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## SECOND-CLASS CITIZENSHIP: THE TENSION BETWEEN THE SUPREMACY OF THE PEOPLE AND MINORITY RIGHTS

ADAM H. MORSE\*

Ballot measures that amend state constitutions to prevent minority groups from gaining legal rights, such as the ability of gay and lesbian couples to enter into legally recognized marriages, pose difficult problems in constitutional law. Voters should generally have the power to enact initiatives that overturn court decisions about state constitutional provisions. The relative ease with which state constitutions can be amended allows for a useful dialogue between state courts and voters. At the same time, a serious danger of "intertemporal lock-ups" exists, where the voters of today impose their will on a different majority tomorrow, particularly when the majority seeks to exclude a discrete minority from achieving its political goals. Minority groups ought to have a right to seek legislative redress, notwithstanding defeats in prior ballot measures. I argue that the Equal Protection Clause protects a fundamental right of access to the political process: the right of all independently identifiable groups to compete equally, although not necessarily to succeed, in the political process.

Initiatives addressing same-sex marriage provide an ideal case study for balancing the political rights of minority groups with those of the majority for three reasons. First, the issue of same-sex marriage has produced a complicated interplay between court interpretations of state constitutional provisions and ballot measures amending state constitutions. Second, several states have adopted ordinary legislation permitting same-sex marriage, establishing the relevance of access to the political process for gays and lesbians. Third, gays and lesbians constitute a well-defined minority that has not been recognized as a suspect or quasi-suspect class by federal courts.

Numerous state initiatives and referenda in the last decade have addressed the legality of same-sex marriage. The California voters narrowly passed Proposition 8, a state constitutional

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amendment to “Eliminate the Right of Same-sex Couples to Marry,” on November 4, 2008.<sup>1</sup> Proposition 8 purports to reverse the recent California Supreme Court decision, *In re Marriage Cases*,<sup>2</sup> and to prohibit the California Legislature from authorizing same-sex marriages as well.<sup>3</sup> Many, but not all, of the previous initiatives and referenda addressing same-sex marriage confirmed the legal status quo—initiatives like California’s Proposition 22 from 2000, enacted at a time when marriage was already limited to different-sex couples in California.<sup>4</sup> Proposition 22 served mostly to demonstrate popular opinion against same-sex marriage, although it did have a prospective effect of eliminating the ability of the California Legislature to authorize same-sex marriage. In contrast, amendments passed in Hawaii<sup>5</sup> and Alaska<sup>6</sup> responded to court decisions that had cast doubt on the constitutionality of limiting marriage to different-sex couples.<sup>7</sup> The amendments to the state constitutions effectively settled the question. Ballot measures can also respond to legislative actions on the question of same-sex marriage; Maine’s legislature recently passed a statute authorizing same-sex marriage, but a petition for a “people’s veto” suspended the statute from going into force and a referendum at the 2009 general election repealed the statute.<sup>8</sup>

Ballot measures addressing same-sex marriage raise serious and complicated questions regarding the rights of political participation protected by the United States Constitution. From the perspective of gays and lesbians, constitutional amendments that limit marriage to different-sex couples impose a form of second-class citizenship. In addition to the obvious concern that limiting marriage to different-sex couples marks people in same-

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1. Proposition 8 passed by a margin of 52.3% to 47.7%. CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE, NOVEMBER 4, 2008, GENERAL ELECTION, at 62 (2008), available at [http://www.sos.ca.gov/elections/sov/2008\\_general/sov\\_complete.pdf](http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf).

2. *In re Marriage Cases*, 183 P.3d 384 (2008) (holding that the California Constitution gives same-sex couples the right to marry).

3. Proposition 8 purports to add a new Section 7.5 to Article I of the California Constitution, stating in full: “Only marriage between a man and a woman is valid or recognized in California.” CAL. CONST. art. I, § 7.5.

4. Proposition 22 is codified as CAL. FAM. CODE § 308.5 (Deering 2010) (“Only marriage between a man and a woman is valid or recognized in California.”). When Proposition 22 was passed on March 7, 2000, California law stated, “Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary.” CAL. FAM. CODE § 300(a) (Deering 2010) (emphasis added).

5. HAW. CONST. amend. II.

6. ALASKA CONST. art. I, § 25.

7. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562, 1998 WL 88743 (Alaska Feb. 27, 1998).

8. Act of May 6, 2009, ch. 82, 2009 Me. Laws 82 (repealed Nov. 3, 2009, by referendum).

sex couples as inferior, the amendments limit the ability of gays and lesbians to pursue their goals through the ordinary legislative process. The possibility of authorizing same-sex marriages through the political process is not theoretical: prior to Proposition 8's passage, the California Legislature had passed a bill that purported to permit same-sex marriages without court intervention, although Gov. Schwarzenegger vetoed the bill.<sup>9</sup> Vermont, New Hampshire, Maine, and the District of Columbia have also each passed statutes legalizing same-sex marriage,<sup>10</sup> although a referendum overturned Maine's statute.<sup>11</sup>

From the perspective of opponents of same-sex marriage, ballot measures like California's Proposition 8, Alaska's Ballot Measure 2 (1998), and Hawaii's Constitutional Amendment 2 (1998) play a vital role in maintaining the democratic legitimacy of government. State constitutional amendments prevent a state supreme court from imposing its policy preferences on the people as a whole.<sup>12</sup> To those opponents, the risk of second-class citizenship comes from the danger that all of the people will be reduced to second-class citizenship under the watchful tutelage of the supreme court justices.

Because of the tension between these two conceptions of democratic rights, ballot measures concerning same-sex marriage provide an ideal opportunity to analyze the question of whether the Fourteenth Amendment limits the ability of voters to reduce

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9. The California Legislature passed AB 849, which would have established gender-neutral marriage, on September 6, 2005. AB 849, 2005-06 Sess. (Cal. 2005) (vetoed Sept. 29, 2005, by Gov. Schwarzenegger). The Legislature passed a similar bill, AB 43, in September 2007. AB 43, 2007-08 Sess. (Cal. 2007) (vetoed Oct. 12, 2007). Because a prior California legislative initiative limited marriage to different-sex couples, the bills in the legislature would have needed to be submitted to the voters prior to becoming effective, unless the prior initiative was itself unconstitutional. See CAL. CONST. art. II, § 10(c); California Ballot Proposition 22 (2000), codified at CAL. FAM. CODE § 308.5 (Deering 2010). Nonetheless, the bills show the substantial possibility that gays and lesbians could win a political fight over the definition of marriage in California.

10. VT. STAT. ANN. tit. 15, § 8 (2010) (enacted Apr. 7, 2009, over Governor's veto); N.H. REV. STAT. ANN. § 457:1-a (2010); Act of May 6, 2009, ch. 82, 2009 Me. Laws 82 (repealed Nov. 3, 2009, by referendum); Religious Freedom and Civil Marriage Equality Amendment Act of 2009, Leg. No. B18-0842 (D.C. 2009) (signed by the Mayor, Dec. 18, 2009; scheduled to go into effect on March 2, 2010).

11. MAINE DEPARTMENT OF THE SECRETARY OF STATE, BUREAU OF CORPORATIONS, ELECTIONS, AND COMMISSIONS, 2009 REFERENDUM TABULATION (2009), available at <http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html>.

12. See *Romer v. Evans*, 517 U.S. 620, 651-53 (1996) (Scalia, J., dissenting) (criticizing Supreme Court majority for substituting its judgment for that of the people of Colorado and noting that the Supreme Court's judgments reflect the judgments of lawyers and other elites rather than the people as a whole).

the legal rights of minorities through ballot measures. I do not address the issues related to the distinction between "revisions" and "amendments" that the California Supreme Court considered in *Strauss v. Horton*.<sup>13</sup> I also do not repeat the arguments about whether a substantive right to same-sex marriage exists under the United States Constitution.<sup>14</sup> In *Perry v. Schwarzenegger*,<sup>15</sup> a district court judge in the Northern District of California ruled that Proposition 8 violated both the fundamental right to marriage, protected under the Due Process Clause, and the rights of gays and lesbians to equal protection of the law. While *Perry* would render the specific legal issues discussed in this Article moot if it is ultimately affirmed, Proposition 8 and similar ballot initiatives would remain useful as a case study for the fundamental right to participate in the political process. The defendant-intervenors in *Perry* have also announced their intent to appeal, and the decisions of the Ninth Circuit and the Supreme Court will ultimately control, rather than the district court decision.

## I. BACKGROUND OF THE FUNDAMENTAL RIGHT TO PARTICIPATE IN THE POLITICAL PROCESS

The right to participation in the political process developed in response to efforts by predominantly white majorities to prevent African-Americans from passing anti-discrimination legislation through the ordinary political process. In 1969, the Supreme Court ruled in *Hunter v. Erickson* that the City of Akron could not

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13. *Strauss v. Horton*, 207 P.3d 48, 60-62 (2009), *reh'g denied* (rejecting arguments that Proposition 8 constituted a "revision" that had to originate in the Legislature rather than an "amendment" that could originate with an initiative petition).

14. A large literature addresses the constitutionality of same-sex marriage. For books and articles supporting a right to same-sex marriage under the federal Constitution, see, for example, WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (The Free Press 1996); MARK STRASSER, *LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION* (Cornell University Press 1997); EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY* (Simon & Schuster 2004); Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184 (2004); Josephine Ross, *Riddle for our Times: The Continued Refusal to Apply the Miscegenation Analogy to Same-Sex Marriage*, 54 RUTGERS L. REV. 999 (2002); but see generally, e.g., Maggie Gallagher, *What Is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773 (2002); Lynn D. Wardle, "*Multiply and Replenish*": *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771 (2001). See also, Paul Axel-Lute, *Same-Sex Marriage: A Selective Bibliography of the Legal Literature* (Dec. 18, 2009), <http://law-library.rutgers.edu/SSM.html> (providing a useful but incomplete bibliography of the legal literature on same-sex marriage).

15. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

amend its charter such that any city ordinance that sought to remedy housing discrimination on the basis of race, religion, or ancestry would not take effect until approved by a majority vote in a referendum.<sup>16</sup> The Akron City Council had enacted an ordinance prohibiting housing discrimination in 1964.<sup>17</sup> Voters responded by initiating and passing a charter amendment that purported to both nullify the previously passed ordinance and to create a new procedural requirement of a referendum for any future anti-discrimination legislation.<sup>18</sup> The Supreme Court struck down the charter amendment as invalid.

The Court's reasoning in *Hunter* relies both upon precedents about the right to an equally weighted vote and upon the "most rigid scrutiny" to which classifications based on race are subject.<sup>19</sup> The arguments based on political participation amount to the conclusion that, while Akron has significant flexibility in structuring its political process, it does not have the power to require some groups of people to overcome a higher burden in achieving their legislative goals. The Court held that Akron could require a referendum before any ordinance became law but could not apply that requirement solely to laws sought by a specific minority. At the same time as *Hunter* addressed the exclusion from the political process in general, however, it also underlined the particular need to protect against exclusion from the political process based on race. *Hunter* simultaneously started the "fundamental right to participate in the political process" line of cases and raised the largest unanswered question about the doctrine: does it actually protect a fundamental right for all groups, or is it simply a manifestation of the general equal protection scrutiny applied to racially discriminatory legislation?<sup>20</sup>

The Supreme Court applied *Hunter* in connection with later cases litigating the ability of initiatives to rollback gains by minorities. A pair of cases addressed initiatives that banned the use of compulsory busing to achieve integrated schools. In *Crawford v. Board of Education*, a California initiative reversed a state Supreme Court decision requiring the use of busing.<sup>21</sup> In the companion case of *Washington v. Seattle School District No. 1*, Washington voters prohibited local school boards from implementing busing to achieve integration, thus superseding a policy voluntarily adopted by the Seattle school board to integrate its schools.<sup>22</sup> A closely divided Supreme Court applied *Hunter* in

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16. *Hunter v. Erickson*, 393 U.S. 385, 392-94 (1969).

17. *Id.* at 386.

18. *Id.* at 387.

19. *Id.* at 392.

20. For further discussion of this issue, see *infra* Part III.

21. *Crawford v. Bd. Of Educ. of L. A.* 458 U.S. 527 (1982).

22. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 461-63 (1982).

both cases but reached opposite results. The Court upheld the California constitutional amendment, reasoning that the people of California necessarily retained the authority to determine what their own constitution means.<sup>23</sup> Justice Powell, writing for the majority, noted the apparent contradiction in a rule that would prevent states from amending their constitution to be less protective of minority rights, even though they could have initially adopted a less protective constitution.<sup>24</sup>

In the *Seattle* case, however, the Supreme Court focused on the fact that the state of Washington delegated substantial authority to local school boards, including the power to adopt policies governing school assignment, yet sought to take away the ability of a school board to pursue integrated schools through busing.<sup>25</sup> *Seattle School District No. 1* fell squarely within *Hunter's* doctrine. Washington did not need to use local school boards, but having done so, it could not deprive African-Americans of the right to seek policies that they viewed as desirable on an equal basis with other voters.<sup>26</sup> Again, as with *Hunter*, the Court used language suggesting both a fundamental rights analysis and a racial discrimination analysis.<sup>27</sup>

*Hunter* and its progeny raise two questions. First, what limitations on participation in the political process implicate the Fourteenth Amendment? Second, what groups have a protected right of access to the political process: only racial minorities, any suspect class, any quasi-suspect class, independently identifiable groups that have been subjected to animus, any independently identifiable group, or even groups definable only in terms of policy preference? Both of these questions affect whether any of the limitations on same-sex marriage violate the Fourteenth Amendment.<sup>28</sup>

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23. *Crawford*, 458 U.S. at 539-40.

24. *Id.* at 535.

25. *Seattle Sch. Dist. No. 1*, 458 U.S. at 474-482.

