Today, it is well settled that private discrimination in public accommodations substantially affects both intrastate and interstate commerce.[297] In fact, the formal titles of Hester's Law and other similar state laws include language suggestive of their direct ties to commerce. For example, these laws include phrases like "Intrastate Commerce Act" as part of their formal titles.[298]

Although banning local efforts to pass LGBT-inclusive NDOs is not an affirmative act condoning or requiring discrimination, it is government acquiescence to such discrimination. These laws are "veiled" attempts to discriminate against members of the LGBT community. While it certainly could be argued, as it was in *Romer v. Evans*, that Hester-type laws simply prohibit *special treatment* for the LGBT community, the *Romer* Court rejected that argument.[299] Therefore, if and when these laws are challenged, the "no special treatment" argument should hold no force.

To be clear, Hester-type laws do not go as far as Colorado's Amendment 2, but despite more subtle drafting, these laws have the same effect: they block local efforts to pass LGBT-friendly NDOs and make it more difficult for the LGBT community to achieve beneficial legislation. Indeed, the LGBT community—and only that community—must appeal to the state legislature or statewide electorate to repeal local bans on or achieve state antidiscrimination protections.

In a constitutional challenge to these Hester-type laws, the political process doctrine is of no avail. Heightened scrutiny under equal protection is dependent on the composition of the Supreme Court and its willingness to either extend quasi-suspect class status to LGBT members or to apply the *Romer* "rational basis with [a] bite" scrutiny to these laws.[300] This article suggests,

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[296] *Id.* at 249, 260-62.

[297] Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 277-80 (1981); Perez v. United States, 402 U.S. 146, 155 (1971); Katzenbach v. McClung, 379 U.S. 294, 299-301 (1964); *Heart of Atlanta Motel*, 379 U.S. at 252-53.

[298] ARK. CODE ANN. §§ 14-1-401 to -403 (West 2015); S.B. 202, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (describing its purpose as "to amend the law concerning ordinances of cities and counties by creating the intrastate commerce improvement act and to declare an emergency"); Equal Access to Intrastate Commerce Act, TENN. CODE ANN. 4-21 § 1 (2011).

[299] Romer v. Evans, 517 U.S. 620, 626-36 (1996).

[300] Darmer & Chang, *supra* note 223, at 21. In light of Justice Scalia's sudden death and the now empty seat on the Supreme Court, the fate of cases addressing LGBT-friendly legislation is currently unclear. *See* Richard Wolf, *Here's How Scalia's Death Affects Supreme Court Rulings*, USA TODAY (Feb. 15, 2016, 7:16 AM), http://www.usatoday.com/

based on the Dormant Commerce Clause, a novel theory that overcomes the hurdles faced by other methods challenging these Hester-type laws.

B. A Dormant Commerce Clause View of De Facto Discrimination in Public Accommodations Against Members of the LGBT Community

Before venturing into uncharted territory and proposing a creative application of the Dormant Commerce Clause, a brief primer on the Commerce Clause and its negative implications is warranted. While the Commerce Clause, particularly its dormant aspect, is a difficult subject to distill in a few paragraphs, the following is meant to provide a very broad framework.

Enumerated in the Constitution, Congress has broad authority to regulate commerce.[301] Indeed, the Constitution was drafted, in part, to create a stronger central government, particularly as applied to the regulation of commerce.[302] The federal government had little power under the Articles of Confederation.[303] As a result, states created trade barriers among themselves, hindering the growth of a strong national economy.[304] The Constitution remedied what the Federalists referred to as local protectionist factions.[305]

Historically, the Court has interpreted the scope of Congress's power under the Commerce Clause in various ways, from very narrow to rather expansive.[306] Today, Congress enjoys

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story/news/politics/2016/02/14/scalia-death-supreme-court-abortion-immigration-race-labor-voting-conservative/80372440/ [http://perma.cc/LP6P-YFKU].

[301] U.S. CONST. art. I, § 8, cl. 1.

[302] *See generally* Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509 (2007); Vasan Kesavan, *When Did the Articles of Confederation Cease to Be Law?*, 78 NOTRE DAME L. REV. 35 (2002).

[303] *See* Roderick E. Walston, *The Federal Commerce and Navigation Powers:* Solid Waste Agency of Northern Cook County*'s Undecided Constitutional Issue*, 42 SANTA CLARA L. REV. 699, 706 (2002) (citing United States v. Lopez, 514 U.S. 549, 557 (1995)); Marianne Moody Jennings & Nim Razook, United States v. Morrison*: Where the Commerce Clause Meets Civil Rights and Reasonable Minds Part Ways: A Point and Counterpoint from a Constitutional and Social Perspective*, 35 NEW ENG. L. REV. 23, 24 (2000) (citing United States v. Morrison, 529 U.S. 598, 608 (2000)).

