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**THE EQUAL PROCESS CLAUSE: A NOTE ON THE
(NON)RELATIONSHIP BETWEEN *ROMER v. EVANS* AND
*HUNTER v. ERICKSON***

Jay S. Bybee*

In this Article, Professor Bybee uses the debate surrounding Romer v. Evans to reexamine the Supreme Court's decision in Hunter v. Erickson and the principle that a political majority may not restructure the political process to make it more difficult for a political minority to obtain favorable government action. Professor Bybee explains the questionable bases of Hunter and succeeding cases, and then turns to the Romer decision and discusses its incongruity with Hunter. After analyzing the meaning of Romer in light of Hunter and other "equal process" cases, Professor Bybee concludes that although the Court's analysis of Colorado's Amendment 2 resembles its treatment of the laws at issue in the equal process cases, the fundamental difference in the Court's treatment of Romer and the equal process cases is that in Romer the Court failed to address the possibility of suspect classification for classes defined by sexual orientation.

* * *

I. INTRODUCTION

The Colorado Supreme Court struck "Amendment 2"¹ under the Equal Protection Clause of the Fourteenth Amendment² because it infringed "the fundamental right to participate equally in the political process."³ According

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¹ "Amendment 2" responded to controversial ordinances in Aspen, Boulder, and Denver banning discrimination on the basis of homosexual orientation. Amendment 2 effectively repealed these ordinances by forbidding state and other governmental entities to "enact, adopt or enforce any statute, regulation, ordinance or policy" making "homosexual, lesbian or bisexual orientation . . . [a] protected status." *Romer v. Evans*, 116 S. Ct. 1620, 1623 (1996) (quoting COLO. CONST. art. II, § 30b).

² U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

³ *Evans v. Romer*, 854 P.2d 1270, 1276 (Colo. 1993) ("*Evans I*"), *subsequent opinion*, 882 P.2d 1335 (Colo. 1994) ("*Evans II*"), *aff'd*, 116 S. Ct. 1620 (1996). Following passage of the Amendment, plaintiffs sought a preliminary injunction. The trial court granted the preliminary injunction, and in *Evans I*, the Colorado Supreme Court affirmed. In *Evans II*, the Colorado Supreme Court affirmed the entry of a permanent

to the court, Amendment 2 “fenc[ed] out” homosexuals by requiring them to obtain an amendment to the Colorado Constitution to obtain favorable treatment based on their sexual orientation.⁴ Amendment 2 thus

bar[red] gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. . . . Amendment 2 single[d] out one form of discrimination and remove[d] its redress from consideration by the normal political processes.⁵

The Colorado Supreme Court found the principles of equal political process in their “most explicit, and nuanced, articulation”⁶ in a line of cases following *Hunter v. Erickson*,⁷ which the court believed bore a “close[] resemblance to the question presented by Amendment 2.”⁸

Like the Colorado Supreme Court, the United States Supreme Court recognized that Amendment 2 “withdr[ew] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forb[ade] reinstatement of these laws and policies.”⁹ The law thus “disqualifi[ed] . . . a class of persons from the right to seek specific protection from the law.”¹⁰ This disqualification, the Court declared, put homosexuals in a “solitary class with respect to transactions and relations in both the private and governmental spheres,”¹¹ an action so “unprecedented in our jurisprudence” that Amendment 2 failed “even [the] conventional inquiry” of rational basis scrutiny.¹² The United States Supreme Court affirmed the Colorado Supreme Court’s decision, but it all but ignored *Hunter v. Erickson*, acknowledging only that the Colorado Supreme Court had relied on it.¹³

Romer v. Evans was predestined for controversy. It was predestined because its subject matter—homosexual rights—fairly ignites impassioned political, legal, and religious debate. In the recent past, when the Court has

injunction.

⁴ *Evans I*, 854 P.2d at 1285.

⁵ *Id.*

⁶ *Id.* at 1279.

⁷ 393 U.S. 385 (1969); see *Evans I*, 854 P.2d at 1279-86.

⁸ *Evans I*, 854 P.2d at 1279.

⁹ *Romer v. Evans*, 116 S. Ct. 1620, 1625 (1996).

¹⁰ *Id.* at 1628.

¹¹ *Id.* at 1625.

¹² *Id.* at 1628.

¹³ See *id.* at 1624.

confronted such controversial questions of general interest, it has attempted to draw on our legal traditions to demonstrate the inevitability of its decision.¹⁴ This idea of judicial precedent possesses a certain Calvinistic fatalism: By ascribing to traditions or prior decisions a power beyond the present Court's ability to control, precedent absolves the present Court of responsibility for the decision the Court must make. Unfortunately, the Court's cryptic opinion in *Romer* will do nothing to quell the public debates that inevitably will attend it; nor will the opinion satisfy the legal community. The Court's opinion eschews familiar equal protection principles and ignores the Court's prior discussions of homosexual conduct,¹⁵ substituting sweeping platitudes for plain talk.

In the process of trying to fit *Romer* into the accepted canon of Fourteenth Amendment cases, as students of the Constitution and constitutional law we will attempt to give meaning to *Romer*, to classify it according to established legal categories, to decide what it is. In this Article, I wish to do something a little different. In the process of trying to understand what *Romer* is, I wish to discuss what *Romer* is not. This Article uses the occasion of *Romer* to re-examine *Hunter v. Erickson* and the principle that a political majority may not restructure the political process to make it more difficult for a political minority to obtain favorable government action. Along the way, this Article explains why *Hunter* and succeeding "equal process" cases rest on a shaky foundation. I then turn to *Romer* and discuss how the Court flirted recklessly with *Hunter*, but ultimately ignored it. I attempt to draw meaning from this strange dance and conclude that although Amendment 2 does bear a striking resemblance to the equal process cases (as the Colorado Supreme Court thought), there is a twist in the Colorado amendment (as the Supreme Court seemed to recognize). All told, it may add up to the question fundamental to the current debate (as Justice Scalia argued in dissent): Are homosexuals a suspect or quasi-suspect class?