26. *Id.* at 487.

27. See, e.g., *id.* at 467. The Court stated:

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

*Id.* (citations omitted) (quoting *Mobile v. Bolden*, 446 U.S. 55, 84 (1980)).

28. Mark Strasser analyzes *Hunter's* implications for initiatives amending state constitutions to preempt litigation seeking same-sex marriage rights in Mark Strasser, *From Colorado to Alaska by Way of Cincinnati: On Romer, Equality Foundation, and the Constitutionality of Referenda*, 36 Hous. L. Rev.

## II. DEGREE OF ACCESS TO THE POLITICAL PROCESS REQUIRED

The magnitude of the effect a constitutional amendment or similar change has on a group's access to the political process can be evaluated using two different criteria. First, the processes for amendment differ significantly. Second, amendments differ in scope. Either aspect could in theory be important to determining the reach of the fundamental right of political participation doctrine.

### A. *The Doctrinal Role of the Amendment Process*

State constitutions vary significantly in their amendment processes.<sup>29</sup> Some states allow future amendments by a simple majority vote on an initiative,<sup>30</sup> while others require supermajority votes in the legislature followed by a ballot measure<sup>31</sup> or repeated actions over the course of several election cycles.<sup>32</sup> To the extent that a straightforward and reasonable opportunity exists to reverse a constitutional amendment, an argument can be made that groups that are disadvantaged by the amendment are not actually excluded from participating in the political process, but rather have their participation channeled into a single mechanism.

While numerous variations exist, the requirements to reverse constitutional amendments or ballot measures prohibiting same-sex marriage fall into four major categories. The most restrictive category encompasses states that require supermajorities to amend their constitutions. Some states require a supermajority in the legislature followed by a simple majority vote in a ballot measure.<sup>33</sup> Others require a supermajority vote on a ballot measure.<sup>34</sup> Supermajority requirements raise the clearest concerns

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1193, 1232-1237 (1999). His analysis of *Hunter* does not fully consider the broader issues of democratic government raised by anti-same-sex marriage amendments.

29. For a complete catalogue of the amendment processes in all fifty states, see *infra* Part IV.

30. See, e.g., CAL. CONST. art. II, § 8(b), art. XVIII, §§ 3-4 ("[a] proposed amendment or revision shall be submitted to the electors and if approved by a majority thereon takes effect . . .").

31. See, e.g., N.H. CONST. pt. II, art. C (requiring three-fifths vote in each house of the legislature followed by a two-thirds popular vote).

32. See, e.g., IOWA CONST. art. X, § 1 (requiring majority votes in both houses of the legislature in two consecutive legislative sessions separated by an election followed by a referendum).

33. See, e.g., KAN. CONST. art. XIV, § 1 (requiring a two-thirds vote in each house of the legislature followed by a majority vote in a referendum); KY. CONST. § 256 (requiring a three-fifths vote in each house of the legislature followed by a majority vote in a referendum); *see also* DEL. CONST. art. XVI, § 1 (requiring a two-thirds vote in two consecutive legislative sessions, without a requirement of popular ratification).

34. See, e.g., FLA. CONST. art. XI, §§ 1, 5 (requiring sixty percent popular

in terms of access to the political process because they imply that even if a disfavored group builds the support of a majority of the electorate, it may still be unable to achieve its goals.<sup>35</sup> The second category requires a sustained majority—approval by a majority of two successive legislatures and then a majority of the vote on a ballot measure or the like.<sup>36</sup> Requirements of a sustained majority significantly increase the difficulty of achieving political victories, but allow a consistent majority to prevail. The third category encompasses states that allow amendments through a simple majority.<sup>37</sup> Several states, including California, permit voters to initiate and adopt a constitutional amendment through a simple majority vote in a single election.<sup>38</sup> In other states, the legislature can propose an amendment with a simple majority that can then be ratified by a simple majority of the people in the same election cycle.<sup>39</sup> In some states, including California, statutory initiatives also have the same basic effect in terms of limiting access to the political process—a simple majority on a future initiative can overturn the initiative, but the initiative binds the legislature.<sup>40</sup> The final category covers amendments that overturn state court

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vote to ratify constitutional amendments); N.H. CONST. pt. II, art. C (requiring a three-fifths vote in each house of the legislature followed by a two-thirds vote in a referendum).

35. Some constitutions go beyond even supermajority requirements for certain provisions, making some provisions unamendable or amendable only through a special process. The most familiar such provision is the United States Constitution Article V limitation on reductions in equal representation in the Senate without consent. U.S. CONST. art. V. But some states and many foreign countries place certain basic rights into this category. See, e.g., OHIO CONST., art. VII, § 5 (“But no alteration of this constitution shall ever take place, so as to introduce slavery or involuntary servitude into this State.”); UTAH CONST. art III, § 1 (“The following ordinance shall be irrevocable without the consent of the United States and the people of this State: First: --Perfect toleration of religious sentiment is guaranteed . . . but polygamous or plural marriages are forever prohibited.”); GRUNDESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY] art. LXXIX, § 3 (“Amendments to this Basic Law affecting the division of the Federation into Länder [States], their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.”) An unamendable provision would present the issue of exclusion from the political process even more starkly than a supermajority requirement. No state has adopted an unamendable restriction on same-sex marriage.

36. IND. CONST. art. XVI, § 1; IOWA CONST. art. X, § 1.

37. ARIZ. CONST. art. XXI, § 1; CAL. CONST. art. II, § 8(b).

38. CAL. CONST. art. II, § 8(b); ARK. CONST. art. 5, § 1, *amended by* ARK. CONST. amend. 7.

39. ARIZ. CONST. art. XXI, § 1.

40. CAL. CONST. art. II, § 10(c) (explaining that the Legislature “may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval”).

constitutional decisions, without restricting future efforts to achieve the same effect through the legislative process. Hawaii's amendment in response to litigation over same-sex marriage provides an exemplar: it explicitly granted the legislature the power to prohibit same-sex marriage without requiring that the legislature exercise that power, thus ending any state constitutional claims to a right to same-sex marriage without reducing the access of gays and lesbians to the ordinary political process.<sup>41</sup> This category would also cover the Maine "people's veto" and similar provisions allowing for ballot measures to nullify statutes passed by the legislature without imposing any future restrictions on legislation.<sup>42</sup>

As a matter of doctrine, the Supreme Court's decisions in *Hunter*, *Crawford*, and *Seattle School District No. 1* fairly definitively resolve which degrees of exclusion from the political system present a constitutional issue. *Hunter* itself dealt with a city charter amendment that could be reversed by an initiative signed by ten percent of the voters of Akron and then passed by a majority of the voters at the next election.<sup>43</sup> The Supreme Court's discussion of the charter amendment process demonstrates that it believed that African-Americans in Akron had access to a reasonable, practical method to achieve their fair-housing political goals.<sup>44</sup> They could have gathered petition signatures and then campaigned to seek a majority vote in favor of their preferred policies. *Hunter* declared that access to one reasonable political method to achieve their goals was insufficient where any other group could either pursue the normal ordinance process through the city council or seek to muster a majority of the vote on a charter amendment.<sup>45</sup> *Hunter*'s logic applies with equal force to a provision like Proposition 8 that prohibits the California legislature from authorizing same-sex marriages, simply substituting constitution for city charter and statute for ordinance. Just like the African-Americans in Akron, gays and lesbians can achieve their political goals by passing an initiative with a simple majority at an election but cannot pursue those goals through the legislature. As *Hunter* acknowledged, a government can shift all decision making to a system of popular votes such as a traditional New England town meeting without implicating the Equal

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41. HAW. CONST. art. I, § 23.

42. See *infra* notes 50-51 and accompanying text (discussing the right to political participation and possible preclusion of political defeats).

43. *Hunter*, 393 U.S. at 387.

44. *Hunter*, 393 U.S. at 392 n.7 ("The people of Akron had the power to initiate legislation, or to review council decisions, even before § 137 . . . [t]he procedural prerequisites for this popular action are perfectly reasonable, as the gathering of 10% of the voters' signatures in the course of passing § 137 illustrates.") (citations omitted).

45. *Id.*

Protection Clause,<sup>46</sup> but requiring one group to use that system while all other groups can choose whether to use that mechanism or a different mechanism raises serious concerns. And, of course, *Hunter's* logic applies with even more force to limits on political participation that would require supermajorities or sustained majorities to reverse.

If charter amendments and state constitutional amendments that eliminate access to the ordinary legislative process can violate the Equal Protection Clause despite the option of overturning those amendments with a simple majority, then statutory initiatives that have the same practical effect should be treated similarly. California's Proposition 22 adopted precisely the same language as Proposition 8 as a statute, rather than as a constitutional amendment.<sup>47</sup> Under the California Constitution, a statute passed by initiative binds the legislature,<sup>48</sup> although of course it does not bind the California courts in their interpretation of the state constitution. Thus, for purposes of *Hunter*, Proposition 22 limited the ability of gays and lesbians to pursue the legalization of same-sex marriage just as effectively as Proposition 8. Statutory initiatives in California require a smaller number of petition signatures (five percent of the vote in the last gubernatorial race versus eight percent for amendments), but that difference does not provide a significant reason to allow statutory initiatives to constrain legislative action in ways that a constitutional amendment could not, especially in light of the professionalization of the petition signature gathering process. Many observers believe that higher petitioning requirements increase the costs of putting an initiative on the ballot without requiring any meaningfully greater popular support due to the increasing importance of professional signature gathering.<sup>49</sup>

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46. A New England town meeting style system for governing a state would presumably violate the Republican Form of Government Clause. See, e.g., Samuel B. Johnson, *The District of Columbia and the Republican Form of Government Guarantee*, 37 How. L.J. 333, 359 (1994) (contrasting town-meeting-style democracy with republican government and noting that "For the early Americans, 'republican' may have meant 'representative government.'"); *In re Duncan*, 139 U.S. 449, 461 (1891) (holding that "the distinguishing feature of [the republican] form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies . . .").

47. Compare CAL. CONST. art. I, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California.") with CAL. FAM. CODE § 308.5 (2010) ("Only marriage between a man and a woman is valid or recognized in California.").

48. See CAL. CONST. art. II, § 10(c).

49. See John G. Matsusaka, Direct Democracy and Social Issues 17-18 (May 2007) (unpublished manuscript) available at <http://ssrn.com/abstract=989682> (finding that the effects of different signature requirements for initiatives on the outcomes on social issues are small and not statistically significant); see

An argument could be made that the frequent use of statutory or constitutional initiatives in California political practice defines the initiative process as part of the ordinary political life of California. That raises obvious administrative difficulties—how common does use of an initiative system have to be in order to render it fully adequate access to the political process? Even beyond the administrative difficulties, *Hunter's* logic precludes that interpretation. *Hunter* and its progeny defend the right to compete on a fair playing field—not the right to prevail, but the right for protected groups to have as much opportunity to pursue their objectives through the political process as any other group. Continuing the sports analogy of a fair playing field, imagine a game of football in which one team can score either by touchdowns or by field goals while the other can score only by touchdowns. Touchdowns are a reasonable way to score in football and are in fact often more desirable than field goals. Nonetheless, allowing one team multiple ways of scoring and the other one would be grossly, and obviously, unfair.

Ballot initiatives that simply reverse state court decisions, such as the Hawaii same-sex marriage amendment, must pass muster because that is precisely analogous to *Crawford*. *Crawford* establishes that a right to political participation does not preclude political defeats with regard to substantive rights under a state constitution.<sup>50</sup> Likewise, *Hunter* acknowledged that the people of Akron could have nullified the fair-housing ordinance through an initiative without violating the Constitution, as long as they allowed room for future political action on the subject.<sup>51</sup> The Maine “people’s veto” thus raises no constitutional issues under the right to political participation.

While many initiatives fall neatly into one category, some cross categories. California’s Proposition 8 functions both as an initiative reversing *In re Marriage Cases*—permitted under *Crawford*—and as a bar on future legislative action. Allowing all groups except gays and lesbians the right to achieve their political goals regarding marriage through the legislature makes Proposition 8 comparable to the Washington initiative in *Seattle School District No. 1*.

In order to reconcile those two competing interpretations of the amendment, courts should unpack Proposition 8 into its logical

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also Larry L. Berg & C.B. Holman, *The Initiative Process and its Declining Agenda-Setting Value*, 11 LAW & POL'Y 451, 452 (1988) (arguing that successful signature gathering processes are increasingly professionalized). Signature requirements may be relevant to outcome. However, the point is that variations in signature requirements appear to have relatively small effects.

50. *Crawford*, 458 U.S. at 542.

51. *Hunter*, 393 U.S. at 392-93.

component parts. If Proposition 8 had two sections, one of which overturned *In re Marriage Cases* and one of which eliminated the ability of the California Legislature to authorize same-sex marriages, the application of *Crawford* and *Seattle School District No. 1* would be straightforward.<sup>52</sup> The section overturning *In re Marriage Cases* would be constitutional under *Crawford*, and the section limiting the California Legislature would be unconstitutional under *Seattle School District No. 1*. While the drafters of Proposition 8 structured it as a single unitary provision, that should not serve to save its unconstitutional application to restrict the California Legislature. Instead, the unconstitutional application of Proposition 8 should be struck down, with the severability of the constitutional (at least in terms of the fundamental right to participate) portion of Proposition 8 as the only remaining question.

The hypothetical of a binary constitutional amendment on same-sex marriages is not far-fetched. A 1998 Alaska constitutional amendment had precisely that structure in its original draft. The Alaska amendment as drafted stated, "To be valid or recognized in this State, a marriage may exist only between one man and one woman. No provision of this constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex."<sup>53</sup> Under my analysis of *Hunter* and its progeny, the first sentence would be unconstitutional, but the second sentence would pass muster.