[304] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring) (discussing the Articles of Confederation and the lack of centralized power to regulate commerce that resulted in "conflict of commercial [state] regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad"); Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249 (1997).

[305] Smith, *supra* note 304; *see also* Stephen M. Feldman, *Is the Constitution Laissez-Faire?: The Framers, Original Meaning, and the Market*, 81 BROOK. L. REV. 1, 8 (2015).

[306] *See generally* Stephen Ganter, *Did* United States v. Lopez *Turn Back the Clock on the Commerce Clause?*, 21 T. MARSHALL L. REV. 343, 349-53 (1996) (discussing

broad power to regulate commerce covering three categories of activity.[307] These categories include (1) the "channels of interstate commerce," (2) "instrumentalities of interstate commerce," and (3) "activities that substantially affect interstate commerce."[308] The Court has defined the instrumentalities that Congress may "regulate and protect" as "persons or things in interstate commerce, even though the threat may come only from intrastate activities."[309]

Despite the fact that Congress enjoys extensive power to regulate commerce, this power is not exclusive.[310] Early Commerce Clause cases held that the Tenth Amendment supported states' rights to regulate intrastate commerce, as well.[311] States had this power even if "the products of a domestic manufacture may ultimately become the subjects of interstate commerce."[312] But reeling from the Great Depression of the late 1930s, the Court acquiesced to President Franklin D. Roosevelt's pressure to uphold his New Deal legislation.[313] This ushered in an era of shifting state and federal power, granting Congress broad authority to regulate commerce—even intrastate commerce—when it substantially affects interstate commerce.[314] Since this shift, a patchwork of federal cases have addressed questions regarding the scope of the states' remaining power to regulate commerce.[315]

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the New Deal, "Switch in Time," and subsequent judicial decisions and how these impacted the scope of Congress's power under the Commerce Clause).

[307] United States v. Lopez, 514 U.S. 549, 558-59 (1995).

[308] *Id.*

[309] *Id.* at 558.

[310] *Id.* at 584-85.

[311] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 293-94 (1936).

[312] Kidd v. Pearson, 128 U.S. 1, 22-23 (1888). *But see* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824) ("[T]he power of Congress [to regulate commerce] does not stop at the jurisdictional lines of the several States.").

[313] *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) ("Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.").

[314] *Id.* at 36-38.

[315] *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005) (finding that a state medical marijuana law was preempted by the federal Controlled Substance Act because Congress created a broad regulatory scheme to combat illegal drugs under its Commerce Clause powers); United States v. Morrison, 529 U.S. 598 (2000); *Lopez*, 514 U.S. 549 (invalidating the federal gun-free school zone law because any connection to interstate commerce was loosely made based on stacking inferences; the Court said that Congress exceeded its Commerce Clause powers by regulating guns in general, rather than providing a "jurisdictional hook" to interstate commerce by limiting the reach of the statute to guns moving through interstate commerce); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); Perez v. United States, 402 U.S. 146 (1971); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding wheat production quota law even though the wheat was grown intrastate for noncommercial,

One category of cases in which the Court has attempted to delineate state and federal authority to regulate commerce involves questions of federal preemption.[316] Of course, under the Supremacy Clause, existing federal regulation precludes state regulation.[317] Where a federal and state regulation conflict, the federal government's authority to regulate in the area forecloses the state's power to regulate the subject matter.[318] As applied to Hester-type laws, since Congress has not yet extended Title II of the Civil Rights Act of 1964 to prohibit discrimination based on sexual orientation or gender identity, there is no federal law that would conflict with a state law banning local efforts to enact LGBT-protective ordinances.[319] Therefore, these state laws face no federal preemption challenges under the Supremacy Clause.

Other cases involve the negative implications of the Commerce Clause.[320] In these cases, there is no direct conflict between federal and state regulations.[321] Typically, these cases involve confusion over whether Congress has regulated in the entire subject area or even in part of the subject area, leaving open unregulated areas for the states to regulate.[322] Then, the inquiry focuses on (1) whether Congress has exclusive power, precluding states to regulate in the area, even in the absence of federal regulation, (2) whether states have concurrent jurisdiction to regulate in an area, and if so, (3) what limits should apply to the state's power.[323] Finally, in determining the limits of a state's power to regulate commerce in an area where there is concurrent jurisdiction, the Court can invoke the Dormant Commerce Clause in determining whether a state regulation discriminates against or directly regulates interstate commerce.[324] The level of deference

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personal use, creating a broad notion of Commerce Clause powers based on an aggregate theory that even in-state, noncommercial activity could in the aggregate affect interstate commerce).