¹⁴ See, e.g., *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (relying on historical condemnation of assisted suicide in concluding that there is no fundamental right to assistance in committing suicide); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (concluding that stare decisis required continued recognition of a woman's right to an abortion as established by *Roe v. Wade* and relying on other precedent to define the limits of that right).

¹⁵ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding as constitutional a Georgia statute criminalizing sodomy because there was no fundamental right to engage in homosexual sodomy); *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *aff'g mem.*, 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court) (upholding a Virginia statute criminalizing sodomy); see also *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting) (distinguishing state regulatory authority over homosexuality, which it forbids altogether, and use of contraceptives by married couples, whose relationship the state must allow and protect).

II. *HUNTER V. ERICKSON* AND EQUAL PROCESSA. *Some Background on Due Process, Equal Protection, and Equal Process*

The relationship between the Due Process¹⁶ and Equal Protection Clauses¹⁷ of the Fourteenth Amendment is easily described: They both are found in the Fourteenth Amendment and they both apply to "person[s]," but they otherwise serve quite different functions.¹⁸ The Due Process Clause, as its terms suggest, is about process. At a minimum, the Due Process Clause promises all persons the procedures prescribed by law before the government may deprive them of life, liberty, or property.¹⁹ In other words, the government cannot decide to deprive someone of life, liberty, or property without following the process of law set forth by the legislature. This concept leaves open the possibility that the legislature will decide summarily to take someone's life, liberty, or property by, for example, having the trier of fact flip a coin. At an early point during the development of due process jurisprudence, however, the Supreme Court interpreted the Due Process Clause as having a substantive component. Depending on the nature of the liberty or property interest at risk, the government must provide some minimal level of process.²⁰ The Court's interest in the substance of due process should not be confused with its later development of substantive due process, which has more to do with due substance than it does with due process.²¹

¹⁶ "[No] State [shall] deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1.

¹⁷ "[No State shall] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

¹⁸ Cass Sunstein has observed that the difference between the Equal Protection and Due Process Clauses is "structural"; that the two clauses "operate along different tracks." Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

¹⁹ See U.S. CONST. amend. XIV, § 1 ("[No state shall] deprive any person of life, liberty, or property, without due process of law . . .").

²⁰ See *Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 260-64 (1970); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Hurtado v. California*, 110 U.S. 516, 528-29 (1884); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856); see also *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989):

[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.

²¹ For a good discussion of substantive due process, see John Harrison, *Substantive*

The Equal Protection Clause, as its terms suggest, is about protection of the laws. Unlike the Due Process Clause, which requires some minimal level of process, the Court has not read the Equal Protection Clause to require a minimum level of protection.²² The Equal Protection Clause itself does not supply a baseline of protection. Rather, the Equal Protection Clause requires that whatever level of protection a state offers to its citizens, it must offer that protection equally to all persons.²³ The Equal Protection Clause invites a comparative rather than an absolute inquiry.

The Court's familiar equal protection analysis consists of a tripartite structure—strict, heightened, and rational basis scrutiny—that turns on the identity of a party specially burdened by the law²⁴ or the right the party seeks to exercise.²⁵ Persons claiming protection under the Equal Protection Clause must demonstrate that they are members of some distinguishable minority, upon which a disproportionate share of the burden of the law has been deliberately imposed, or upon which a disproportionate share of the benefits of the law has been deliberately withheld.²⁶ Parties burdened “because of” certain characteristics may demand that the law be tailored to the law's legitimate purposes.²⁷ The success of these claims traditionally turns on a plaintiff's ability to prove two points: (1) that the law disproportionately burdens an identifiable group and (2) that the group is entitled to special protection because of the nature of the right at issue or because of the insularity of the group, the immutability of the group's characteristics, a history of discrimination against the group, and the political powerlessness of the group.²⁸

The Supreme Court's equal protection jurisprudence can be divided into two broad areas, defined by context.²⁹ The first and broadest area compris-

Due Process and the Constitutional Text, 83 VA. L. REV. 493 (1997).

²² See *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (holding that while there is an “equal right” to vote, that right is not absolute; states may impose voter qualifications and may regulate access to the franchise in other ways subject to strict scrutiny review).

²³ See *DeShaney*, 489 U.S. at 197 n.3 (“The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.”) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

²⁴ See *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-41 (1985); *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).

²⁵ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Reynolds v. Sims*, 377 U.S. 533, 576 (1964).

²⁶ See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-68 (1977); *Washington v. Davis*, 426 U.S. 229, 238-42 (1976).

²⁷ See *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

²⁸ See *Cleburne*, 473 U.S. at 440-41; *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

²⁹ For a discussion of the problem of defining the distinction between “substance”

es substantive laws drawn to impose penalties or to confer governmental privileges on the basis of suspect classifications.³⁰ For example, the state may not draw distinctions on the basis of race in the districting of schools or in the hiring of employees.³¹ A state may not operate an institution of higher learning and deny admission on the basis of gender.³² A state may not hire or refuse to hire certain employees on the basis of their alienage.³³ School districting, admission to college, and public employment are important substantive rights, which (once created by the government) may not be denied to persons because of their race, gender, or alienage.

The second category of Equal Protection Clause cases concerns laws which govern the processes of self-government. These are the rules by which we make other rules. These include laws on voter qualifications,³⁴ voting districts,³⁵ government structure,³⁶ and validation of public referen-

and "procedure," see Harrison, *supra* note 21, at 497-98 (defining "procedural due process" as acting "in accordance with established law" and "substantive due process" as everything else).

³⁰ Certain "fundamental rights," such as the right to travel, see *Shapiro v. Thompson*, 394 U.S. 618 (1969), may also constitute substantive rights as I have used the term here.