### *B. The Scope of Exclusion from the Political Process*

Provisions that exclude a group from the political process also vary in terms of substantive scope. Within the context of prohibitions of same-sex marriage, some amendments apply solely to the term "marriage." California's Proposition 8 has been construed by the California Supreme Court to prevent the use of the term "marriage" for future legal relationships within a same-sex couple while noting that the California Constitution continues

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52. This assumes that *Hunter* and *Seattle School District No. 1* recognize a fundamental right of access to the political process independent of a suspect classification. For a discussion of whether those cases depended on a suspect classification, see *infra* Part III.

53. *Bess v. Ulmer*, 985 P.2d 979, 988, n.57 (Alaska 1999). The Alaska Supreme Court ordered the second sentence struck from the proposed amendment as surplusage and because of a concern that it could result in prosecutions of people in marriage-like relationships not sanctioned by the state. The amendment as adopted consists only of the first sentence of the draft amendment. ALASKA CONST. art. I, § 25. It is also worth noting that the Alaskan amendment was not a voter-initiated amendment; under the Alaska Constitution, amendments must first be passed by a two-thirds vote of each house of the legislature and then adopted by a majority vote of the population. *Bess*, 985 P.2d at 982.

to require the state to offer the same substantive rights to same-sex couples as to different-sex couples.<sup>54</sup> Conversely, Utah's same-sex marriage amendment prohibits same-sex marriage or the creation of any same-sex relationship with a substantially equivalent legal effect to marriage.<sup>55</sup>

The scope of exclusion from the political process could in principle play a role in triggering scrutiny under the fundamental right to participate. Some of the language in *Romer v. Evans* emphasizes the "sweeping and comprehensive . . . change in legal status"<sup>56</sup> instituted by Colorado's Amendment 2, which purported to eliminate any "protected status based on homosexual, lesbian, or bisexual orientation."<sup>57</sup> *Romer* is a complicated case with regard to arguments about a fundamental right of political participation—depending on how it is read, it can either provide substantial support for the existence of such a right or foreclose those same arguments.<sup>58</sup> Nonetheless, *Romer* is relevant because of Justice Kennedy's emphasis in the majority opinion on the wide scope of Amendment 2. In explaining the difficulty in applying rational basis review to the Amendment, Justice Kennedy noted that the Amendment had the "exceptional" and "peculiar property of imposing a broad and undifferentiated disability on a single named group,"<sup>59</sup> from which he concluded that the basis for the Amendment was improper animus. *Romer* thus does raise some possibility that the scope of exclusion could affect the validity of a constitutional amendment limiting the ability of gays and lesbians to seek the opportunity to marry.

The cases that deal more directly with access to the political process, however, do not focus on the breadth of the restrictions at issue. *Hunter* did not dwell on the importance of fair-housing statutes within the political goals of African-Americans, nor did it address the opportunities for other victories within the city government.<sup>60</sup> Likewise, neither *Crawford* nor *Seattle School District No. 1* appeared to turn on the relative importance of busing programs in promoting integrated schools.<sup>61</sup> Rather, the only question is whether the relevant governmental body had responsibility for other similar matters. The lack of emphasis on breadth of restrictions suggests that the state could remove all

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54. *Strauss* 207 P.3d at 60-62.

55. UTAH CONST. art. I, § 29.

56. *Romer*, 517 U.S. at 627.

57. See *id.* at 624 (quoting COLO. CONST. amend. 2).

58. See *infra* Part III.B (noting that *Romer* did not explicitly rely on a fundamental right of political participation, despite the fact that the court below did, but still incorporated reasoning related to political access in striking down the law under review).

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

60. *Hunter*, 393 U.S. at 386-96.

61. *Crawford*, 458 U.S. 527; *Seattle Sch. Dist. No. 1*, 458 U.S. 457.

responsibility for marriage law from a given decision-making body without implicating *Hunter*. A state does implicate *Hunter*, however, by allowing the legislature to control marriage law within broad parameters but nonetheless eliminating the ability of gays and lesbians to pursue even the purely symbolic yet important label of marriage.

### III. THE ROLE OF A SUSPECT CLASSIFICATION IN *HUNTER*

All of the decisions by the United States Supreme Court striking down initiatives for eliminating the right to participate in the political process have dealt with initiatives that interfered in the ability of African-Americans to achieve their goals through ordinary legislative means. Extending the *Hunter* line of cases to invalidate state constitutional amendments that limit the access of gays and lesbians to the political process raises the question of whether there is, in fact, a fundamental right to participate in the political process, or whether *Hunter* should be understood as an application of strict scrutiny to a suspect classification. If the right to political participation is a fundamental right, than strict scrutiny would apply regardless of whether the group deprived of the right to participate is a suspect class.<sup>62</sup> As Pamela Karlan has noted, "double-barreled" precedents like *Hunter* can be very slippery—a court can always distinguish one component of the analysis by pointing to the other component as the real meaning of the case.<sup>63</sup>

#### A. *The Supreme Court Precedent on the Fundamental Right to Participate*

*Hunter* contains language suggesting that its holdings go beyond suspect classes. While *Hunter* relies on a host of cases involving discrimination against racial minorities, its discussion of the law of democracy relies as much on non-racial right to vote cases as on cases addressing racial discrimination.<sup>64</sup> *Hunter* cites *Anderson v. Martin*,<sup>65</sup> which struck down a law listing the race of candidates on the ballot, and *Gomillion v. Lightfoot*,<sup>66</sup> about the racial gerrymandering of Tuskegee to exclude African-American voters, but it also relied on *Reynolds v. Sims*<sup>67</sup> and *Avery v.*

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62. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445 (1985) (suggesting that if a particular minority group was "powerless to assert direct control over the legislature" such lack of control could be used as a "criterion for higher level scrutiny by the courts").

63. Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289, 296-97 (1997).

64. *Hunter*, 393 U.S. at 391-93.

65. 375 U.S. 399 (1964).

66. 364 U.S. 339 (1960).

67. 377 U.S. 533 (1964).

*Midland County*,<sup>68</sup> cases addressing malapportionment of election districts that were not based on any suspect classification.<sup>69</sup> The *Hunter* majority stated in connection with its citation of the malapportionment cases:

Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.<sup>70</sup>

The statement that a state may not disadvantage "any particular group" can only be transformed into an inability to disadvantage only suspect classes by assuming that the Supreme Court was being very sloppy in its writing.

Conversely, *Seattle School District No. 1* appears to rely more heavily on racial discrimination than *Hunter* did. *Seattle School District No. 1* uses *Hunter* as the core benchmark for its analysis of why Washington's decision to prohibit local school boards from using busing to promote integration, but its language focuses on the need to prevent the exclusion of racial minorities from the political process.<sup>71</sup> The sentences in *Seattle School District No. 1* that address access to the political process consistently either specifically mention race or speak of excluding "minorities"—a term that can easily be interpreted in racial terms.<sup>72</sup> *Seattle School District No. 1* is not inconsistent with a broader right of political participation that would apply to "any particular group," to use the language from *Hunter*. Nonetheless, the language of *Seattle School District No. 1* provides scant support for the fundamental rights reading of *Hunter*.

The Supreme Court has never directly answered whether a fundamental right to political participation exists separate from the rights of suspect classes. In *Gordon v. Lance*,<sup>73</sup> the Court rejected a challenge to a West Virginia constitutional provision requiring a referendum with the approval of 60% of the voters in order to authorize a political subdivision to raise taxes or issue bonds. While the Court's analysis focused on whether this law deprived proponents of tax increases of the right to an equally

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68. 390 U.S. 474 (1968).

69. *Hunter*, 393 U.S. at 391-93.

70. *Id.* at 392-93.

71. *Seattle Sch. Dist. No. 1*, 458 U.S. at 470 ("In our view, Initiative 350 must fall because . . . it uses the *racial* nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on *racial* minorities.") (emphasis added).

72. *Id.* at 470-84.

73. 403 U.S. 1 (1971).

weighted vote, it also rejected a *Hunter*-based challenge as well.<sup>74</sup> In contrast to *Hunter*, the West Virginia law did not disadvantage a “discrete and insular minority,”<sup>75</sup> but applied equally to all bond issues. The Court stated that it could “discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently, no sector of the population may be said to be ‘fenced out’ from the franchise because of the way they will vote.”<sup>76</sup>

While relevant, the handful of sentences in *Gordon* that address *Hunter* do not resolve the issue of the existence of a free-standing right to political participation. The reference to “discrete and insular minorities” could be read as limiting *Hunter* to protecting suspect or quasi-suspect classes, particularly in light of the long history of that phrase, dating back to *Carolene Products* footnote 4,<sup>77</sup> as identifying the rationale for providing some groups with additional protection under the Fourteenth Amendment. Conversely, *Gordon* could be read as merely requiring an “independently identifiable group or category” in order to apply the right to participate cases. Notably, *Gordon* did not frame its decision specifically in terms of the absence of racial discrimination.<sup>78</sup> The Court could have easily written a statement to the effect of “*Hunter*’s holding applies solely to racial minorities and other suspect classes.” The absence of any such language, at a minimum, leaves the question of whether *Hunter* protects an independent fundamental right open.

### B. Rational Basis Review and the Right to Political Participation

Moving beyond the core cases relying on *Hunter*, other Supreme Court cases dealing with hard issues in Equal Protection Clause jurisprudence have also discussed access to the political process in ways that illuminate the question of whether a free-standing fundamental right of political participation exists. Both of the major Supreme Court cases that invalidated government action under ostensibly rational basis review contained important language about access to the ordinary democratic process. Furthermore, if those cases are understood as prohibiting animus, they raise peculiar issues in analyzing bans on same-sex marriage such as Proposition 8. Finally, the cases that analyze which level of scrutiny should apply to various classifications put substantial emphasis on access to the political process—suggesting that rights of political participation are at the core of the Equal Protection

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74. *Id.* at 5.

75. *Id.*

76. *Id.* See also *James v. Valtierra*, 402 U.S. 137 (1971) (upholding the requirement of a referendum to approve construction of low-income housing).

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

78. *Gordon*, 403 U.S. at 5.

Clause's meaning.

### 1. Language about Democracy in "Rational Basis Plus" Cases

The Supreme Court has decided two major cases striking down statutes under rational basis review: *City of Cleburne v. Cleburne Living Center, Inc.*<sup>79</sup> and *Romer v. Evans*.<sup>80</sup> The majority opinions in both cases contain substantial language discussing political opportunity. Neither case definitively supports a fundamental right to political participation, but both emphasize the importance of the lack of opportunity to seek political redress in finding an equal protection violation. Taken together, they provide some limited support for a fundamental right of political participation independent of the rights of suspect and quasi-suspect classes.

On its face, *City of Cleburne* did not involve access to the political process at all, and yet the majority opinion focused a surprising amount of attention on the lack of a potential political solution. *City of Cleburne* dealt with whether a city regulation that blocked a group-home for adults with mental disabilities violated the Equal Protection Clause.<sup>81</sup> The Court rejected arguments that people with mental disabilities should constitute a suspect or quasi-suspect class, but nonetheless struck down the zoning regulation under rational basis review.<sup>82</sup> The most interesting thing about the *City of Cleburne* decision for present purposes, however, is its language about democracy. When the Court first states the general rule that regulations that do not involve suspect or quasi-suspect classes must merely have a rational basis, it justifies that rule by noting that "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes."<sup>83</sup> In contrast, the Court justifies the heightened scrutiny for laws involving suspect classes in part "because such discrimination is unlikely to be soon rectified by legislative means."<sup>84</sup> *City of Cleburne* thus recognizes that lack of access to the political process is a key reason to provide greater protection under the Equal Protection Clause—a recognition that inherently raises questions about whether specifically depriving a group of access to the political process violates the Fourteenth Amendment.

The next major case in which the Supreme Court struck down a law under rational basis Equal Protection review is *Romer v.*

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79. 473 U.S. 432 (1985).

80. 517 U.S. 620 (1996).

81. *City of Cleburne*, 472 U.S. at 435.

82. *Id.* at 442-50.

83. *Id.* at 440.

84. *Id.*

*Evans*.<sup>85</sup> The majority opinion in *Romer* is slippery, and its implications for a fundamental right of political participation are unclear. The best place to start our analysis is with the decision of the Colorado Supreme Court that *Romer* affirmed.

The Colorado Supreme Court decision in *Evans v. Romer* turned directly on the question of whether an independent fundamental right to political participation exists.<sup>86</sup> The Colorado Court invalidated Colorado's Amendment 2, which purported to ban any anti-discrimination laws or laws providing "protected status" to gays and lesbians.<sup>87</sup> The plaintiffs in *Evans* did not argue that gays and lesbians were a suspect class.<sup>88</sup> The majority held that they nonetheless constituted an identifiable group with a fundamental right to participate in the political process, and thus applied strict scrutiny to Amendment 2.<sup>89</sup> The dissent, in contrast, treated *Hunter* and its progeny as dependent on a suspect classification.<sup>90</sup>

The United States Supreme Court applied a different analysis in *Romer* after granting certiorari and neither endorsed nor rejected the Colorado Supreme Court's approach in the course of striking down Amendment 2 as a violation of the Equal Protection Clause.<sup>91</sup> Unfortunately, *Romer*'s reasoning is opaque and hard to untangle. Is it a decision based on the sweeping (and, according to Justice Kennedy's majority opinion, unprecedented) nature of Colorado's Amendment 2?<sup>92</sup> Is it a decision based on a conclusion that the Colorado voters were motivated by animus against gays and lesbians?<sup>93</sup> Is it a decision about the fundamental right to participate in the political process, striking Amendment 2 down because it would permit all other minorities except gays and lesbians to receive protection against discrimination through the ordinary political process?<sup>94</sup> Does *Romer* embody a more idiosyncratic interpretation of Equal Protection, such as a pariah principle or an anti-subordination and caste principle?<sup>95</sup> Each

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85. 517 U.S. 620 (1996).

86. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993). Because the Colorado Supreme Court remanded, a second *Evans v. Romer* decision also exists, 882 P.2d 1335 (Colo. 1994). *Evans I* contains all of the interesting analysis for the purposes of this Article.

87. *Evans*, 854 P.2d at 1272.

88. *Id.* at 1275.

89. *Id.* at 1275-86.

90. *Id.* at 1296-1302 (Erickson, J., dissenting).

91. *Romer*, 517 U.S. at 626.

92. *Id.* at 632-33.

93. *Id.* at 634-35.

94. *Id.* at 633 ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."); Karlan, *supra* note 63, at 296.

95. See generally Daniel Farber & Suzanna Sherry, *The Pariah Principle*,

interpretation has its own difficulties, and the reality is probably a mix of several considerations.

While *Romer* does not explicitly rely on a fundamental right to political participation, like *City of Cleburne*, it contains language emphasizing the importance of redress from the political process. Justice Kennedy's majority opinion stresses that "the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability."<sup>96</sup> The inability to "seek [legal redress] without constraint" or to obtain protection without amending the state constitution deprived gays and lesbians of precisely the same opportunities that a fundamental right to political participation would protect. The majority opinion also describes Amendment 2 as particularly unique, and unusually questionable, because of a "disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."<sup>97</sup> Indeed, some of Justice Kennedy's language could be viewed as a paraphrase of a statement of a fundamental right to political participation: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."<sup>98</sup> A right to seek aid from the government on the same terms as all other groups describes precisely what a fundamental right to political participation would protect.

Justice Scalia, in dissent in *Romer*, argued that the majority had "implicitly reject[ed]"<sup>99</sup> the Colorado Supreme Court's holding. Justice Scalia's statement seems simply wrong as a matter of the ordinary effect of a decision affirming on an alternate ground.<sup>100</sup> The majority opinion in *Romer* could have stated that the Colorado Supreme Court's analysis was wrong, but it did not. Where a superior court affirms on an alternate ground without either rejecting or endorsing the lower court opinion, it should be understood as explicitly leaving open the question of whether the

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13 CONST. COMMENTARY 257 (1996); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

96. *Romer*, 517 U.S. at 631.

97. *Id.* at 633.

98. *Id.*

99. *Id.* at 640 n.1.

100. See Strasser, *supra* note 28, at 1232-33 ("However, two claims should not be conflated: (1) the United States Supreme Court based its decision upon a rationale that differed from that offered by the Colorado Supreme Court and (2) the Court explicitly (or at least implicitly) stated that the rationale offered . . . would not support the holding in *Romer*.").

lower court was correct. Numerous reasons could support such a decision. For example, the Court could want to allow further percolation on a difficult question while resolving the case on an easier basis. Alternately, the Court could have granted certiorari to address a specific question and not want to deal with other questions. Avoiding ruling on the reasoning of the court below also could be necessary to preserve a single majority opinion. Assuming two or more of the concurring justices in *Romer* were unwilling to reject the Colorado Supreme Court's rationale, Justice Kennedy would have lost his majority had he addressed the *Hunter* argument directly. A narrower decision could easily serve the interests of the Court by deliberately leaving the question of *Hunter*'s scope unclear.<sup>101</sup>

Moreover, Justice Scalia sought to have it both ways: he both stated that Justice Kennedy rejected the Colorado Supreme Court's reasoning and yet argued that the majority's decision could only be understood as based on political process rights. As noted above, Justice Scalia stated in footnote 1 at the beginning of Part II of his opinion that "the Court implicitly rejects the Supreme Court of Colorado's holding that Amendment 2 infringes upon a 'fundamental right' of 'independently identifiable class[es]' to 'participate equally in the political process.'"<sup>102</sup> Two short paragraphs earlier, however, Justice Scalia began the forceful conclusion of Part I of his opinion by stating that "[t]he central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others."<sup>103</sup> It seems hard to reconcile Justice Scalia's two statements, that the majority rejected a fundamental right to participate equally in the political process and yet that the majority's "central thesis" involved precisely that sort of right. One possibility would be to interpret Justice Scalia's distinction as entirely one of terminology—that the *Romer* majority rejected the language of a fundamental right of political participation, yet concluded that

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101. Pamela Karlan argues that Justice Kennedy may have wanted to avoid relying on *Hunter* in *Romer* to avoid an implication that gays, lesbians, and bisexuals constitute a suspect or quasi-suspect class based on the "double-barreled" nature of the decision in *Hunter*. Karlan, *supra* note 63, at 297-304. While Karlan's argument may be correct in explaining Justice Kennedy's decisionmaking, it does not address a related point. The Court could have decided *Romer* on the basis of a fundamental right to political participation while explicitly rejecting a need to show a suspect class in order to prove a political participation claim. Because the Colorado Court did essentially that, Justice Kennedy must have deliberately chosen to avoid framing *Romer* purely in terms of fundamental rights.

102. *Romer*, 517 U.S. at 640 n.1 (Scalia, J., dissenting).

103. *Id.* at 639 (Scalia, J., dissenting).

depriving a group of equal access to the democratic process would violate the Equal Protection Clause.

The better interpretation of Justice Scalia's dissent, however, focuses on the two competing purposes that a dissenting opinion can serve. On the one hand, dissenting opinions seek to demonstrate that the majority opinion is wrong—ideally to persuade some members of the majority to not ultimately join its opinion, but failing that, to persuade future judges to reject the reasoning of the majority opinion.<sup>104</sup> At the same time, a justice can use a dissenting opinion in an effort to shape the interpretation of the majority opinion.<sup>105</sup> In *Romer*, Justice Scalia attempted to do both through a bit of judicial sleight-of-hand. In his criticisms of the majority's opinion, he acknowledged the important role that access to the political process for redress of grievances played in the majority's decision as a means to try to marshal support against the majority.<sup>106</sup> Yet he also emphasized that the majority's decision rested on a "rationale different"<sup>107</sup> from the Colorado Supreme Court's decision as "implicitly reject[ing]"<sup>108</sup> any purported fundamental right of political participation in an effort to interpret the majority's opinion. Each statement served one of Justice Scalia's purposes in dissent, but neither provides a reliable tool for interpreting the majority opinion in *Romer* that Justice Scalia rejected.

## 2. Banning Animus and a Strange One-Way Ratchet

The most straightforward reading of *City of Cleburne* and *Romer* reduces their holdings to a requirement that government action have some basis other than animus, but rational basis review based on preventing animus produces particular problems when applied to amendments banning same-sex marriage. If a law fails rational basis review under *Romer* if the sole, or perhaps even principal, reason for its enactment is animus against a specific group, then initiatives reversing state-court decisions permitting same-sex marriage should be unconstitutional. Even before *In re Marriage Cases*, California enacted a domestic partnership law that provided same-sex couples with essentially the same legal rights—but not the same label—as marriage.<sup>109</sup> Proposition 8, at

104. See, e.g., Maurice Kellman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 239-40 (1985) (describing the reasons behind a judge's dissent); CHARLES CURTIS, LIONS UNDER THE THRONE 74-75 (Houghton Mifflin 1947) (describing the reasons behind a judge's dissent).

105. See Kellman, *supra* note 104, at 259-65 (describing the "damage control" behavior of dissenting justices).

106. *Romer*, 517 U.S. at 639-40 (Scalia, J., dissenting).

107. *Id.* at 626 (majority opinion).

108. *Id.* at 640 n.1 (Scalia, J., dissenting).

109. *In re Marriage Cases*, 183 P.3d at 397-98 ("California . . . in recent years has enacted comprehensive domestic partnership legislation under

least on its face, would do nothing to eliminate the ability of same-sex couples to enter into domestic partnerships. Instead, Proposition 8's sole effect is a statement of disapproval—saying, in effect, “whatever those partnerships are, they are not real marriages.” Many gays and lesbians value the right to marry, at least in part, because it comes with a statement of acceptance and establishes the normativity of their relationships.<sup>110</sup> Proposition 8 serves precisely to eliminate that statement of acceptance and normativity and instead to label same-sex relationships as inferior and disfavored.<sup>111</sup> Applying an anti-animus principle, a law whose sole purpose is to express the government’s animus against a class of people fails to serve any rational government purpose.<sup>112</sup> Put another way, the government can act for many reasons, including reasons that reflect poor judgment, but it cannot act to devalue a portion of the populace by branding their most intimate relationships as inferior to the majority’s comparable relationships.

To be sure, proponents of Proposition 8 would defend it as

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which a same-sex couple may enter into a legal relationship that affords the couple virtually all of the same legal obligations and duties, that California law affords to and imposes upon a married couple.”).

110. *Id.* at 434–35, 452–53.

111. Some argue that refusing the label of “marriage” makes same-sex domestic partnerships different without being inferior. However, the whole rationale for reserving the term “marriage” for different-sex unions is that marriage is special and unusually meritorious, and that same-sex relationships should not be entitled to the same recognition. See ARGUMENT IN FAVOR OF PROPOSITION 8, VOTER INFORMATION GUIDE FOR THE NOVEMBER 4, 2008 GENERAL ELECTION, available at <http://voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt8.htm>. It states:

[Proposition 8] protects our children from being taught in public schools that “same-sex marriage” is the same as traditional marriage. Proposition 8 protects marriage as an essential institution of society. While death, divorce, or other circumstances may prevent the ideal, the best situation for a child is to be raised by a married mother and father. . . . We should not accept a court decision that may result in public schools teaching our kids that gay marriage is okay.

*Id.* (emphasis in original). That context, as well as in the overall context of the history of official condemnation of homosexuality and of same-sex relationships, demonstrates that people seek to put a different label on same-sex domestic partnerships precisely to mark those relationships as inferior.

112. *Romer*, 517 U.S. at 634–35. It states:

A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. “If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”

*Id.* (emphasis in original) (quoting *Dept. of Agric. v. Moreno*, 413 U.S. 528 (1965)).

preserving “traditional” marriage.<sup>113</sup> In a sense, their arguments are true, although the arguments parallel those of advocates of segregation who described segregation as intended to preserve traditional definitions of community and marriage rather than seeking to oppress African-Americans.<sup>114</sup> Preserving the “traditional” definition, when that definition excludes one group because their relationships were traditionally viewed as inferior and proscribed, amounts to the same thing in practice as making a decision based on animus against that group.

Moreover, the same arguments proponents of Proposition 8 would advance today could be made in defense of Colorado’s Amendment 2—indeed, Justice Scalia’s dissent in *Romer* made those very arguments.<sup>115</sup> Traditionally, gays and lesbians were not protected against discrimination but instead faced prosecution for any sexual activity.<sup>116</sup> Justice Scalia argued vigorously that the state had historically sought to discourage homosexuality and to brand it as unacceptable, and that continuing that tradition did not represent some new “fit of spite” but rather an acceptable act in a “Kulturkampf.”<sup>117</sup> Of course, Justice Scalia relied on *Bowers v. Hardwick*,<sup>118</sup> a precedent that the Supreme Court has since repudiated in *Lawrence v. Texas*.<sup>119</sup> *Lawrence* only makes the argument against Proposition 8 stronger—if animus against gays and lesbians could not provide a rational basis for Amendment 2 at a time when states could constitutionally criminalize homosexual conduct, how can animus against gays and lesbians possibly provide a rational basis for Proposition 8 today?

Striking down Proposition 8 on an animus analysis would produce a bizarre one-way ratchet result, where a state could choose to not permit same-sex marriage yet would be unable to ban same-sex marriage if it is legalized. *Romer*’s anti-animus doctrine appears at its strongest when dealing with a purely symbolic law, affecting only who can use certain highly valued labels like “married,” “husband,” and “wife.” Yet unless the federal courts are willing to take the further step of declaring a federal right to same-sex marriage in all states, invalidating initiatives

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113. ARGUMENT IN FAVOR OF PROPOSITION 8, *supra* note 111.

114. See *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955) (upholding Virginia’s anti-miscegenation law and stating “[t]he institution of marriage has from time immemorial been considered a proper subject for State regulation in the interest of the public health, morals and welfare, to the end that family life . . . may be maintained . . . in accordance with established tradition and culture . . .”).

115. *Romer*, 517 U.S. at 636-653 (Scalia, J., dissenting).

116. *Id.* at 640-41 (Scalia, J., dissenting).

117. *Id.* at 636 (Scalia, J., dissenting).

118. 478 U.S. 186 (1986).

119. 539 U.S. 558 (2003).

like Proposition 8 would create a paradoxical one-way ratchet.<sup>120</sup> Under that odd interpretation, states could choose to maintain existing bans on same-sex marriages, but once same-sex marriages are legal, any subsequent law banning same-sex marriages would be unconstitutional as motivated only by animus. Imposing a one-way ratchet would seem particularly inappropriate in this case, where it would ignore the interplay between the California courts and the people of California. If the people of California could choose not to recognize marriages of same-sex couples without violating the federal Constitution prior to *In re Marriage Cases*, they should not lose that power simply because the California courts made a ruling under the state constitution.

The Colorado Supreme Court's decision, with its reliance on a fundamental right of participation in the political process, avoids the difficulties created by *Romer*. Protecting the right of gays and lesbians to participate in the political process does not create a constitutional one-way ratchet. Instead, it reserves the questions to a political resolution where the rights of minorities fluctuate according to their political success.