316 *See, e.g.*, Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493 (1989).

317 U.S. CONST. art. VI, cl. 2.

318 Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819)) (stating that "state law that conflicts with federal law is 'without effect'" (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981))).

319 *See supra* Section I.C.

320 *See, e.g.*, Okla. Tax Comm'n, v. Jefferson Lines, Inc., 514 U.S. 175, 179-80 (1995) (explaining the negative implications of the Commerce Clause).

321 *Id.*

322 Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141-42 (1963).

323 *Id.* at 142.

324 Maine v. Taylor, 477 U.S. 131, 138 (1986) (stating that where a state or local regulation "discriminate[s] against interstate commerce 'either on its face or in practical effect,'" the Court applies strict scrutiny and the regulation will be held unconstitutional unless there are no less restrictive means to meet a "legitimate local purpose"; on the other hand, where the regulation serves a legitimate local concern and has only an incidental

the Court will give to the state's regulation depends on the extent to which the regulation burdens interstate commerce.[325]

Most law students' eyes glaze over when the Dormant Commerce Clause is introduced in their first-year Constitutional Law class. The dormancy described, however, is the nebulous negative aspect of the Commerce Clause.[326] Particularly unpopular with some of the Justices, the various cases applying the Dormant Commerce Clause seem irreconcilable. Even the Justices struggle with the Dormant Commerce Clause and the body of case law that has interpreted and applied the doctrine.[327] Justice Thomas expressed his view that "'[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application[,]' and, consequently, cannot serve as a basis for striking down a state statute."[328]

Despite its complexity, the Dormant Commerce Clause (or the negative implications of the Commerce Clause) completes the circle of Congress's broad authority over interstate commerce.[329] It ensures that the states' interest in maximizing their own economies will not create barriers, something that was an unfixable problem under the Articles of Confederation.[330] It

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effect on interstate commerce, the Court will find such regulations unconstitutional "only if the burdens they impose on interstate trade are 'clearly excessive in relation to the putative local benefits'" (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979))); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[325] *See Pike*, 397 U.S. at 142 (applying a balancing test to determine whether the burden on interstate commerce outweighs the local burden).

[326] *See supra* note 315 and accompanying text.

[327] *See, e.g.*, Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232 (1987) (Scalia, J., concurring in part and dissenting in part) (discussing the Dormant Commerce Clause and the Court's unjustified, nontextual application of it, which the Court has done very poorly for over a century). According to Justice Scalia, "There is no conceivable reason why congressional inaction under the Commerce Clause should be deemed to have the same preemptive effect elsewhere accorded only to congressional action. There, as elsewhere, 'Congress' silence is just that—silence . . . ." *Id.* (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987)).

[328] Am. Trucking Ass'ns v. Michigan, 545 U.S. 429, 439 (2005) (Thomas, J., concurring) (citation omitted) (quoting Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 68 (2003)); *see also* Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 68 (2003) (Thomas, J., concurring in part and dissenting in part).

[329] *See* Anna J. Cramer, *The Right Results for All the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause*, 53 VAND. L. REV. 271, 275 (2000); Larry E. Gee, *Federalism Revisited: The Supreme Court Resurrects the Notion of Enumerated Powers by Limiting Congress's Attempt to Federalize Crime*, 27 ST. MARY'S L.J. 151, 157-59 (1995) (providing a history of the Court's Commerce Clause jurisprudence); Maxwell L. Stearns, *The New Commerce Clause Doctrine in Game Theoretical Perspective*, 60 VAND. L. REV. 1, 4 (2007).

[330] Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1184 (1986).

also helps fulfill the promise of the Constitution and ensures national unity.[331]

Although an imperfect fit, the Dormant Commerce Clause might be an effective doctrine to challenge the constitutionality of laws banning local NDOs that protect LGBT members. Recently, big businesses such as Walmart, Target, and Apple have threatened to boycott states adopting robust religious freedom laws that would shield businesses from public accommodation laws if they withheld goods or services from same-sex couples.[332] Other mega-corporations like American Airlines, Facebook, Nike, General Mills, Google, The Dow Chemical Company, and Levi Strauss have expressed their support for the proposed Equality Act of 2015.[333] These corporate endorsements for LGBT equality

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[331] General Motors Corp. v. Tracy, 519 U.S. 278, 299 (1997); C&A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 411 (1994) (Souter, J., dissenting) (explaining that local favoritism and economic protectionism is what "dormant Commerce Clause jurisprudence seeks to root out"). *But see* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Co., 550 U.S. 330, 343 (2007) ("The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition.").