³¹ See *Brown v. Board of Educ.*, 347 U.S. 483 (1954); see also *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Plyler v. Doe*, 457 U.S. 202 (1982).

³² See *United States v. Virginia*, 116 S. Ct. 2264 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

³³ See *Foley v. Connelie*, 435 U.S. 291 (1978); *Sugarman v. Dougall*, 413 U.S. 634 (1973); see also *Toll v. Moreno*, 458 U.S. 1 (1982); *Graham v. Richardson*, 403 U.S. 365 (1971).

³⁴ See, e.g., *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (holding a New York statute violative of the Equal Protection Clause because it prohibited otherwise eligible voters from voting in school district elections if they failed to meet the qualification requirements of owning or leasing taxable realty or of being a parent or guardian of a child enrolled in a local school).

³⁵ See, e.g., *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (holding that an allegation that North Carolina's redistricting legislation was so irregular on its face that it could only be viewed as an effort to segregate races for voting purposes was sufficient to state an equal protection claim); *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that under the Equal Protection Clause, seats in both houses of a bicameral legislature must be apportioned substantially on a population basis); *Baker v. Carr*, 369 U.S. 186 (1962) (holding that allegations that Tennessee legislation classifying voters with respect to representation in the General Assembly and failure to reapportion the seats in light of substantial growth presented a justiciable claim under the Equal Protection Clause).

³⁶ See, e.g., *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978) (holding that "police jurisdiction" statutes were constitutional because it was not unreasonable to extend municipal services to areas adjoining cities and to require outlying citizens to contribute on a reduced scale to payment for the services without permitting outlying residents to vote in municipal elections); *Sailors v. Kent Bd. of Educ.*, 387 U.S. 105

da.³⁷ These cases are something of a double-edged sword for the Court. In this second area of Equal Protection Clause jurisprudence, the Court has to proceed cautiously because it is dealing with fundamental questions of self-government, not simply government entitlements. The United States Constitution says remarkably little about the process by which states must organize and govern themselves. Only by reading with reflected light from the Constitution of 1789 can we discern that states may not establish monarchies³⁸ and should constitute themselves as representative democracies.³⁹ The amendments to the Constitution show greater attention to state governmental processes, but the emphasis is decidedly on voting rights.⁴⁰ To apply the broad principles of the Fourteenth Amendment to state governmental processes, the Court must skirt the brink between laws that genuinely strip citizens of the power of self-government and laws that are the result of one side prevailing in a political dispute.⁴¹ On the one hand, voting is “preser-

(1967) (concluding that because school boards are essentially administrative and not legislative, school board members may be chosen by means other than by election, such as by the elective-appointive system).

³⁷ See, e.g., *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (striking a statewide initiative prohibiting school boards from requiring a student to attend a school other than the one geographically closest to the student’s home because it violated the Equal Protection Clause by allocating governmental power “nonneutrally” by using the “racial nature of a decision to determine the decisionmaking process”); see Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503 (1990).

³⁸ U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . grant any Title of Nobility.”).

³⁹ U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . .”), *repealed sub silentio* by U.S. CONST. amend. XVII; U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”).

⁴⁰ See, e.g., U.S. CONST. amend. XIV, § 2 (reducing representation in Congress when states deny the right to vote to any male citizens, “except for participation in rebellion, or other crime”); U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”); U.S. CONST. amend. XVII, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . .”); U.S. CONST. amend. XIX, cl. 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”); U.S. CONST. amend. XXIV, § 1 (“The right of citizens of the United States to vote . . . shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.”); U.S. CONST. amend. XXVI, § 1 (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”).

⁴¹ The latter is the “political question” doctrine in its purest form. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (discussing the political question doctrine; criteria include

vative of other basic civil and political rights,"⁴² and the Court will not afford the usual presumptions of constitutionality to state restrictions on the franchise.⁴³ On the other hand, the Court believes the process by which we adopt laws reflects our "devotion to democracy"⁴⁴ and "[t]he [s]tates have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised."⁴⁵

The process cases may also be divided. The first subcategory concerns the rights of individuals to represent themselves or to choose their representatives. I will refer to these as the "voting cases." The second subcategory concerns the actual process by which certain types of laws are adopted. I will refer to these as the "equal process" cases.

The voting cases and the equal process cases are marked by important differences. In the voting cases, typically the state (or some subdivision thereof) has restricted who is eligible to vote or how much any given person's vote will count. The voting cases involve limitations on the ability of persons to participate in the political process, rather than the types of rules that can be adopted.⁴⁶ The Constitution supplies several examples of such voting restrictions. The Fourteenth Amendment implies, for instance, that states may restrict the electorate to citizens of the United States who have not participated in "rebellion[] or other crime."⁴⁷ The Twenty-Sixth Amendment suggests that the United States or a state may decline to give persons seventeen years old and younger the right to vote.⁴⁸

Beyond these examples, the Court has struck attempts to limit the right to vote or to limit the relative weight given to votes. In *Kramer v. Union*

matters that cannot be resolved by the courts "without expressing lack of the respect due coordinate branches of government"); *see also* *White v. Regester*, 412 U.S. 755, 765-66 (1973) (requiring proof that a group was deprived of an opportunity to participate in the political process, not just that it failed to secure "legislative seats in proportion to its voting potential").

⁴² *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

⁴³ *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627-28 (1969).

⁴⁴ *James v. Valtierra*, 402 U.S. 137, 141 (1971).

⁴⁵ *Lassiter v. Northampton Election Bd.*, 360 U.S. 45, 50 (1958) (citing *Pope v. Williams*, 193 U.S. 621, 633 (1904)).

⁴⁶ *See, e.g., Kramer*, 395 U.S. at 629 ("Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not.").