### 3. *The Role of Political Access in Identifying Suspect Classes*

Cases analyzing the appropriate level of scrutiny for various classifications routinely discuss access to the political process and ability to seek redress through democracy. To the extent that a group is politically powerful and able to protect itself through the democratic process, the Supreme Court tends to conclude that the group does not need the protection of heightened scrutiny. Thus, in the section of *City of Cleburne* rejecting intermediate scrutiny for classifications based on mental disabilities, Justice White noted the successes of people with mental disabilities in achieving political goals through the ordinary legislative process as "negat[ing] any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the

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120. Some aspects of *Perry* appear to rely on an anti-animus rationale. For example, the court states:

In the absence of a rational basis, what remains of proponents' case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. . . . Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate.

*Perry*, 704 F. Supp. 2d at 1002. The bulk of *Perry*'s reasoning would invalidate all laws limiting marriage to different-sex couples and would thus avoid the one-way ratchet that I discuss. To the extent that either the Ninth Circuit or the Supreme Court affirms because of the animus motivating Proposition 8, as discussed in *Perry*'s fact-finding, it would create the one-way ratchet.

attention of the lawmakers.”<sup>121</sup> Their access to the legislative process was important precisely because it indicates heightened scrutiny is appropriate when “discrimination is unlikely to be soon rectified by legislative means.”<sup>122</sup> Likewise, *Lyng v. Castillo* held that classifications based on immediate family relationships were not suspect in part because “they are not a minority or politically powerless.”<sup>123</sup> While political powerlessness is only one of the factors considered in evaluating whether a class is suspect, the Supreme Court has presented those factors in the disjunctive, suggesting that any one of “the traditional indicia of suspectness” might be sufficient: if the class is “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>124</sup>

Fewer cases conclude that a classification is suspect or quasi-suspect based on a lack of political power, but the constitutional pedigree remains strong. In many ways, the touchstone for questions of whether a classification is suspect remains footnote 4 of *Carolene Products*: “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”<sup>125</sup> While prejudice matters, it matters in significant part because it “curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>126</sup> Scholars working on the issue of the countermajoritarian difficulty often focus on the Constitution’s special role in protecting groups that cannot protect themselves through the democratic process.<sup>127</sup> Several of the recent state supreme courts that have analyzed whether classifications based on sexual orientation should face heightened scrutiny have also given extensive consideration to the question of whether gays and lesbians remain politically disempowered.<sup>128</sup>

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121. *City of Cleburne*, 473 U.S. at 445.

122. *Id.* at 440.

123. *Lyng v. Castillo*, 477 U.S. 675, 678 (1986).

124. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); see also *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (quoting *Rodriguez*, 411 U.S. at 28).

125. *Carolene Products*, 304 U.S. at 152 n.4.

126. *Id.*

127. The classic text on this remains JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (arguing that judicial review is justified despite its countermajoritarian effects to the extent that it protects the functioning of the democratic process or protects minorities that cannot protect themselves through ordinary politics).

128. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 893-95 (Iowa 2009)

Likewise, *Perry* made extensive findings of fact about discrimination against gays and lesbians, including findings that they did not have access to the normal political process.<sup>129</sup> *Perry* concluded that "the evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect,"<sup>130</sup> while the only specific citation to the factual findings in support of this conclusion was a citation to findings about the lack of relevance of sexual orientation to legitimate judgments about capabilities, the extensive findings about the history of discrimination and political defeats surely provides some of the evidentiary support for *Perry*'s conclusion.

The doctrine that classifications are suspect or quasi-suspect based in part on whether they can rely on the ordinary political process for protection provides strong support for a fundamental right of political participation. Heightened scrutiny serves to examine laws that cannot otherwise be adequately judged in a fair and open democratic process. Suspect classifications thus represent, in part, a proxy for identifying violations of a more general right to participate in democratic politics for redress. If suspect classifications serve as a proxy for judging when an identifiable group lacks the ability to use the democratic processes for its benefit, a direct exclusion from participation in the political process should be subjected to strict scrutiny as well. Applying strict scrutiny to direct exclusions from the political process is precisely the effect of recognizing a fundamental right of political participation.

### C. Resolving the Issue of Whether the Right to Political Participation Depends on a Suspect Classification

The range of groups protected by *Hunter*'s doctrine can be limited in at least five different ways. At one extreme, it could apply only to suspect classes. The next broader category would protect quasi-suspect classes as well—indeed, even interpreting *Hunter* as based on a suspect class analysis, without any fundamental rights component, would imply intermediate scrutiny

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(discussing the political powerlessness of gays and lesbians); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 439-44 (Conn. 2008) (comparing the political power of gays and lesbians with the political power of women to conclude that gays and lesbians are a quasi-suspect class).

129. *Perry*, 704 F. Supp. 2d at 987, 973-991. In particular, see *Id.* at 987 ("[I]f the group is envisioned as being somehow \*\*\* morally inferior, a threat to children, a threat to freedom . . . , then the range of compromise is dramatically limited. It's very difficult to engage in the give-and-take of the legislative process when I think you are an inherently bad person.") (alteration in original) (quoting Gary Segura, a political scientist and expert on the political power/powerlessness of minority groups).

130. *Id.* at 121. Note that this statement is arguably dicta; see *infra* note 131 and accompanying text.

for laws excluding quasi-suspect classes from the political process. To the extent that federal courts may in the future apply heightened scrutiny to classifications based on sexual orientation,<sup>131</sup> constitutional prohibitions on same-sex marriage

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131. Federal courts have thus far generally applied rational basis review to classifications based on sexual orientation. See, e.g., *Lofton v. Sec'y of Dept. of Children & Family*, 358 F.3d 804, 818 (11th Cir. 2004) (reviewing the Florida statute under the rational basis test); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289, 292-293 (6th Cir. 1997) (explaining why a Cincinnati Charter Amendment was not subject to heightened scrutiny); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997) (applying a rational basis test); *Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996) (arguing that the "Don't Ask, Don't Tell" policy should be reviewed on a heightened scrutiny standard); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-574 (9th Cir. 1990) (rejecting the district court's determination that homosexuals deserve heightened scrutiny); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (holding that homosexuality is not a quasi-suspect or suspect class); *Rich v. Sec'y of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984) (holding that the equal protection clause claim fails because homosexuality is not a suspect class); but see *Witt v. Dept. of the Air Force*, 527 F.3d 806, 813 (9th Cir. 2008) ("*Lawrence* requires something more than traditional rational basis review" as a matter of substantive due process). Some scholars argue that *Romer* applied some form of "rational basis plus" review. See, e.g., Nan D. Hunter, *Sexual Orientation and Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1529 (2003) (explaining that the rational basis test may consist of two tiers of review); *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 386-388 (D. Mass. 2010) (applying, arguably, some form of rational basis plus or rational basis with teeth). *Gill* struck down the portions of the Defense of Marriage Act that purported to deprive same-sex couples married under Massachusetts law of federal benefits. *Gill* explicitly applied rational basis review, but because the court rooted its conclusions in *Romer*'s anti-animis language, it arguably applied some form of slightly heightened rational basis review. Most of the cases addressing the level of scrutiny applied to classifications based on orientation preceded *Lawrence* and relied on the now-repudiated *Bowers*. Federal courts may revisit the issue in the future in light of *Lawrence*.

*Perry* applied rational basis review but also stated that "the evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect." *Perry*, 704 F. Supp. 2d at 997. This statement is arguably dicta, in light of *Perry*'s ultimate conclusion that Proposition 8 cannot survive rational basis review and the court's statement that "the court need not address the question whether laws classifying on the basis of sexual orientation should be subject to a heightened standard of review." *Id.* We will have to wait to see whether the Ninth Circuit or the Supreme Court will affirm *Perry*, and if so, whether they will apply heightened scrutiny, but *Perry* represents a major step toward applying heightened scrutiny in the federal courts.

Several state courts have applied either strict or intermediate scrutiny to classifications based on sexual orientation. *Varnum*, 763 N.W.2d at 876-906; *Kerrigan*, 957 A.2d at 425-461; *In re Marriage Cases*, 183 P.3d at 384 (2008). While the state courts applying heightened scrutiny have relied on their state constitutions, several courts based their analysis on the standards applied by the United States Supreme Court in determining the correct level of scrutiny under the Fourteenth Amendment. *Kerrigan*, 957 A.2d at 425-461; see also

would likely violate *Hunter*'s doctrine even if simple laws limiting marriage to different-sex couples did not.<sup>132</sup> The next broader category would protect against irrational, animus oriented restrictions on the political rights of groups, in the tradition of the rulings in *Romer* and *Cleburne*. *Evans* applied the doctrine to a still broader category, any "independently identifiable group,"<sup>133</sup> which encompasses any group defined by something more than a simple policy preference. Finally, *Hunter* could be applied most broadly to even groups defined only in terms of their policy preferences.

*Gordon* forecloses as a matter of doctrine the broadest application of *Hunter* as protecting groups defined solely in terms of their policy preferences.<sup>134</sup> If *Hunter* protects groups defined by policy preferences, then the group of people who support increased education spending ought to be within its protection. *Gordon* squarely rejects that possibility.<sup>135</sup> Moreover, an interpretation that protected all policy preferences would call into question vast swathes of state constitutional law. Any provision that is not purely structural could be criticized because some group would be excluded from seeking to achieve their goals. Many states have constitutional provisions guaranteeing a right to bear arms.<sup>136</sup> Should all of those provisions be invalidated as depriving gun control advocates of their right to seek favorable laws? In states like California in which statutory initiatives bind the legislature, the broadest reading of *Hunter* would even invalidate many statutory initiatives. While a plausible constitutional theory could be constructed in which the only permissible topics for constitutions are structural matters and protections for minority rights, an effort to constitutionalize that rule through the Equal Protection Clause would contradict the well-established history of

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*Varnum*, 763 N.W.2d at 876-906 (explicitly patterning its interpretation of a state constitution Equal Protection Clause on the U.S. Supreme Court's interpretations of the federal Equal Protection Clause). This raises the possibility that federal courts will follow their reasoning in the future. The appropriate level of scrutiny is beyond the scope of this Article.

132. For the reasons articulated in several of the state constitutional decisions invalidating bans on same-sex marriages, see, for example, *Kerrigan*, 957 A.2d at 425-61. I believe that those bans cannot survive intermediate scrutiny as a substantive matter. Fully exploring that question would require a different article.

133. *Evans*, 854 P.2d at 1276.

134. *Gordon*, 403 U.S. at 5.

135. *Id.*

136. See, e.g., *United States v. Miller*, 307 U.S. 174, 182 (1939) ("Most if not all of the States have adopted provisions touching the right to keep and bear arms."); TEX. CONST. art. I, § 23 ("Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.").

more substantive constitutional restrictions in American practice.

The more difficult issue is whether *Hunter* protects any independently identifiable group or whether it requires something more. *Hunter's* reasoning depended on the exclusion of African-Americans from the political process, not merely on the substantive law regarding fair housing.<sup>137</sup> *Hunter* did not establish a right to have fair-housing laws in place at the municipal level.<sup>138</sup> Rather, it held that a city charter could not be amended to make it more difficult to enact fair-housing laws than other laws.<sup>139</sup> While that amendment applied in effect only to racial minorities, the right at issue was fundamentally procedural. Because of the broad protection of rights to equal participation in the political process in other areas, limiting *Hunter* to protecting the rights of suspect classes is an unnecessarily constrained reading.

If *Hunter* and its progeny do not depend on a suspect-class analysis but protect any independently-identifiable group, the current doctrine strikes a sensible balance between the interests of allowing state law to develop and experiment while protecting the political participation rights of minority groups. Efforts by current majorities to entrench their positions, and in particular to entrench policies that oppress a minority, represent a major problem in constitutional law. If a disfavored minority group can gain political advantage in the future, basic notions of equality require that they have the same opportunity to use their increased political clout. Likewise, changing the rules of the game to deprive a minority group and its allies of their local successes represents a fundamentally unfair approach to allocating power among different levels of government. Many policy considerations legitimately contribute to determining whether a local government should be entrusted with certain powers, but taking away powers from a school district, city council, or county government because of a fear that the wrong type of people will gain power represents an illegitimate effort to disenfranchise. The disenfranchisement is not literal—the minority group affected still gets to formally cast their votes. Nonetheless, if a group of voters has lost the ability to actually achieve its goals, those voters have been functionally disenfranchised.

These arguments apply with equal force to minority groups defined by some characteristic other than a suspect or quasi-suspect classification.<sup>140</sup> A law that excluded gays and lesbians

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137. *Hunter*, 393 U.S. at 392.

138. *Id.*; *Id.* at 395-96 (Harlan, J., concurring).

139. *Id.* at 392-93.

140. Several constitutional amendments provide specific protections to the voting rights of certain suspect and quasi-suspect classes. U.S. CONST. amend. XV (right to vote “shall not be denied or abridged . . . on account of race, color, or previous condition of servitude”); U.S. CONST. amend. XIX (right to vote

from voting, or that reduced the weight of their votes, would be just as unconstitutional as one that prevented or underweighted the votes of African-Americans. By analogy, a law that says that gays and lesbians can vote but cannot achieve their goals without amending the constitution functionally disenfranchises them.

The difficulty with this analysis is how to distinguish between the independently identifiable groups and policy-based groups. A law that literally disenfranchises proponents of gun control would be equally unconstitutional as one disenfranchising an independently identifiable group.<sup>141</sup> Proponents of gun control are, however, a clear example of a policy-based group. Nothing defines the category of proponents of gun control except for their agreement on a policy issue. While some gun control advocates share characteristics that are independently identifiable—such as being the victims of gun violence—the connection seems too weak, especially because not all victims of gun violence would seek increased gun control laws. Of course, not all gays and lesbians support same-sex marriage. A strong tradition within queer thought opposes the institution of marriage as oppressive and patriarchal and argues that queer people should oppose the institution of marriage altogether.<sup>142</sup>

Moreover, the distinction between independently identifiable groups and policy-based groups can be fuzzy. Consider the case of laws limiting the purchase of alcohol or of other drugs. People who want to be able to legally purchase alcohol can be viewed as an independently identifiable group—the group of drinkers. Or they can be viewed as simply a policy preference group—the group of people who support legal alcohol sales, perhaps because they want

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"shall not be denied or abridged . . . on account of sex.") While these amendments provide additional protection for the voting rights of racial minorities and of women, modern Fourteenth Amendment jurisprudence would clearly also secure the voting rights of both racial minorities and women. In general, cases addressing racially discriminatory rules in election law tend to be litigated as much under the Fourteenth Amendment as under the Fifteenth.