[332] *See* Claire Zillman, *Salesforce Boycotts Indiana over Fear of LGBT Discrimination*, FORTUNE (Mar. 26, 2015, 4:51 PM), http://fortune.com/2015/03/26/salesforce-indiana-same-sex-law/ [http://perma.cc/8CQF-PNM6] (following the signing into law of Indiana's religious freedom bill on March 25, 2015, Salesforce's founder and CEO Marc Benioff announced the company's decision to boycott the State of Indiana and cancel all programs requiring employees and customers to travel to Indiana); Tim Evans, *Angie's List Canceling Eastside Expansion over RFRA*, INDYSTAR (Apr. 2, 2015, 11:38 AM), http://www.indystar.com/story/money/2015/03/28/angies-list-canceling-eastside-expansion-rfra/70590738/ [http://perma.cc/52YV-UZAY] (Angie's List CEO Bill Oesterle announced on March 28, 2015, the company's decision to cancel a $40 million headquarters expansion in Indiana); Jeremy Stoppelman, *An Open Letter to States Considering Imposing Discrimination Laws*, YELP (Mar. 26, 2015, 5:52 PM), http://officialblog.yelp.com/2015/03/an-open-letter-to-states-considering-imposing-discrimination-laws.html [http://perma.cc/DF4J-JLJM] (Yelp CEO Jeremey Stoppelman threatened to boycott states that enact laws allowing discrimination against LGBT persons); *see also* Kay Steiger, *The Growing Backlash Against Indiana's New LGBT Discrimination Law*, THINK PROGRESS (Mar. 27, 2015, 10:41 AM), http://thinkprogress.org/lgbt/2015/03/27/3639895/8-entities-may-boycott-indiana-new-lgbt-discrimination-bill/ [http://perma.cc/ZL8D-AK9T] (enumerating a list of artists and entities taking reactive boycotting measures against Indiana); *Statement from Gov. Jay Inslee on Indiana's new "Religious Freedom" Law*, GOVERNOR JAY INSLEE (Mar. 30, 2015), http://www.governor.wa.gov/news-media/statement-gov-jay-inslee-indiana%E2%80%99s-new-%E2%80%9Creligious-freedom%E2%80%9D-law [http://perma.cc/S4MM-9TJD] (Washington Governor Jay Inslee announced on March 30, 2015, an administration-wide ban on state-funded travel to Indiana); Danielle Weatherby, *Corporate America Just Became the LGBT Community's Most Powerful Ally*, FORTUNE (Apr. 2, 2016, 11:00 AM), http://fortune.com/author/danielle-weatherby/ [http://perma.cc/6SP4-SK7T].

[333] Tom Huddleston, Jr., *Google Joins Chorus of Companies Backing LGBT Bill*, FORTUNE (July 28, 2015, 5:00 PM), http://fortune.com/2015/07/28/google-equality-act-lgbt/ [http://perma.cc/C77N-W4YY]. Of course, there are always businesses that will take the opposite, more conservative stance on social issues, and there may be incentives to avoid more liberal states. Certainly, Hobby Lobby has become infamous for its strong anti-abortion position. The flight of these businesses could also have a negative effect on interstate commerce. But as the general consumer becomes more

evidence the effect that laws aimed at preempting LGBT civil rights, though applicable to intrastate commerce only, would in the aggregate have on interstate commerce.[334]

As states like Arkansas, Michigan, Texas, West Virginia, and Tennessee try to mitigate or circumvent the legal consequences of *Obergefell* by passing Hester-type laws, the Dormant Commerce Clause might be a viable weapon to invalidate these laws. The Dormant Commerce Clause applies to state laws that have the effect of economic protectionism or economic isolation.[335] Regulations have the effect of economic protectionism if they are "designed to benefit in-state economic interests by burdening out-of-state competitors."[336] Economic isolation occurs when a state tries "to isolate itself from a problem common to [many] states by raising barriers to the free flow of interstate [commerce]."[337]

Contrary to the usual effect of regulations creating economic protectionism, states with Hester-type laws may suffer economic losses as people and businesses flee a state that they believe engages in LGBT discrimination.[338] For states like Arkansas, Michigan, Oklahoma, Tennessee, West Virginia, and