⁴⁷ U.S. CONST. amend. XIV, § 2; *see Richardson v. Ramirez*, 418 U.S. 24 (1974) (holding that the California Constitution and the implementing statutes disenfranchising convicted felons who have completed their sentences and paroles does not deny equal protection).

⁴⁸ U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

Free School District No. 15,⁴⁹ for example, the Court addressed whether states can limit the franchise in special elections. New York law provided that in certain school district elections, persons otherwise eligible to vote in state and federal elections could vote in the school district elections only if they owned or leased real property or had children in the public schools. New York argued that the limitation permitted those “primarily interested” in the elections to vote.⁵⁰ The Court said this argument invited the comparison of “whether all those excluded are in fact substantially less interested or affected than those the statute includes.”⁵¹ The Court found that the statute was not “sufficiently tailored”⁵² and thus held the statute violative of the Equal Protection Clause.⁵³ In the “one person/one vote” decisions, the Court held that the Equal Protection Clause requires that voting districts be roughly equal in size so that every elector’s vote has the same voting power as every other vote.⁵⁴ In the recent spate of redistricting cases, the Court has struck districts where the boundaries were determined by reference to race.⁵⁵

In the voting cases, the challenged practices are not neutral with respect to persons but are neutral with respect to the substance of the laws. In the equal process cases, this situation is inverted; the electorate remains fixed, but some issues are placed beyond the ordinary reach of the electorate.

⁴⁹ 395 U.S. 621 (1969).

⁵⁰ *Id.* at 631.

⁵¹ *Id.* at 632.

⁵² *Id.* at 633.

⁵³ *See id.* at 631. Justice Stewart, joined by Justices Black and Harlan, dissented. According to the dissent, the classification was entirely rational. Persons excluded from the school elections were not excluded from state elections and thus had direct recourse to the state legislature to change the qualifications for voting in the school district elections. *See id.* at 639-40 (Stewart, J., dissenting).

The Court has subsequently disapproved most restrictions on the franchise. *See City of Phoenix v. Kolodziejcki*, 399 U.S. 204 (1970) (striking an Arizona law that excluded nonproperty owners from voting in elections held to approve the issuance of general obligation bonds); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (striking a Louisiana law that gave only “property taxpayers” the right to vote in elections called to approve the issuance of revenue bonds by a municipal utility). *But see Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (upholding a law restricting voters in water district elections to landowners).

⁵⁴ *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

⁵⁵ *See, e.g., Bush v. Vera*, 116 S. Ct. 1941 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996); *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *see also Davis v. Bandemer*, 478 U.S. 109 (1986) (concluding that political gerrymandering by the Republican majority in the Indiana Legislature that adversely affected the Indiana Democratic Party was justiciable under the Equal Protection Clause).

Some rules must be adopted by a process different from that required for other rules. Thus, the law is neutral with respect to voter qualifications. It does, however, restrict what the voters can do. The First Amendment and the Bill of Attainder and Ex Post Facto Clauses are examples of provisions in the Constitution that forbid the passage of certain rules.⁵⁶ The Constitution also provides that spending bills must originate in the House of Representatives,⁵⁷ a provision that gives relatively greater power to more populous states. Also, impeachment, ratification of treaties, and amending the Constitution require supermajority votes.⁵⁸

Hunter v. Erickson,⁵⁹ illustrates the Fourteenth Amendment restrictions on this "equal process" category. In 1964, the Akron City Council enacted an equal housing ordinance. The ordinance forbade discrimination on the basis of "race, color, religion, ancestry or national origin," and established a Commission on Equal Opportunity in Housing to enforce it.⁶⁰ Shortly thereafter, by referendum vote, the electorate amended the city charter to provide that any ordinance regulating use (including sale, transfer, lease, and financing) of real property "on the basis of race, color, religion, national origin or ancestry" had to be approved first by a majority of electors in a general election.⁶¹ The Akron charter amendment did not repeal outright the prior fair housing ordinance; however, it did require that the ordinance be submitted to public referendum.⁶² Ordinarily Akron held a general referendum on council-enacted legislation only when ten percent of the voters requested it.⁶³ The Court held the amendment unconstitutional because it was "an explicitly racial classification treating racial housing matters differently from other racial and housing matters."⁶⁴ The amended charter

⁵⁶ See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . ."); U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

⁵⁷ See U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives . . .").

⁵⁸ See U.S. CONST. art. I, § 3, cl. 6 ("[N]o Person shall be convicted [upon impeachment] without the Concurrence of two thirds of the Members [of the Senate] present."); U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ."); U.S. CONST. art. V (requiring a vote of "two thirds of both Houses" or two thirds of the legislatures of the states to propose amendments and requiring ratification of proposed amendments by three fourths of the states).

⁵⁹ 393 U.S. 385 (1969).

⁶⁰ *Id.* at 386 (quoting Akron, Ohio, Ordinance 873-1964, § 1 (1964)).

⁶¹ *Id.* at 387 (quoting Akron, Ohio, City Charter § 137 (1964)).

⁶² See *id.* at 390.

⁶³ See *id.*

⁶⁴ *Id.* at 389.

drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends Only laws to end housing discrimination based on "race, color, religion, national origin or ancestry" must run [the amendment's] gantlet.⁶⁵

Although the law drew no distinctions between "Negroes and whites, Jews and Catholics[,] . . . the reality is that the law's impact falls on the minority."⁶⁶ The Court thus identified two potential problems: The Akron charter amendment altered the process by which a class of laws could be enacted, and the class of laws dealt with race.

B. *The Equal Process Cases*

Although *Hunter* is perhaps the best known of the equal process cases, it followed by two years the Court's decision in *Reitman v. Mulkey*.⁶⁷ In *Reitman*, the people of California adopted by referendum an amendment to their Constitution forbidding the state to

deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.⁶⁸

⁶⁵ *Id.* at 390.