141. See *Romer*, 517 U.S. at 634 ("To the extent Davis held that persons advocating a certain practice may be denied the right to vote, it is no longer good law.") (quoting *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam)).

142. See, e.g., Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993) (expressing why many feminist, lesbian women do not wish to be mainstream by getting married); but see Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men, and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994-95) (opining that homosexuals should resist oppression by being allowed the right to marry someone of the same sex). I use the term "queer thought" here specifically to focus on parts of the gay, lesbian, bisexual, and transgendered community that self-identify as queer in opposition to the norms of the "straight" community that they consider oppressive.

to drink, but nonetheless united by preference, not by identity.

One tool for identifying whether a provision entrenches a policy preference or excludes the preferences of an independently identifiable group relates to whether the issue can be framed naturally in terms of the “rights” of the group. In cases like *Hunter* and *Romer*, the charter or constitutional amendments at issue did not simply resolve general policy questions; instead, they established that African-Americans on the one hand and gays and lesbians on the other could not gain the legal rights they sought even through majority support in the ordinary legislative body. The right to integrated schools, the right to access to the housing market free of discrimination, the right to marry a person regardless of the person’s race or sex—all of these fall naturally into the contested space of what rights exist. The fundamental right of political participation should not depend on whether an underlying right exists—*Hunter* would have been unnecessary if African-Americans had a pre-existing right to fair housing. Rather, because what was at stake in *Hunter* was whether a group would have access to the political process to establish their rights, it makes sense to invoke a fundamental right of political participation to protect the group’s access to the political process. Conversely, policy preferences like gun control or opposition to high taxes do not have nearly the same intuitive connection to rights. We can speak of a right to be free of guns or a right to low taxes, but they do not tie into the same core idea of rights. That supports the conclusion that people who seek gun control or people who seek to limit taxation are not independently identifiable groups entitled to have unimpaired access to the political process.

Despite the difficulties, *Hunter* is best understood as read in *Evans* as protecting any independently identifiable group. The borders of the doctrine are fuzzy, but a certain indeterminacy is hardly unique to this area of the law. The key conceptual distinction that justifies treating independently identifiable groups differently from groups defined solely by policy preferences is the question of whether a law excludes people from the political community. Limitations that block the policy preferences of a group that can only be defined in terms of its policy preferences serve as limitations on the decisionmaking of the polity as a whole—limits on our collective ability to make certain decisions. When the limitations fall on an independently identifiable group, they function as limitations on “the other,” and an exclusion from full participation in the political society. That exclusion raises serious Equal Protection concerns. In order to fully understand the difference, we should analyze this in terms of the distinction between pre-commitment strategies and exclusionary entrenchment of current majorities, the topic of Part IV.C.

#### IV. THE VALUE OF DIALOGUE OVER THE MEANING OF STATE CONSTITUTIONS

Any analysis of the federal Constitutional checks on the ability of voters of a state to amend their constitution must consider the overall effects on how state constitutional interpretation and amendment actually works. Constitutional lawyers tend to think about interpretation and amendment in terms of the United States Constitution, which has been formally amended only twenty-six or twenty-seven times over the course of slightly more than two centuries.<sup>143</sup> Despite its familiarity to constitutional lawyers, however, the federal Constitution is not the norm. The United States Constitution is much harder to amend than any state constitution and is in fact an outlier among other national constitutions in how difficult it is to amend.<sup>144</sup>

State constitutions, in contrast, are vastly more malleable. The California Constitution has been amended more than 500 times,<sup>145</sup> and the people can amend it by a simple majority vote on a voter-initiated ballot measure.<sup>146</sup> Moving beyond California, Donald Lutz's comparison of amendment processes concluded that despite differing forms of amendment, most state constitutions are easily amendable, with slightly more than half tied for the distinction of most easily amendable.<sup>147</sup>

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143. The count depends on whether the ratification of the Congressional pay increase amendment, proposed as part of the Bill of Rights and purportedly ratified in 1992 as the Twenty-seventh Amendment, was valid. See generally Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST'L COMMENTARY 101 (1994).

144. Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237, 259-61 (Sanford Levinson ed., 1995).

145. HAROLD W. STANLEY AND RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 301 tbl. 8-2 (2006) (reporting that the current California Constitution had been amended 207 times).

146. CAL. CONST. art. XVIII, §§ 3-4. More substantial "revisions" of the California Constitution must receive the support of two-thirds of each house of the legislature and then be approved by a majority vote at an election. CAL. CONST. art. XVIII, §§ 1, 4.

147. Lutz, *supra* note 144, at 260. While Lutz's methodology has various limitations, there is strong support for the overall impressionistic result that most states have constitutions that are amended readily in practice, whereas the United States Constitution is extremely difficult to amend. In particular, Lutz's treatment of multiple amendment paths suffers from serious problems. Lutz calculates an index of difficulty based on a variety of factors. If there are multiple paths to amendment, as there are in almost all states, he uses the single easiest path, an average of all of the paths, or a weighted average of the paths, depending on circumstances. *Id.* at 256-60. That has the incongruous effect of producing an index of difficulty to a state that has multiple paths to amendment that is at least as high as the index for the easiest method and sometimes higher. The most natural assumption, in contrast, is that multiple different methods would make the overall difficulty of amendment lower

A simple taxonomy of state constitutional amendment processes supports the conclusion that state constitutions are readily amendable.<sup>148</sup> Ten states permit amendment by a simple majority vote in the legislature ratified by a majority vote of the people on a referendum.<sup>149</sup> Twelve states allow the legislature to propose amendments with two consecutive majority votes followed by a majority vote of the people to ratify the amendments.<sup>150</sup> Fourteen states permit the voters to initiate an amendment by petition and ratify it by a simple majority vote.<sup>151</sup> Nevada permits amendment by initiative ratified by two consecutive general

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because groups seeking an amendment will pursue the specific method of amendment that they view as easiest, which may vary depending on issue, political situation, and so forth. Lutz might be correct that that behavior does not in fact produce the expected result, but he fails to justify his conclusion. See generally Lutz, *supra* note 144. Moreover, his entire system of indices appears to rely heavily on ad hoc judgments about difficulty, without solid evidence to support the complicated structure. See generally Lutz, *supra* note 144.

148. Some states require special procedures for constitutional “revisions” as opposed to amendments. See, e.g., CAL. CONST. art. XVIII, §§ 1, 4. The following discussion limits its consideration to methods that can be used for amendments and does not point out which states have higher requirements for revisions. Similarly, some states insulate one or more provisions in their constitutions from the ordinary amendment process. I do not catalogue those provisions.

149. ARIZ. CONST. art. XXI, § 1; ARK. CONST. art. XIX, § 22; MINN. CONST. art. IX, § 1; MO. CONST. art. XII, §§ 2(a), 2(b); N.M. CONST. art. XIX, § 1; N.D. CONST. art. IV, § 16; OKLA. CONST. art. XXIV, § 1; OR. CONST. art. XVII, § 1; R.I. CONST. art. XIV, § 1; S.D. CONST. art. XXIII, §§ 1, 3.

150. CONN. CONST. art. XIII, *amended* by CONN. CONST. amend. art. VI; HAW. CONST. art. XVII, § 3; IND. CONST. art. XVI, § 1; IOWA CONST. art. X, § 1; MASS. CONST. art. XLVIII, pt. IV, §§ 4-5 (J. Sess. Leg.); NEV. CONST. art. XVI, § 1; N.J. CONST. art. IX; N.Y. CONST. art. XIX, § 1; PENN. CONST. art. XI, § 1; TENN. CONST. art. XI, § 3; VA. CONST. art. XII, § 1; WIS. CONST. art. XII, § 1.

151. ARIZ. CONST. art. XXI, § 1; ARK. CONST. art. V, § 1, *amended* by ARK. CONST. amend. 7; CAL. CONST. art. II, § 8(b), art. XVIII, §§ 3, 4; COLO. CONST. art. V, § 1; ILL. CONST. art. XIV, § 3 (limited topics); MICH. CONST. art. XII, § 2; MISS. CONST. art. XV, § 273; MO. CONST. art. III, §§ 49, 50, art. XII, § 2(b); MONT. CONST. art. XIV, § 9; NEB. CONST. art. III-2, III-4; N.D. CONST. art. III, §§ 8, 9; OKLA. CONST. art. V, §§ 2, 3, and art. XXIV, § 3; OR. CONST. art. IV, § 1; S.D. CONST. art. XXIII, §§ 1, 3. Note that Mississippi’s requirements for a constitutional initiative petition cannot currently be fulfilled—in order to qualify for the ballot, a certain number of signatures must be collected in each of five Congressional Districts. Since the 2000 reapportionment, Mississippi has had only four Congressional Districts. MEMBER WEBSITE LISTING (BY STATE), UNITED STATES HOUSE OF REPRESENTATIVES, 111TH CONGRESS, 2ND SESSION, available at [http://www.house.gov/house/MemberWWW\\_by\\_State.shtml#ms](http://www.house.gov/house/MemberWWW_by_State.shtml#ms). Massachusetts also permits the people to propose amendments on a limited range of topics through a petition; if at least one quarter of the state legislature votes in support of the amendment, it can then be ratified by a majority vote of the people. MASS. CONST. art. XLVIII, pt. IV, §§ 4, 5, art. LXXXI, § 1.

election majority votes.<sup>152</sup> All told, twenty-eight states permit constitutional amendments by some combination of one or more majority votes of the legislature, an initiative petition, and one or more majority votes on a referendum, without any supermajority vote requirements.<sup>153</sup>

Some states require supermajoritarian support for constitutional amendments, but even in those cases, the hurdles are usually not particularly high. A majority of the states (twenty-seven) permit amendments to their constitutions through a supermajority vote in the legislature followed by a majority vote of the people on a referendum,<sup>154</sup> but many of those states also permit easier means of amendment.<sup>155</sup> Florida always requires a supermajority (sixty percent) vote on a referendum to ratify a constitutional amendment, but the Florida Constitution provides for numerous different mechanisms to propose a constitutional amendment to the people.<sup>156</sup> Delaware, unique among the states, allows for amendment by the state legislature without the direct involvement of the people of the state—the legislature must pass a proposed amendment by a two-third majority both before and after an election for its members.<sup>157</sup> New Hampshire probably has the hardest constitution to amend; an amendment must receive a three-fifth majority in each house of the legislature and then be passed by a two-third majority of the voters at an election.<sup>158</sup> New

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152. NEV. CONST. art. XIX, § 2.

153. See *supra* notes 149 -152 (explaining the process for constitutional amendment in selected states).

154. ALA. CONST. art. XVIII, § 284, *amended by* ALA. CONST. amend. 24; ALASKA CONST. art. XIII, § 1; CAL. CONST. art. XVIII, §§ 1, 4; COLO. CONST. art. XIX, § 2; CONN. CONST. art. XII, *amended by* CONN. CONST. amend. art. VI; GA. CONST. art. X, para. 2; HAW. CONST. art. XVII, § 3; IDAHO CONST. art. XX, § 1; ILL. CONST. art. XIV, § 2; KAN. CONST. art. XIV, § 1; KY. CONST. § 256; LA. CONST. art. XIII, § 1; ME. CONST. art. X, § 4; MD. CONST. art. XIV, § 1; MICH. CONST. art. XII, § 1; MISS. CONST. art. XV, § 273; MONT. CONST. art. XIV, § 8; NEB. CONST. art. XVI-1; N.J. CONST. art. IX; N.C. CONST. art. XIII, § 4; OHIO CONST. art. XVI, § 1; PENN. CONST. art. XI, § 1(a); TEX. CONST. art. XVII, § 1; UTAH CONST. art. XXIII, § 1; WASH. CONST. art. XXIII, § 1; W. VA. CONST. art. XIV, § 14-2; WYO. CONST. art. XX, § 1 (97-20-001). South Carolina requires a supermajority vote in its legislature, a majority vote of the people in a referendum, and then a subsequent majority vote in the legislature. S.C. CONST. art. XVI, § 1. Vermont requires a supermajority in the state Senate with a majority vote in the state House, followed by a majority vote in both houses of the legislature in the following session, and then ratification by a majority vote in a referendum. VT. CONST. § 72.

155. Compare *supra* note 154 with *supra* note 149-152 (comparing states not requiring a supermajority to state that do).

156. FLA. CONST. art. XI, §§ 1-7.

157. DEL. CONST. art. XVI, § 1.

158. N.H. CONST. pt. II, art. C. Lutz concludes that the Delaware Constitution is the hardest state constitution to amend, with an amendment index of 3.6. Lutz, *supra* note 144, at 260. According to his formula, New Hampshire would have an amendment index of roughly 3.25.

Hampshire and Florida are outliers, however, in requiring a supermajority vote of the people to ratify. In the other forty-seven states besides Delaware, New Hampshire, and Florida, the people can ratify constitutional amendments through simple majority votes, although in some cases a supermajority vote of the legislature is necessary to put the amendment before the people.<sup>159</sup> In addition to the regular amendment processes, thirty-nine states explicitly permit constitutional conventions to amend their constitutions.<sup>160</sup> Finally, some state supreme courts have recognized the power of the people to amend or replace their constitutions through an extratextual mechanism.<sup>161</sup>

State courts should be more willing to invalidate statutes as violating the state constitution precisely because of the ease with which state constitutions can be amended. When the federal courts invalidate a law as unconstitutional, they have essentially the final word. The Supreme Court, in particular, should thus act with caution, lest it impose its substantive preferences on the nation

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159. See *supra* notes 149-155 and accompanying text.