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socially liberal, the trend is for companies to either take progressive views on social issues or to remain silent. *See, e.g.*, Phil Wahba, *Corporate America Comes Out Swinging Against 'Religious Freedom' Laws*, FORTUNE (Mar. 31, 2015, 1:26 PM), http://fortune.com/2015/03/31/corporate-america-religious-freedom/ [http://perma.cc/L3VR-495Q]; Sandhya Somashekhar, *After Epic 39-Hour Filibuster, Missouri Senate Passes Bill Criticized as Anti-gay*, WASH. POST (Mar. 9, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/03/09/after-epic-39-hour-filibuster-missouri-senate-passes-bill-criticized-as-anti-gay/ [http://perma.cc/N6Y9-CLG2] (explaining how Missouri's legislature passed a historic "license to discriminate bill" after a record filibuster); Katy Steinmetz, *South Dakota Could Pass 'Bathroom Bill' Affecting Transgender Students*, TIME (Feb. 16, 2016, 7:02 PM), http://time.com/4220345/south-dakota-bathroom-bill-religious-freedom/ [http://perma.cc/RH7T-5UPH] (explaining how South Dakota could be the next state to pass a "license to discriminate bill" that would allow public schools to ban transgender students from the restroom that corresponds with their gender identity).

[334] Wickard v. Filburn, 317 U.S. 111, 118-29, 133 (1942) (articulating an aggregate theory that extends Congress's Commerce Clause power to regulate totally intrastate, noncommercial activity).

[335] *C&A Carbone, Inc.*, 511 U.S. at 411 (Souter, J., dissenting); Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93 (1994); Jones v. Memphis, 868 F. Supp. 2d 710, 728 (W.D. Tenn. 2012) ("The Commerce Clause is intended to prevent economic protectionism and insure the free movement of goods between state borders, prohibiting 'laws that would excite . . . jealousies and retaliatory measures' among the several states." (quoting Huish Detergents, Inc. v. Warren, Cty., Ky., 214 F.3d 707, 710-11 (6th Cir. 2000))).

[336] New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1988) (explaining the "negative" aspect of the Commerce Clause).

[337] Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 339-40 (1992); Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179-80 (1995); *see also* Wardair Canada, Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 12 (1986); Hughes v. Oklahoma, 441 U.S. 322, 338-39 (1979).

[338] *See supra* note 319 and accompanying text.

Texas that may wish to isolate themselves from the effects of the *Obergefell* decision, efforts to push LGBT individuals and businesses to other states threaten to result in economic isolationism. What is clear is that a state's economic interests will undoubtedly fluctuate based on its LGBT-friendly or LGBT-hostile laws.[339]

The Court has long held that a state may not insulate itself from a problem common to all the states.[340] In *Edwards v. California*, the Court invalidated a statute that made it a misdemeanor for any person or corporation to knowingly "bring[] or assist[] in bringing into the State any indigent person who is not a resident of the State."[341] Knowing that his brother-in-law was without a job or money, Fred Edwards helped him move to California from Texas.[342] Edwards was convicted of violating the statute and received a suspended sentence of six months in jail.[343]

On appeal, the U.S. Supreme Court held that the California statute was "an unconstitutional barrier to interstate commerce."[344] Recognizing that the migration of indigent persons is a financial problem for the State of California, the Court determined that even the state's police power could not justify California's attempt to "isolate itself from difficulties common to all [the states] by restraining the transportation of persons and property across its borders."[345]

Any comparison of LGBT individuals to indigent persons is totally unintended. Further, the authors do not intend to suggest that LGBT individuals and LGBT-friendly businesses should be unwelcome in states and their communities—quite the contrary. Encouraging all kinds of diversity enriches a community socially, politically, and economically.[346] Apparently, however, Arkansas, West Virginia, Texas, and Tennessee disagree. In passing Hester-type laws, these states appear to value social

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339 Michael Hiltzik, *How Indiana's New Anti-LGBT Law Puts the State and Businesses in a Bind*, L.A. TIMES (Mar. 27, 2015, 1:15 PM), http://www.latimes.com/business/hiltzik/la-fi-mh-how-indianas-new-antilgbt-law-20150327-column.html [http://perma.cc/W5L3-8B36].

340 Edwards v. California, 314 U.S. 160, 171, 178, 182 (1941) (concurring opinions thought the California statutes violated the Privileges and Immunities Clause, not the Commerce Clause).

341 *Id.*

342 *Id.*

343 *Id.*

344 *Id.* at 173.