⁶⁶ *Id.* at 390-91. Justice Harlan concurred. In his view, if the city's fair housing provision had been defeated in an ordinary referendum requested by 10% of the voters, blacks would have lost a political battle, but they would not have been denied equal protection. Even if blacks were forced to seek their political goals through state legislation or through amendment of the state constitution, the legislation would have been defeated through the application of "neutral principles." *Id.* at 394 (Harlan, J., concurring). By contrast, the amendment in *Hunter* had "the clear purpose of making it more difficult for racial and religious minorities to achieve legislation that is in their interest." *Id.* at 395 (Harlan, J., concurring). Only Justice Black dissented. He argued that the Fourteenth Amendment did not bar Akron from repealing its statute. *See id.* at 396 (Black, J., dissenting).

⁶⁷ 387 U.S. 369 (1967).

⁶⁸ *Id.* at 371 (quoting CAL. CONST. art. I, § 26 (1964) (repealed 1974)).

The effect of the amendment was to overturn state laws regulating the transfer of private property, such as equal housing legislation.⁶⁹ The Supreme Court began from the premise that the Fourteenth Amendment did not obligate California to adopt equal housing legislation, such that merely repealing equal housing legislation would not violate the Fourteenth Amendment.⁷⁰ The Court, however, found that the amendment went beyond repeal—that “[t]he right to discriminate . . . was now embodied in the State’s basic charter, immune from legislative, executive, or judicial regulation at any level of the state government.”⁷¹ The Court concluded that the amendment did “not just repeal an existing law forbidding private racial discriminations,” but that it “authorize[d] racial discrimination in the housing market.”⁷²

Justice Harlan, joined by Justices Black, Clark, and Stewart, dissented.⁷³ According to Justice Harlan, the Fourteenth Amendment does not require the government to enact laws prohibiting private discrimination. California merely repealed its prior statutes forbidding such discrimination.⁷⁴ According to Justice Harlan, “[t]his runs no more afoul of the Fourteenth Amendment than would have California’s failure to pass any such antidiscrimination statutes in the first instance.”⁷⁵ Justice Harlan emphasized that California had no role in enforcing the amendment and that any discrimination was only the result of private choices.⁷⁶ The Court’s decision, he said, had far-reaching implications for the state-action doctrine:

Every act of private discrimination is either forbidden by state law or permitted by it. There can be little doubt that such permissiveness—whether by express constitutional or statutory provision, or implicit in the common law—to some extent “encourages” those who wish to discriminate to do so. Under this theory “state action” in the form of laws that do nothing more than passively permit private discrimination could be said to tinge *all* private discrimination with the taint of unconstitutional state encouragement.⁷⁷

⁶⁹ *See id.* at 374.

⁷⁰ *See id.* at 376.

⁷¹ *Id.* at 377.

⁷² *Id.* at 380-81.

⁷³ *See id.* at 387 (Harlan, J., dissenting).

⁷⁴ *See id.* at 389 (Harlan, J., dissenting).

⁷⁵ *Id.* (Harlan, J., dissenting).

⁷⁶ *See id.* at 390, 392 (Harlan, J., dissenting).

⁷⁷ *Id.* at 394-95 (Harlan, J., dissenting).

Justice Harlan suggested that the Court's decision might actually discourage equal housing legislation because it could be argued that legislatures would interpret the Court's decision to mean that they could not repeal any such legislation.⁷⁸

Reitman and *Hunter* were followed by *James v. Valtierra*,⁷⁹ in which California voters again amended by referendum their constitution. This time the amendment provided that no "low-rent housing project" (including those financed in whole or in part by the federal government) could be developed, constructed, or acquired unless a community election approved it by majority vote.⁸⁰ The Court upheld this provision, finding that "referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."⁸¹ The Court distinguished *Hunter* on the grounds that the California referendum at issue in *Valtierra* did not distinguish on the basis of race; it applied to "any low-rent public housing project, not only for projects which will be occupied by a racial minority."⁸² The fact that public housing proposals had to clear an additional hurdle did not deprive anyone of equal protection; if such proposals were found to deprive people of equal protection, states would be prevented from holding referenda on any issue, unless they held referenda on all such issues.⁸³

Also during the 1971 term, in *Gordon v. Lance*,⁸⁴ the Court approved a West Virginia requirement that political subdivisions of the state could not incur debt and increase tax rates unless approved by 60% of the voters in a referendum. The Court distinguished the West Virginia requirement from the laws at issue in prior equal process cases, such as *Hunter*, on the basis that

⁷⁸ See *id.* at 395 (Harlan, J., dissenting). In one sense, the Akron amendment at issue in *Hunter* did not go as far as the California amendment at issue in *Reitman*. The Akron amendment did not repeal outright the city fair housing ordinance. Rather, it required that the amendment pass the additional hurdle of a referendum vote. It is true that Akron created a hurdle that California did not, but the California constitutional amendment was final on the question of fair housing laws, while the Akron amendment left open the possibility of such laws. Neither law, of course, was permanent; both the Akron and California amendments could be repealed in the same way in which they were passed, through "neutral principles." *Hunter v. Erickson*, 393 U.S. 385, 394 (Harlan, J., concurring).

⁷⁹ 402 U.S. 137 (1971).

⁸⁰ *Id.* at 139.

⁸¹ *Id.* at 141.

⁸² *Id.*

⁸³ See *id.* at 142. Justice Marshall, joined by Justices Brennan and Blackmun, dissented. They thought that the California amendment expressly singled out low-income persons, thereby classifying persons on the basis of poverty. See *id.* at 144-45 (Marshall, J., dissenting). Justice Marshall stated that classifications on the basis of poverty are suspect and demand "exacting judicial scrutiny." *Id.* at 145 (Marshall, J., dissenting).

⁸⁴ 403 U.S. 1 (1971).