160. ALA. CONST. art. XVIII, § 286, *amended by* ALA. CONST. amend. 714; ALASKA CONST. art. XIII, §§ 2-4; ARIZ. CONST. art. XXI, § 2; CAL. CONST. art. XVIII, §§ 2, 4; COLO. CONST. art. XIX, § 1; CONN. CONST. art. XIII; DEL. CONST. art. XVI, § 2; FLA. CONST. art. XI, §§ 4-5; GA. CONST. art. X, para. 4; HAW. CONST. art. XVII, § 2; IDAHO CONST. art. XX, §§ 3-4; ILL. CONST. art. XIV, § 1; IOWA CONST., art. X, § 3; KAN. CONST. art. XIV, § 2; KY. CONST. §§ 258-263; LA. CONST. art. XIII, § 2; MD. CONST. art. XIV, § 2; MICH. CONST. art. XII, § 3; MINN. CONST. art. IX, §§ 2-3; MO. CONST. art. XIII, §§ 3(a), 3(c); MONT. CONST. art. XIV, §§ 1, 2, 3, 7; NEB. CONST. art. XVI-2; NEV. CONST. art. XVI, § 2; N.H. CONST. pt. II, art. C; N.M. CONST. art. XIX, § 2; N.Y. CONST. art. XIX, § 2; N.C. CONST. art. XIII, §§ 1, 3; OHIO CONST. art. XVII, §§ 2-3; OKLA. CONST. art. XXIV, § 2; R.I. CONST. art. XIV, § 2; S.C. CONST. art. XVI, § 3; S.D. CONST. art. XXIII, §§ 2-3; TENN. CONST. art. XI, § 3; UTAH CONST. art. XXIII, §§ 2-3; VA. CONST. art. XII, § 2; WASH. CONST. art. XXIII, §§ 2-3; W. VA. CONST. art. XIV, § 14-1; WISC. CONST. art. XII, § 2; WYO. CONST. art. XX, §§ 3-4 (97-20-003 and 004).

161. *Gatewood v. Matthews*, 403 S.W.2d 716 (Ky. 1966); *Wheeler v. Bd. of Trs.*, 37 S.E.2d 322 (Ga. 1946); *In re Op. to the Governor*, 178 A. 433 (R.I. 1935). A few state constitutions specifically forbid amendment by any process other than the ones contained in the text of the constitution. See, e.g., MO. CONST. art. XII, § 1 ("This constitution may be revised or amended only as therein provided."). While some scholars have argued for the availability of extratextual means of amending the United States Constitution, see, for example, BRUCE ACKERMAN, *WE THE PEOPLE: VOL. 1, FOUNDATIONS* (1991); BRUCE ACKERMAN, *WE THE PEOPLE: VOL. 2, TRANSFORMATIONS* (1998); Stephen M. Griffin, *Constitutionalism in the United States, in RESPONDING TO IMPERFECTION* 50-61 (Sanford Levinson ed., 1995) (positing one such extratextual means of amendment); and Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988) (positing another such means of amendment), their thesis has been hotly contested. See, e.g., David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1 (1990) (rejecting extratextual means of amendment and embracing the majoritarian values behind the amendment process).

without adequate justification.<sup>162</sup> In contrast, when the California Supreme Court invalidates a law, it acts as part of an ongoing dialogue with the people of California over what the state constitution means. If the people disagree with the Court, they can overturn its decisions with relative ease.<sup>163</sup> Notably, while a vanishingly small number of federal Supreme Court decisions have been overturned by explicit constitutional amendments, many state supreme court decisions have been reversed by the will of the people.<sup>164</sup> Precisely because their decisions are not final in the sense that the people can respond effectively, state supreme courts can decide constitutional cases without the same degree of caution that ought to attach to the awesome power of the United States Supreme Court to interpret the federal Constitution.

The difference between the difficulty in amending state constitutions and amending the federal Constitution suggests that state courts should be more willing to strike down statutes in cases of first impression but also more bound by *stare decisis*. When a state court faces a novel issue—as many courts have in the context of same-sex marriage—they can act with less deference to the elected branches than the federal courts ought to exhibit

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162. The vast literature on the counter-majoritarian difficulty addresses precisely this issue. See generally ELY, *supra* note 127; ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); LEARNED HAND, *THE BILL OF RIGHTS* (1958). In addition to the classic framing in terms of the counter-majoritarian difficulty, a recent body of scholarship has focused on ideas of popular constitutionalism and mechanisms for the people or the political branches to constrain the federal judiciary's interpretation of the Constitution. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); JAMIN B. RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE* (2004); MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Robert C. Post and Reva B. Siegel, *Legislative Constitutionalism and Section Five Power*, 112 YALE L.J. 2059 (2003). In contrast, Barry Friedman has argued in several recent works that dialogue between the people and the federal courts about the meaning of the Constitution is already effective and that the courts are more constrained by popular opinion than they appear. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE passim* (2009); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 653, 653 (1993). Friedman acknowledges, however, that disparities between the Court's interpretation of the Constitution and the people's preferences can endure for substantial periods, sometimes as much as decades. FRIEDMAN, *supra*, at 167-236. As the Supreme Court's diffuse support grows, its ability to act against the will of the people in relatively low-salience areas increases substantially. *Id.* at 377-81.

163. See generally Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 983 (1998-99).

164. See John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983 (2007) (contrasting the between four and seven instances of federal constitutional amendments intended to overturn Supreme Court decisions with numerous examples of state constitutional amendments with the same goal).

precisely because of the ability of the people to overturn their decisions. Thus, if a state constitution has an equal rights amendment or an equal protection clause that has been interpreted more broadly than the Fourteenth Amendment, a state court should be more willing to take that clause at its word and carry through its logical consequences, even if that requires striking down a law passed by the legislature. But at the same time, the federal courts should apply *stare decisis* less vigorously in cases where prior courts have struck down statutes to avoid perpetuating the dead hand of the past without any means of checking it. If a state's constitutional interpretations include conclusions that are no longer acceptable to the people of that state, the standard response should be an amendment. In an analogous situation in the federal context, amendment will usually be a forlorn hope, rendered impossible by the massively supermajoritarian requirements of Article V.<sup>165</sup>

The role for more stringent applications of state constitutional requirements, however, only works if courts do not create additional barriers to the amendment process. If the Equal Protection Clause or the Guarantee Clause were interpreted to prevent any amendments that roll back decisions permitting same-sex marriages, then state supreme courts would need to approach the issue with the same deference to the legislature—the same recognition of the tension between their duty to the majority and their duty to minorities—that constrains the federal courts. When amendment remains easy, they can act with less deference to the political branches, confident that the people can correct them if they go beyond what the people would approve.

#### *A. The Benefits of Dialogue between State Courts and the People*

The back-and-forth process of stringent state court application of constitutional provisions followed by popular responses has a valuable function in pursuing just policy. State courts applying state constitutions have been much more willing to hold that a right to same-sex marriage exists than federal courts applying the United States Constitution or than state legislatures making political decisions. The Hawaii, Massachusetts, California, Connecticut, and Iowa Supreme Courts have all issued decisions either permitting same-sex marriages or

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165. Article V requires a two-thirds majority of both houses of Congress, followed by ratification by either the legislatures or special conventions in three-quarters of the states to amend the Constitution. U.S. CONST. art. V. While Article V also permits a constitutional convention called by application of the legislatures of two-thirds of the states, it still requires ratification by three-quarters of the states. The convention means of amending the Constitution has, of course, never been used since the adoption of the Constitution in 1787.

suggesting that the state constitution might invalidate bans on same-sex marriages, and the Vermont Supreme Court required civil unions that provide the same state benefits as marriage.<sup>166</sup> Those decisions, especially the early decisions, came in a context where permitting same-sex marriage was not even a matter of serious political discussion. The earliest state court decisions in Alaska and Hawaii were promptly overturned by constitutional amendments,<sup>167</sup> but not before they began a transformative process for the whole dialogue over gay rights. After the Vermont Supreme Court's decision, popular sentiment began shifting, with many more people supporting at least civil unions. In much of the country, the conversation ceased to be whether same-sex couples were entitled to any legal recognition, but rather whether civil unions were sufficient.

To be sure, much of the country's population continues to oppose same-sex marriages and even civil unions.<sup>168</sup> Likewise, a major component of the shift in attitudes has been demographic, as younger voters who tend to support same-sex marriage rights make up more of the population and elderly opponents of same-sex marriage die.<sup>169</sup> Even so, the decisions of state courts have greatly facilitated the public discussion. Far from constitutional decisions serving to move overly difficult issues off the public agenda,<sup>170</sup> state constitutional decisions have forced the people to struggle to reconcile their abstract commitment to notions of equal rights with their internal commitments to oppose same-sex marriage. Robust political activism and public debate now characterizes the issue of same-sex marriage. Vermont, Maine, New Hampshire, and the District of Columbia recently legalized same-sex marriage through ordinary legislation, although the people of Maine subsequently invalidated its same-sex marriage statute through a "people's

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166. *Varnum*, 763 N.W.2d at 862; *Kerrigan*, 957 A.2d at 407; *In re Marriage Cases*, 183 P.3d at 384; *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 941 (Mass. 2003); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999); *Baehr*, 852 P.2d at 44.

167. ALASKA CONST. art. I, § 25; HAW. CONST. art. I, § 23.

168. See Pew Forum on Religion & Public Life and Pew Research Center for the People & the Press, *Most Still Oppose Same-Sex Marriage, Majority Continues to Support Civil Unions: Results from the 2009 Annual Religion and Public Life Survey* (Oct. 9, 2009), available at <http://pewforum.org/newassetss/images/reports/samesexmarriage09/samesexmarriage09.pdf> (noting that fifty-three percent oppose same-sex marriages, while fifty-seven percent support civil unions).

169. *Id.* at 5 (showing much stronger support for legal same-sex marriages among youngest age group and decreasing support with each increase in age).

170. See, e.g., Stephen Holmes, *Gag Rules or the Politics of Omission, in Constitutionalism and Democracy* 19-23 (Jon Elster and Rune Slagstad ed., Cambridge Univ. Press 1988) (addressing why certain topics are not discussed).

veto."<sup>171</sup> Several other states may follow in the next few years.<sup>172</sup> In other states, public attitudes that once strongly opposed same-sex marriages have shifted. And in Massachusetts and Connecticut, populations that at one time opposed same-sex marriages have shifted to supporting the legal regime imposed by the state supreme courts.

Indeed, judicial interpretation of state constitutions can provide a majoritarian role as well. Evidence suggests that legislation protecting the rights of gays and lesbians typically does not pass without substantially more than majority support.<sup>173</sup> When well-organized interest groups oppose gay and lesbian rights, even larger popular majorities are necessary to produce legislative action.<sup>174</sup> Court decisions rigorously applying general principles to the specific case of gay and lesbian rights may thus, at least in some instances, result in policies favored by a majority of the people yet unable to pass the legislature.<sup>175</sup> The Massachusetts Supreme Court's decision permitting same-sex marriage may have been an example of a state court decision producing majoritarian results after the legislature failed to act, although the evidence is not clear.<sup>176</sup>

At the same time, the ability of the voters of Alaska, Hawaii, and California to reject their Supreme Courts' interpretations preserves popular sovereignty and contributes to the legitimacy of the state constitution. If the state supreme courts had the final authoritative word on what equality means, many voters would believe that the state government did not represent them at all. Criticisms of "activist judges" would be entirely valid when applied to judges who imposed their policy preferences in disregard for a substantial majority's disagreement, with little chance of reversal. Rejecting voter-initiated state constitutional amendments because they reach the "wrong" result threatens the people's control over their government.

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171. MAINE DEPARTMENT OF THE SECRETARY OF STATE, BUREAU OF CORPORATIONS, ELECTIONS, AND COMMISSIONS, 2009 REFERENDUM TABULATION (2009), available at <http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html>.

172. See, e.g., Jeremy W. Peters, *Advocates on Both Sides Seek Momentum on Same-Sex Marriage*, N.Y. TIMES, Apr. 8, 2009, <http://www.nytimes.com/2009/04/09/nyregion/09marriage.html> (showing that momentum may have shifted against same-sex marriage following the Maine referendum and Democratic electoral defeats in the 2009 elections and the 2010 Massachusetts special election). It is too early to be certain what the long-term effects will be.

173. Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AMER. POL. SCI. REV. 367, 383 (2009).

174. *Id.* at 378.

175. In states that permit initiatives, the initiative process might offer another way to adopt policies supported by a majority of the people yet unable to gain majority support in the legislature.

176. *Goodridge*, 798 N.E.2d at 941.

### B. The Alternative to the Formal Amendment Process

In the end, the question is not whether the people of California can reverse the Supreme Court's decision in *In re Marriage Cases*; rather, the question is whether they can do so through the formal amendment process. As Sanford Levinson observed in discussing amendments of the United States Constitution, the Constitution has in fact been amended many more times through processes of judicial interpretation than through formal amendment.<sup>177</sup> If constitutional amendments like Proposition 8 were invalidated, the result would be to require opponents of same-sex marriage to pursue their goals by attempting to change the composition of the California Supreme Court, rather than by amending the state constitution. Indeed, before the court decided *Strauss*, some supporters of Proposition 8 predicted recall or non-retention campaigns against members of the California Supreme Court if the Court had classified Proposition 8 as a revision, and thus invalid without legislative involvement, as opposed to an amendment.<sup>178</sup>

The saga of California's death penalty jurisprudence provides a useful cautionary tale. The California Supreme Court concluded that the death penalty violated the state constitution's ban on "cruel or unusual punishment" in *People v. Anderson*.<sup>179</sup> The people of California responded with a constitutional amendment overturning *Anderson*.<sup>180</sup> Up to that point, the system had worked smoothly, with the state Supreme Court and the people engaged in a dialogue. In the 1980s, however, many people became convinced that a majority of the Court would strike down any death penalty—finding some reason in each case to declare the sentence invalid.<sup>181</sup> An organized campaign opposed the retention of several Supreme Court Justices with the death penalty as the principal campaign issue, although business interests that opposed the justices for other reasons funded much of the campaign.<sup>182</sup> California voters ultimately removed Chief Justice Rose Bird and Justices Cruz Reynoso and Joseph Grodin in the retention election

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177. Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change*, in *RESPONDING TO IMPERFECTION* 14-24 (Sanford Levinson ed., Princeton Univ. Press 1995).