345 *Id.*

346 *See, e.g.*, Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCI. AM. (Sept. 16, 2014), http://www.scientificamerican.com/article/how-diversity-makes-us-smarter/ [http://perma.cc/9Z8W-W7HG] (analyzing the personal, social, political, and economic benefits that arise from diversity).

convention more than diversity. In response to the changing social landscape, states passing Hester-type laws are attempting to isolate themselves from the national effect of *Obergefell* and the growing trend toward inclusivity.

While Hester-type laws differ substantially from the California statute invalidated in *Edwards*, that case supports the proposition that any laws having an inevitable effect on interstate migration are matters of national concern and are thus subject to Dormant Commerce Clause doctrine.[347] States cannot regulate in areas affecting interstate commerce that "demand . . . their regulation . . . be prescribed by a single authority"—the federal government.[348]

Admittedly, federal courts may be reluctant to apply the Dormant Commerce Clause to constitutional challenges to Hester-type laws. But a robust national economy supported by the free flow of people and goods in interstate commerce is a strong rationale for judicial review of Dormant Commerce Clause claims.[349] Referring to the importance of national unity, Justice Cardozo eloquently stated, "[The Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[350]

Dormant Commerce Clause cases typically present issues that have both economic and political implications.[351] The economic aspect focuses on the extent to which the state or local regulation burdens interstate commerce,[352] whereas the political component focuses on who is burdened by the state's regulation.[353]

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[347] *Edwards*, 314 U.S. at 174.

[348] *Id.* at 176 (quoting Milk Control Bd. v. Eisenberg Farm Prods., 306 U.S. 346, 351 (1939)).

[349] *Id.*

[350] Baldwin v. G.A.F. Seelig, 294 U.S. 511, 523 (1935).

[351] CHARLES A. SHANOR, AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION 413 (2d ed. 2001).

[352] Jennifer L. Larsen, *Discrimination in the Dormant Commerce Clause*, 49 S.D. L. REV. 844, 846-47 (2004) (stating that the "promotion of national unity" is a "recurring rationale supporting judicial review of dormant Commerce Clause cases" and is often addressed in two contexts: (1) economic protectionism and (2) economic isolationism); *Baldwin*, 294 U.S. at 527 (discussing that the doctrine of economic isolation states that "one state in its dealings with another may not place itself in a position of economic isolation. . . . Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce").

[353] *See* SHANOR, *supra* note 351, at 413; Larsen, *supra* note 352, at 849 (stating that where "an out-of-state party burdened by a discriminatory regulation of another state does not have any political weight to encourage the legislature to change

If the regulation imposes burdens on outsiders—those not part of the state's polity or local electorate—judicial intervention is warranted. Because outsiders have no effective means to change unfavorable legislation through the political process, judicial intervention is the only available remedy.[354]

In applying these principles to challenge Hester-type laws, the argument rests on the assumption that these laws are disguised LGBT-discrimination measures that will have a substantial effect on interstate commerce, as recognized in *Heart of Atlanta Motel*.[355] With Hester-type laws either already on the books or currently pending in the southern states of Arkansas, Tennessee, West Virginia, and Texas, the net impact could be a general trend of businesses that support LGBT rights fleeing the south and moving north for a more inclusive business environment.[356]

As states pass LGBT-hostile laws that are designed to insulate those states from the changing social landscape that recognizes marriages and families beyond the traditional one man and one woman institution, businesses will undoubtedly respond.[357] In the aggregate, these laws will affect interstate commerce to the detriment of other southern states or local progressive communities, like Fayetteville and Eureka Springs, that support LGBT-protective measures.[358]

It is equally likely that LGBT individuals and families will move out of the states that block local efforts to expand

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the regulation, . . . the Court has used the dormant Commerce Clause to protect [such] politically powerless interests" (footnote omitted)).

354 Larsen, *supra* note 352, at 849.

355 *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

356 Tyler Pipe Indus. v. Wash. State Dep't of Revenue, 483 U.S. 232 (1987); s*ee also Despite Nationwide Uproar, Discrimination Bill Becomes Arkansas Law*, GOVERNING (Feb. 24, 2015), http://www.governing.com/topics/politics/Despite-Nationwide-Uproar-Arkansas-Blocks-Localities-from-Passing-Anti-Discrimination-Laws.html [http://perma.cc/9468-E53U] (commenting on the passage of S.B. 202, Rita Sklar, Executive Director of the ACLU of Arkansas, stated that "this bill . . . will amount to a giant, flashing 'Gays Stay Away' sign" and Rea Carey, Executive Director of the National LGBTQ Task Force Action Fund, predicted it will "stifle[] business by sending a message that Arkansas is not an inclusive place to visit, reside in, or to do business [in]"); Hiltzik, *supra* note 339 (illustrating how businesses might pull away from states with anti-LGBT laws through the example of Arizona: (1) after Arizona voters rejected a 1990 ballot measure seeking to designate Martin Luther King, Jr. Day as a state holiday, the National Football League relocated the 1993 Super Bowl, scheduled to be held in Arizona, to California, thereby costing the state roughly $100 million; and (2) after the passing of a harsh anti-immigration bill, businesses and nonprofit organizations boycotted Arizona, costing the state approximately $140 million).