“the West Virginia Constitution singles out no ‘discrete and insular minority’ for special treatment.”⁸⁵ The Court thought that the class singled out in *Hunter* was “clear—‘those who would benefit from laws barring racial, religious, or ancestral discriminations.’”⁸⁶ In the West Virginia scheme, however, there was “no independently identifiable group or category that favor[ed] bonded indebtedness over other forms of financing.”⁸⁷ As in *Valtierra*, the Court treated *Hunter* as a case principally about disparate racial impact, not about selective changes in the legislative process.

In *Washington v. Seattle School District No. 1*,⁸⁸ the Court proffered its most detailed and sophisticated explanation for its equal process decisions. The Seattle School Board voluntarily had adopted busing to alter the racial balance in Seattle schools.⁸⁹ In a state-wide referendum, the citizens of Washington adopted Initiative 350, which provided that “no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student’s place of residence.”⁹⁰ The Court found that *Hunter* applied, offering a “simple but central principle”: “laws structuring political institutions or allocating political power according to ‘neutral principles’—such as the executive veto, or the typically burdensome requirements for amending state constitutions—are not subject to equal protection attack, though they may ‘make it more difficult for minorities to achieve favorable legislation.’”⁹¹ The Court continued:

the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to

⁸⁵ *Id.* at 5.

⁸⁶ *Id.* (quoting *Hunter v. Erickson*, 393 U.S. 385, 391 (1969)).

⁸⁷ *Id.*

⁸⁸ 458 U.S. 457 (1982).

⁸⁹ *See id.* at 461.

⁹⁰ *Id.* at 462 (quoting WASH. REV. CODE § 28A.26.010 (1981) (repealed 1991)). The Initiative contained certain exemptions for special education, safety concerns, and court-ordered busing.

⁹¹ *Id.* at 469-70 (quoting *Hunter*, 393 U.S. at 394 (Harlan, J., concurring)). The Court explained that in *Hunter*,

[t]he evil condemned . . . was not the particular political obstacle of mandatory referenda imposed by the Akron charter amendment; it was, rather, the comparative structural burden placed on the political achievement of minority interests. Thus, in *Hunter*, the procedures for enacting racial legislation were modified in such a way as to place effective control in the hands of the citywide electorate. Similarly here, the power to enact racial legislation has been reallocated. In each case, the effect of the challenged action was to redraw decisionmaking authority over racial matters—and only over racial matters—in such a way as to place comparative burdens on minorities.

Id. at 474-75 n.17.

secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process.⁹²

The Court concluded that Initiative 350 imposed “substantial and unique burdens on racial minorities.”⁹³

In *Seattle School District No. 1*, the Court further argued that Initiative 350 reallocated power over racial problems that might be addressed through forced busing.⁹⁴ Initiative 350 took the authority to impose forced busing from the School Board and lodged it in the state legislature or the electorate.⁹⁵ “[T]hose championing school integration . . . [must] surmount a considerably higher hurdle than persons seeking comparable legislative action.”⁹⁶ Finally, the Court distinguished Initiative 350 from the simple repeal of the School Board’s busing decision. The Initiative not only affected the immediate past decisions of the School Board, but “burden[ed] all future attempts to integrate Washington schools . . . by lodging decisionmaking authority over the question at a new and remote level of government.”⁹⁷

Four members of the Court, in an opinion by Justice Powell, dissented. They noted that a school board’s decision not to assign students on the basis of race does not violate the Fourteenth Amendment, nor does the Fourteenth Amendment require that school decisions be made locally, rather than statewide. Justice Powell stated that the “only relevant constitutional limitation” on a state’s structure of its political institutions was whether the state had placed a “special burden[] on racial minorities within the governmental process.”⁹⁸ Because the Initiative did not “uniquely or comparatively burden[]” minorities, *Hunter* was “simply irrelevant.”⁹⁹

On the same day the Court decided *Seattle School District No. 1*, the Court decided *Crawford v. Los Angeles Board of Education*.¹⁰⁰ Before *Crawford* reached the Supreme Court, the California courts construed the California Constitution to mean that California school boards had an obligation to alleviate segregation in public schools, whether or not the segrega-

⁹² *Id.* at 470.

⁹³ *Id.* The Court admitted, however, that the proponents of Initiative 350 crossed racial lines. *See id.* at 472.

⁹⁴ *See id.* at 474.

⁹⁵ *See id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 483.

⁹⁸ *Id.* at 493 (Powell, J., dissenting) (quoting *Hunter v. Erickson*, 393 U.S. 385, 391 (1969)).

⁹⁹ *Id.* at 498 (Powell, J., dissenting).

¹⁰⁰ 458 U.S. 527 (1982).

tion was intentional.¹⁰¹ In 1979, California voters adopted Proposition I, which amended the Due Process and Equal Protection Clauses of the California Constitution to provide that no California state court could impose an “obligation or responsibility with respect to the use of pupil school assignment or pupil transportation” unless such remedy was required by the Fourteenth Amendment of the United States Constitution.¹⁰² The Court found that California voters merely had limited their courts to the requirements of the Fourteenth Amendment and, accordingly, that this limitation could not violate the Fourteenth Amendment. The Court denied that Proposition I used a racial classification because no person was to be treated differently based on race. “[T]he Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place.”¹⁰³ The Court recognized, however, that the California Constitution still required school boards to desegregate their schools, even though Proposition I limited the power of the state courts to enforce the obligation.¹⁰⁴ The Court simply denied that Proposition I had a disproportionate effect on racial minorities.¹⁰⁵

In a concurring opinion, Justice Blackmun, joined by Justice Brennan, explained why he believed *Crawford* and *Seattle School District No. 1* were consistent. It was true that California voters had made it more difficult for schools to achieve desegregation, but California had not changed the *political process*, only the *judicial remedies* available.¹⁰⁶ “[R]uling for petitioners on a *Hunter* theory seemingly would mean that statutory affirmative-action or antidiscrimination programs never could be repealed, for a repeal of the enactment would mean that enforcement authority previously lodged in the state courts was being removed by another political entity.”¹⁰⁷ The same entity—the people of California—that had adopted the California Constitution had changed it.¹⁰⁸

¹⁰¹ See *Crawford v. Los Angeles Bd. of Educ.*, 551 P.2d 28 (Cal. 1976).