178. Maura Dolan, *Court is Feeling the Heat on Prop. 8*, L.A. TIMES, Nov. 19, 2008, <http://articles.latimes.com/2008/nov/19/local/me-prop8-supreme-court19>; see also CAL. CONST. art. I, §§ 13-15 (providing for recall), art. VI, § 16(d)(1) (providing for judicial retention elections).

179. *Anderson*, 493 P.2d at 880, 891, 899.

180. CAL. CONST. art. I, § 27.

181. See John H. Culver & Chantel Boyens, *Political Cycles of Life and Death: Capital Punishment as Public Policy in California*, 65 ALB. L. REV. 991, 1003 (2002) (showing a shift in the political makeup of the court).

182. *Id.*

of 1986.<sup>183</sup>

In the November 2010 election, the Iowa voters voted against retaining three of the Iowa Supreme Court Justices who were part of the unanimous *Varnum* Court, which recognized a right to same-sex marriage in that state.<sup>184</sup> The campaign against their retention focused on the decision in *Varnum*, and observers generally attributed the result of the election—the first in the history of Iowa's retention elections when an incumbent Supreme Court Justice was not retained<sup>185</sup>—to a backlash motivated by opposition to the decision.<sup>186</sup> The irony of the results of the Iowa Supreme Court retention election is that it has no direct effect on the legal status of same-sex marriage—*Varnum* remains binding precedent in Iowa, and a majority of the *Varnum* Court remains. The net effect of the decision, however, may be to deter future courts from interpreting their Constitutions as broadly as they would have otherwise.

If the California Supreme Court had invalidated Proposition 8 in *Strauss*, some would have concluded that the only viable way to overturn a Supreme Court decision is by removing enough justices to tip the balance of voting. While “throwing the bums out” is a perfectly normal and appropriate response to disliked decisions by political actors, it raises troubling issues of infringing judicial independence and threatening the rule of law when applied to judges.<sup>187</sup> Allowing voters to instead overturn judicial decisions through the amendment process allows the courts and the voters to have a fruitful dialogue about fundamental values while not reducing the courts to simply another political branch.

### C. Striking the Right Balance

Allowing state constitutional amendments to overturn state supreme court decisions, while at the same time providing legal guarantees for the rights of minorities to participate in the political process, strikes the right balance between protecting the

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183. *Id.*

184. *Varnum v. Brien*, 763 N.W.2d 862; A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to the Bench*, N.Y. TIMES, Nov. 3, 2010, at A1.

185. Grant Schulte, *Iowans Dismiss Three Justices*, DES MOINES REGISTER (Nov. 3, 2010), available at <http://www.desmoinesregister.com/article/20101103/NEWS09/11030390/1007/news05/Iowans-dismiss-three-justices>.

186. See, e.g., *id.*; Sulzberger, *supra* note 184.

187. See, e.g., F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 651-54 (2009) (discussing impartiality and independence as core values for the judiciary); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 965-76 (2002) (discussing the concept of judicial independence and its importance within the legal system); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 270-296 (2008) (discussing the canonical virtues and vices of judicial elections).

rights of minorities and empowering the people as a whole. To the extent that state constitutional amendments purport to eliminate the ability of the legislatures to authorize same-sex marriage, invalidating those amendments under the Equal Protection Clause protects the political rights of minorities. At the same time, permitting an amendment to overturn decisions like *In re Marriage Cases* still allows opponents of same-sex marriage to avoid having equality imposed by the courts without any democratic process. Opponents of same-sex marriage would be free, of course, to use the ballot box as the traditional check against elected officials adopting policies that they oppose, thus structuring public debate over same-sex marriage into part of the ordinary political process.

The lack of any serious entrenchment of current views provides a key reason for why state constitutional amendments adopted by simple majorities should nonetheless be able to overturn state court decisions expanding the rights of minorities. Despite its sweeping language, Proposition 8 does not permanently end same-sex marriage in California as a practical matter even without taking into account the fundamental right to participate in the political process argument. Instead, Proposition 8 merely bans same-sex marriages until a new majority replaces it with a different constitutional amendment. Gathering large numbers of signatures and winning a state-wide initiative vote is far from easy, but I am confident that if sentiment in California shifts so that a clear majority supports permitting same-sex marriages, Proposition 8 will be repealed.

Supermajority requirements to amend constitutions pose a much more difficult problem because they can allow a transient supermajority to impose its will on a contrary majority in the future rather than allowing the people to make binding pre-commitments to improve decision-making in a crisis. To be sure, supermajority requirements make the initial decision to amend a constitution harder to reach, but when a supermajority exists temporarily, it can use the constitutional amendment process to lock-up the political process against future changes in opinion. Constitutional provisions are often understood as democratic pre-commitment strategies.<sup>188</sup> Like Odysseus sailing past the sirens, the people tie themselves to a constitutional mast to avoid temptation during a crisis. Thus, because the people know that they will be tempted to run budget deficits and to pass the bill for their spending on to their children, they might adopt a state constitutional requirement of a balanced budget with heavily

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188. See generally JON ELSTER, ULYSSES AND THE SIRENS (2d ed., 1984) (discussing how judges interpret the Constitution and public opinion); Jed Rubenfeld, *Of Constitutional Self-Government*, 71 FORDHAM L. REV. 1749 (2003) (discussing how judges interpret the Constitution and public opinion).

constrained access to bond markets.<sup>189</sup> Likewise, because the people know that they may be tempted to seek scapegoats in a crisis and to punish someone when things go wrong, they adopt bans on ex post facto laws to pre-commit to the principles of rule of law before the crisis arises.<sup>190</sup>

The standard arguments in favor of democratic pre-commitment strategies have little force when the pre-commitment is a commitment against minority rights or an effort to entrench the views of the day on a hotly contested social issue. The justification for pre-commitment is that we need to take certain options off the table when we consider them calmly and dispassionately because we fear that we will make the wrong decision when confronted with a crisis. Efforts at entrenchment of the current majority's viewpoints have an entirely different feel—the fear is not that “we the people” will decide issues poorly in a crisis, but rather that “they” will gain control of the government and do something that we currently consider undesirable. The difference between protecting against the majority’s tendency to make poor decisions in the heat of the moment and an effort to ensure that the current majority’s decisions bind the future means the difference between the category of pre-commitments and that of attempts to lock-up the political process.

Some theorists would instead focus on a Burkean function in constitutional provisions.<sup>191</sup> Under that approach, the purpose of a constitution is, at least in part, to preserve certain values against changing norms. If some reason existed to believe that the traditional values of a constitution were necessarily correct, then entrenchment might become a valuable feature in its own right, preserving the underlying values. The difficulty with this approach is that it assumes a reason to believe that the status quo (or more accurately the status quo ante) is morally superior to the views of the current population. People who believe in the idea of progress or Martin Luther King Jr.’s aphorism that “the arc of the moral universe is long, but it bends towards justice,”<sup>192</sup> would

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189. See, e.g., CAL. CONST. art. XVI (limiting bond issues to specific purposes and otherwise requiring a balanced budget). The California Constitution even goes so far as to attempt to render its restriction on bond issues unamendable. *Id.* § 2. Many economists would argue that balanced budget requirements have negative effects on fiscal policy, resulting in government policy that increases the severity of the business cycle. But while balanced budget requirements may be poor policy, they remain easy to explain within the context of a broader concern about pre-commitment to policies.

190. See, e.g., CAL. CONST. art. I, § 9 (providing for prohibition on bills of attainder, ex post facto laws, and contract-inhibiting laws).

191. See e.g., Ward Fransworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407, 411-21 (2005) (reflecting on judicial life tenure).

192. Martin Luther King Jr., Our God is Marching On (Mar. 25, 1965),

quickly reject the idea that we should entrench values in constitutions to protect them against future changes. But even without a belief in the necessity of progress, a long tradition in American legal thought rejects the idea that we should substitute the dry papers of the past for the democracy of the living. Thomas Jefferson famously supported a new generation every nineteen years so that no generation would be ruled illegitimately by the decisions of previous generations.<sup>193</sup> While few would go as far as Jefferson's position, many would agree with his basic proposition that "[t]he earth belongs always to the living generation."<sup>194</sup> We have no objective means to determine whether today's majority is superior or inferior to yesterday's majority. And so, except under circumstances when concepts of deliberate pre-commitment make sense, we seek to allow today's majority to control.

Focusing on issues of valid pre-commitment versus invalid attempts to entrench a current majority's view on future majorities provides the key to unraveling the question of what sorts of minority groups should be entitled to protection by *Hunter*'s right of political participation. When a constitutional provision eliminates substantive rights, especially the rights of a minority, directly, it functions as an attempt to lock-up the political process. Conversely, when the constitutional provision has the feeling of limiting the majority's own right to set policy, particularly in response to a crisis, that functions as a valid pre-commitment. The distinction between *Gordon* and *Hunter* makes sense when analyzed through this lens. *Gordon* represents an effort to limit government spending—a perfectly normal, although in that case arguably poorly considered, effort to pre-commit to small government and to not raising taxes except when the people make a super-majority decision. *Hunter*, conversely, represents an effort to entrench the powers of the current majority and to maintain the current racial hierarchy. Structural pre-

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available at <http://www.mlkonline.net/ourgod.html>.

193. See Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), available at <http://odur.let.rug.nl/~usa/P/tj3/writings/brf/jefl81.htm>. It states:

On similar ground it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, and consequently may govern them as they please. But persons and property make the sum of the objects of government. The constitution and the laws of their predecessors extinguished them, in their natural course, with those whose will gave them being. This could preserve that being till it ceased to be itself, and no longer. Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right.

*Id.*

194. *Id.*

commitments that actually limit the majority as a whole are valid, while efforts to constitutionally eliminate the right of participation of a recognizable minority, regardless of whether the minority is a suspect class, are invalid. Applying this analysis, constitutional amendments that take away the ability of gays and lesbians to seek same-sex marriage through ordinary political means fall well within the category of proscribed efforts to entrench a current majority position, rather than efforts to pre-commit on the majority's decisions. The distinction between pre-commitment and entrenchment can be slippery in some individual cases, as the distinction between process-based protections and substantive concerns always is,<sup>195</sup> but it provides a sensible framework with which to analyze the distinction between cases like *Hunter* and a hypothetical challenge to Proposition 8, on the one hand, and cases like *Gordon*, on the other.

The distinction between pre-commitment and entrenchment provides a strong albeit imperfect justification for the limitation of *Hunter* to independently identifiable groups. When an independently identifiable group is excluded from the political process, the effect is to fence them out and entrench the current majorities distaste for the group's goals. A constitutional rule, especially a constitutional rule entrenched with a supermajoritarian amendment process, ensures that even if the group grows in size and develops allies beyond its membership, it will be unable to achieve its goals without supermajority support. That raises all of the troubling concerns about entrenching a current majority's preferences against the interests of a changing polity. Conversely, when the only way to define the excluded group is in terms of policy preferences, the excluded group is necessarily part of "us"—the exclusion is a limitation on our policy choices, not an effort to ensure that an undesirable "they" does not gain power.

If *Hunter* establishes a right to political access that would invalidate any state constitutional amendment that takes away the power of the legislature to create same-sex marriages, the actions of the supermajority cannot have any greater oppressive effect on a minority than the action of a majority can. A supermajority adopting a constitutional amendment, just like a majority, can check the actions of the state courts, but under a correct interpretation of *Hunter*, it cannot take away the ordinary political rights of the minority. The people can participate in a dialogue with the courts about what fundamental rights the state constitution protects, but they cannot take away the right of a different future majority to revisit those conclusions. *Hunter* and

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195. See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1071 (1980) (describing the interrelated nature of process and substance).

its progeny, broadly understood, strike the right balance between protecting the supremacy of the people and preventing current majorities from entrenching their transient beliefs on future populations with different views.

## V. CONCLUSION

Constitutional amendments prohibiting same-sex marriage provides a troubling test for people who want to preserve the political rights and full citizenship of gays and lesbians while also preserving the political power of the people as a whole to control their courts. If we read Equal Protection cases like *Hunter* and *Seattle School District No. 1* as protecting a fundamental right to political participation for all discrete groups, not just suspect classes, current doctrine resolves the tension between minority rights and majority control correctly. The majority has the right to bring the state courts to heel but not to eliminate the right of the minority to seek reforms through the ordinary legislative process. That balance also produces the right result in terms of encouraging a productive dialogue between courts and the people. State courts can interpret their constitutions aggressively, spurring debate and presenting compelling arguments based on equality, without facing the countermajoritarian difficulty posed by a small group of justices imposing their beliefs on the people without any effective check. The back-and-forth over same-sex marriage provides a perfect example of how that process of dialogue can serve as a means to achieve not merely transient legal equality but ultimately legal equality supported by a majority of the people. An extended process of dialogue may not be as fast or as smooth as many people would wish, but it promises a better ultimate result than the imposition of a legal regime that the majority of the people would consider illegitimate.