357 *See Tyler Pipe Indus.*, 483 U.S. 232.

358 *Id.*

antidiscrimination protections for their community.[359] Further, like businesses that wish to avoid states with veiled discrimination laws such as Hester's Law, individuals and families seeking an LGBT-friendly community will avoid these states.[360]

Under traditional Dormant Commerce Clause doctrine, local communities burdened by their state laws would be unable to bring their claims to court.[361] The theory blocking these types of suits is that disgruntled local communities may utilize the ballot box to voice their disapproval with their legislators' enactments.[362] But since the precise injury caused by Hester-type laws is the inability of local communities to participate in the political process to achieve favorable legislation at a level of decisionmaking available to every other group, judicial intervention is the only available remedy to challenge the constitutionality of these anti-NDO laws. When people and businesses are powerless to effect legislative changes, the courts should intervene.

The doctrinal fit may not be as seamless as the political process doctrine, but the Dormant Commerce Clause provides a framework for federal review of Hester-type laws. Sensible-minded Americans might be more amenable to recognizing that the free flow of people and commercial activity in interstate commerce is more supportive of our national interests than a "cultural war" about traditional family values.[363]

CONCLUSION

Almost 20 years ago, Colorado attempted to do on a larger scale what Hester-type laws aim to do today. While

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[359] *See* Frank Newport & Gary J. Gates, *San Francisco Metro Area Ranks Highest in LGBT Percentage*, GALLUP (Mar. 20, 2015), http://www.gallup.com/poll/182051/san-francisco-metro-area-ranks-highest-lgbt-percentage.aspx [http://perma.cc/EF9A-WT5T] (finding, in a 2012-214 survey comparing the respective LGBT population of 50 metropolitan areas across various states within the United States, that the top 10 cities with the highest population of LGBTs were located in "every region of the country except the Midwest"); Gary J. Gates & Frank Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, GALLUP (Feb. 15, 2013), http://www.gallup.com/poll/160517/lgbt-percentage-highest-lowest-north-dakota.aspx [http://perma.cc/FLE5-EBFM] (finding that states with more supportive LGBT legal climates generally have larger LGBT populations—all states with at least a four percent LGBT population, except South Dakota, have laws protecting LGBTs from discrimination).

[360] Gates & Newport, *supra* note 359; Newport & Gates, *supra* note 359.

[361] General Motors Corp. v. Tracy, 519 U.S. 278, 299-300 (1997).

[362] United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343-45 (2007).

[363] Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting); Lawrence v. Texas, 539 U.S. 558, 589-90 (2003) (Scalia, J., dissenting); *see* Terri Day & Danielle Weatherby, *LGBT Rights and the Mini-RFRA: A Return to Separate but Equal*, DEPAUL L. REV. (forthcoming).

perhaps more artfully drafted than Colorado's Amendment 2, the Hester-type laws in Arkansas, Tennessee, Texas, and West Virginia, like Colorado's Amendment 2, are designed to prevent municipalities from carving out antidiscrimination protections for LGBT individuals.[364]

In his scathing dissent, Justice Scalia criticized the majority of the *Romer* Court for entering into what he characterized as a "Kulturkampf."[365] In framing the Coloradans' efforts to "preserve traditional sexual mores" amidst ever-evolving social norms, Justice Scalia thought the Court should defer to the will of the people and honor the political process.[366] Even then, the majority saw through the asserted purpose as pretext and viewed the Colorado amendment as "inexplicable by anything but animus" toward homosexuals.[367]

Despite the recent legal recognition of same-sex marriage, some states have not evolved past Colorado circa 1996. Indeed, conservative southern states that oppose LGBT equality have allowed the statewide electorate to block local efforts to provide increased LGBT antidiscrimination protections, just like the Colorado amendment 20 years ago.

Although the Colorado Supreme Court applied the political process doctrine to Colorado's Amendment 2, the U.S. Supreme Court has limited that doctrine's application to cases impacting race and access to the ballot box for racial minorities.[368] While the injuries caused by Hester-type laws are the precise injuries that the political process doctrine was designed to protect, there are limitations on that doctrine. This is particularly so in light of the Court's recent marriage equality decision, which did not go far enough in recognizing sexual orientation as a suspect or quasi-suspect class, further hindering the applicability of the political process doctrine to this group.