¹⁰² *Crawford*, 458 U.S. at 532 (quoting CAL. CONST. art I, § 7(a)).

¹⁰³ *Id.* at 538.

¹⁰⁴ See *id.* at 536 & n.12, 541.

¹⁰⁵ See *id.* at 545. The Court distinguished *Crawford* from *Hunter*. The Akron ordinance at issue in *Hunter* did not expressly discriminate on the basis of race; rather, the law singled out “persons seeking antidiscrimination housing laws,” who were “presumptively racial minorities.” *Id.* at 541.

¹⁰⁶ See *id.* at 546-47 (Blackmun, J., concurring).

¹⁰⁷ *Id.* (Blackmun, J., concurring).

¹⁰⁸ Justice Marshall dissented. For Justice Marshall, Proposition I was not a mere repeal, but a mechanism through which the “rules of the game have been significantly changed.” *Id.* at 555-56 (Marshall, J., dissenting). Citing *Seattle School District No. 1*, *Hunter*, and *Reitman*, Justice Marshall pointed out that in each of those cases the Court had rejected the “mere repeal” theory because the “alleged rescission was accomplished by a governmental entity other than the entity that had taken the initial action, and resulted in a drastic alteration of the substantive effect of existing policy.” *Id.* at 557

C. *First Principles of Equal Process*

Three fundamental propositions, or lemmas, emerge from the equal process cases:

- Lemma 1:* The Fourteenth Amendment imposes no obligation on states to adopt antidiscrimination legislation.¹⁰⁹
- Lemma 2:* If a state adopts antidiscrimination laws, the state does not violate the Fourteenth Amendment if it later repeals that legislation.¹¹⁰
- Lemma 3:* The Fourteenth Amendment requires that states govern themselves through neutral principles.¹¹¹

Consider each of the propositions. First, Lemma 1 is implicit in the negative phrasing of the Equal Protection Clause: "No state shall . . ." As such, states must refrain from enacting or enforcing laws that deny equal protection, but the states have no affirmative obligation to enact legislation that, for example, would forbid decisions on the basis of race. If state government discriminates on the basis of race, state legislation forbidding such practice would duplicate the Equal Protection Clause. Furthermore, states have no obligation to ban private acts of discrimination because the Fourteenth Amendment does not reach private acts.¹¹² Lemma 1 acknowledges the sufficiency of the Fourteenth Amendment as a remedy for a state's failure to protect persons equally. The Equal Protection Clause does not require a minimum baseline of protection, but it does require that whatever protection a state affords must be provided on an equal basis.

Lemma 2 follows logically from Lemma 1. If a state has no affirmative obligation to enact a class of laws, it may repeal the laws it has enacted. The state may undo that which it had no obligation to do in the first place.

(Marshall, J., dissenting). Proposition I constituted a barrier between minority school children and their rights under the state constitution, and that barrier applied uniquely to court-enforced busing. *See id.* at 559 (Marshall, J., dissenting).

¹⁰⁹ *See Crawford*, 458 U.S. at 535, 538; *Reitman v. Mulkey*, 387 U.S. 369, 376 (1967); *see also id.* at 389 (Harlan, J., dissenting).

¹¹⁰ *See Crawford*, 458 U.S. at 538; *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 483 (1982); *Hunter v. Erickson*, 393 U.S. 385, 390 n.5 (1969).

¹¹¹ *See Seattle Sch. Dist. No. 1*, 458 U.S. at 470; *Hunter*, 393 U.S. at 394 (Harlan, J., concurring).

¹¹² *See The Civil Rights Cases*, 109 U.S. 3 (1883). *But see Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that the Fourteenth Amendment forbids state courts from enforcing racially restrictive covenants). Professor Tribe suggests that *Shelley* and *Crawford*, *see supra* discussion accompanying notes 100-08, are inconsistent. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16-17, at 1488 (2d ed. 1988).

Confusion over Lemma 2 occurs when the courts do not look at an entire sequence of events and, instead, engage in marginal analysis. Let us suppose that the Akron City Council enacts a fair housing law—a law that (by Lemma 1) the city had no obligation to adopt. Does Akron act on the basis of race when it repeals the antidiscrimination law? The answer, according to a marginal analysis, is “yes.” The repealing law is plainly a law about race, racial minorities are worse off after repeal than before, and racial animus, therefore, likely motivated some legislators.

This marginal analysis is attractive but flawed. The flaw in the “no repeals” logic is that it treats race-specific legislation asymmetrically. Both the original fair housing law and the law repealing it were neutral as to any particular race. Although both the benefit conferred by the original legislation and the incidence of its repeal disproportionately affected minorities, throughout its passage and repeal the law applied equally to all persons. A “no repeals” rule would be a ratchet, allowing only protective legislation. Ironically, a “no repeals” rule would be the most serious constraint on process because it would not permit a law to be changed once it was passed and, therefore, would bind all future legislatures. In effect, it would be a rule that says, “there shall be no other rules.” Additionally, as Justice Harlan pointed out in *Reitman*, if the Court adopted this position, states would react to preserve their options by refusing to pass antidiscrimination legislation.¹¹³ The result would be that less antidiscrimination legislation would exist in the future, not more.