While the Court has recognized the importance of allowing the voice of the electorate to speak on important and controversial matters of public policy, there are striking differences between the majority opinion in *Obergefell* and the plurality opinion in *Schuette*, both authored by Justice Kennedy. The opinions

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364 *Romer*, 517 U.S. at 620.

365 *Id.* at 636 (Scalia, J., dissenting). A "kulturkampf" is a "conflict between civil government and religious authorities especially over control of education and church appointments; *broadly*: a conflict between cultures or value systems . . . ." *Kulturkampf*, MERRIAM-WEBSTER'S DICTIONARY, http://www.merriam-webster.com/dictionary/Kulturkampf [http://perma.cc/NW4Y-FQGQ] (last visited May 10, 2016).

366 *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

367 *Id.* at 632 (Scalia, J., dissenting).

368 Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467-68 (1982).

disagree about what issues should be decided by the voters and when the Constitution should protect a minority group against the majority. Specifically, in *Obergefell*, despite the dissent's view that it was a policy decision that should be decided by the voters, Justice Kennedy declared same-sex marriage a fundamental right not subject to voter approval. In contrast, in *Schuette v. BAMN*, Justice Kennedy upheld the political process when Michigan voters amended their state constitution to ban race-sensitive admissions preferences. Like Chief Justice Roberts's *Obergefell* dissent, Justice Kennedy felt that affirmative action in admissions was a difficult and delicate policy decision and should be left to the will of the people.

How the Court would view Hester-type laws (e.g., the Colorado amendment in *Romer* or the Michigan admissions amendment) is uncertain. But it is likely that the conservative Justices on the Court would view Hester-type laws as affecting a matter of public policy, which is rightfully left to a popular vote. Nonetheless, Hester-type laws harm an unpopular minority by obstructing local communities from passing pro-LGBT legislation.

It is questionable whether the political process doctrine, which used to trigger strict scrutiny review when laws change the political process "in the middle of the game,"[369] survives post-*Schuette*. Now the Court seems to favor notions of political process that uphold the electorate's wishes even at the expense of an unpopular minority.

Just as the U.S. Constitution sets the floor for liberties and protections, allowing states to provide greater benefits and protections to their citizens, state constitutions should similarly set the floor, not the ceiling, for local laws.[370] Hester-type laws are barriers to progressive communities, where the governed are closest to the power and are able to effect legal change. States reacting in fear to the potential ripple effect of *Obergefell* are inappropriately using Hester-type laws and the legislative process to fight cultural change to the status quo.

As an alternative to the framework of the equal protection and political process doctrines, this article proposes a novel repurposing of the Dormant Commerce Clause under the assumption that Hester-type laws will affect interstate commerce.

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[369] Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623, 1653 (2014) (Sotomayor, J., dissenting).

[370] *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 719 (1975); Lego v. Twomey, 404 U.S. 477, 489 (1972); Cooper v. California, 386 U.S. 58, 62 (1967) (stating that the states have the power to impose higher standards than those required by the federal Constitution).

If pro-inclusive individuals and businesses will flee from states with Hester-type laws and migrate to states with laws supporting inclusivity,[371] Hester-type laws could implicate concerns about economic isolationism, which in the aggregate could negatively affect interstate commerce. Hester-type laws allow states opposing change to isolate themselves from the evolving social landscape at the expense of minority groups in their communities.

It is not uncommon for a constitutional doctrine to undergo a metamorphosis. At one time, liberty guaranteed under the Due Process Clause of the Fourteenth Amendment protected laissez-faire economics and the right to contract.[372] As the country faced paralysis from an economic depression, the Court reinterpreted the meaning of liberty.[373] Decades later, this same liberty protected personal rights, rather than contract rights.[374]

Today, our country stands at the precipice of changing notions of personal and family relationships.[375] Just as the principles of due process transformed from economics to personal liberty[376] to match the needs of the time, so too should the doctrine of the Dormant Commerce Clause evolve from protecting equality in interstate commerce to also protecting equality in public accommodations for members of the LGBT community.

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[371] RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS REVISITED 237-39 (10th ed. 2012).

[372] Lochner v. New York, 198 U.S. 45, 53 (1905).

[373] W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937).

[374] Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980); Breard v. Alexandria, 341 U.S. 622, 625-27 (1951).

[375] Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

[376] *See supra* notes 357-62 and accompanying text.