Lemma 3 states the basic requirement of the Equal Protection Clause as applied to the law-making process. Although I have taken neutrality as a general statement of equality principles, Lemma 3 does not answer the problem of sequencing or marginal analysis: At what point in time do we ask if the process is neutral? Lemma 3 gives us no guidance regarding the level at which “neutral principles”¹¹⁴ must be employed. To remove from local school districts the power to use forced busing to integrate the schools, the people of Washington passed a neutral referendum provision; the referendum mechanism could just as easily have been used to require busing for integration. The referendum mechanism was content-neutral. Washington’s Initiative 350, at issue in *Seattle School District No. 1*, however, plainly was not content-neutral; it was highly political, which is true of almost all legislation.

With these lemmas in mind, I wish to discuss a series of hypotheticals based on *Hunter*. First, suppose that the Akron City Council passed a fair housing act and subsequently repealed it. According to Lemma 1, the Akron City Council had no obligation to enact a fair housing provision. By Lemma 2, Akron did not violate the Fourteenth Amendment by repealing it, even

¹¹³ See *Reitman*, 387 U.S. at 395 (Harlan, J., dissenting).

¹¹⁴ *Hunter*, 393 U.S. at 394 (Harlan, J., concurring).

though race discrimination was the subject matter of the law and the law repealing the fair housing legislation was heavily supported by minorities. What if Akron also provided that all future fair housing laws would have to be submitted for public referenda? What if the Akron City Council announced that because of its past experience with fair housing legislation, it wished to ensure adequate political support for future fair housing legislation by requiring the support of three-quarters of the Council? In either of these cases, fair housing laws have to pass an additional hurdle, having a different "gantlet"¹¹⁵ to run than other legislation. Does having to pass such an additional hurdle violate Lemma 3? Akron has placed an additional obstacle in the path of fair housing legislation, and the referenda or supermajority requirements will be difficult to overcome; indeed, the hurdle appears insuperable. The supermajority rule itself, however, may be avoided by a majority vote. It requires no more political support to change the rules about passing fair housing laws than it does to adopt the rules themselves. Stated another way, if there is sufficient political support for a substantive fair housing law, the "no fair housing" rule should not be an obstacle to its enactment. Through the application of the same "neutral principles" of legislation by which the "no fair housing" rule was adopted, the rule may be repealed and fair housing legislation enacted.¹¹⁶

Next, suppose that Akron repealed its fair housing law and said nothing about future fair housing acts. A group of citizens attempted to get the Akron City Council to enact new fair housing legislation, but the Council, recognizing the inevitable, bowing to political pressure, or reflecting changes in its composition, refused to enact new legislation. This scene recurred year after year. Under Lemmas 1 and 2, the City Council did not violate the Equal Protection Clause. Lemma 3 also should be satisfied because the process for adopting legislation was not altered in any way, and no one alleged that the process was unfair from the outset.

In this hypothetical, over time it has become apparent that Akron has developed a policy and practice of not having fair housing legislation. In effect, the iterative process of either the Council refusing to enact fair housing legislation or the Council enacting and the electorate repealing fair housing legislation has created an informal rule concerning fair housing. Would the *informal* rule violate the Equal Protection Clause? Would the analysis change if Akron adopted a *formal* rule? What if the City Council actually adopted a rule prohibiting the introduction of fair housing legislation? To

¹¹⁵ *Id.* at 390.

¹¹⁶ Even if Akron tried to cement the "no fair housing legislation" rule by providing that the rule itself required a three-quarters vote to revoke it, at some point a simple majority vote will be required to unravel the layers of insulating devices. See John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 503-04 (1995).

those seeking fair housing legislation, the rule seems quite unfair. The rule, however, simply recognizes what has regularly occurred in Akron. Moreover, the rule is self-enforcing. If the Akron City Council does adopt fair housing legislation, it is unlikely that the Council's prior rule will prevent its enforcement. Either the Council simultaneously will revoke or waive its prior rule, or the passage of the legislation will be deemed an implied repeal. In any event, the "no fair housing" rule can be repealed by the same process through which it was passed, by simple majority vote.¹¹⁷

What if, instead of the Akron City Council adopting a rule forbidding fair housing legislation, the citizens of Akron in a public referenda, or even the Ohio legislature, imposed the rule on the Council? Imposing the rule in this way introduces a new element—the "no fair housing" rule now has its origins in some other body so that the City Council no longer has the power to overrule, waive, or revoke the "no fair housing" rule. The argument that the repeal effected by a different political body violates the Fourteenth Amendment¹¹⁸ strikes me as contrived. The "no fair housing" rule was adopted pursuant to a set of neutral principles—the principles governing all referenda. The referendum mechanism can be used equally to forbid fair housing legislation or to compel it; it may be used for politically charged matters, such as fair housing or forced busing (as in *Hunter* or *Seattle School District No. 1*), or for important, but more mundane matters, such as local government debt limits (as in *Gordon v. Lance*). Furthermore, what the people have worked through a referendum may be undone through the same set of neutral principles. It is no harder to repeal a law enacted by a referendum (or to amend a state constitutional provision) than it was to enact it in the first place. The process is *equal* because it is the *same*. If a repeal is unattainable, it is because it is a politically unlikely outcome, not because the process is unfair.

The contrary rule, which the Court adopted in *Seattle School District No. 1*, for example, shows great disdain for democratic self-government. Referenda are populist self-help measures, an end run around recalcitrant public officials. The contrary rule values the decisions of public officials over the wishes of the electorate; the political views of a municipality to those of a state. Carried to its logical extreme, the Court's extant position would hold that a "no fair housing amendment" to the United States Constitution would violate the Equal Protection Clause.

If, as I have argued, the equal process cases are flawed applications of neutral principles,¹¹⁹ one must ask how the Court should have dealt with

¹¹⁷ See *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527, 546-47 (1982) (Blackmun, J., concurring).

¹¹⁸ See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474-75, 483-84 (1982).

¹¹⁹ See *Coalition for Econ. Equity v. Wilson*, 110 F.3d 1431, 1440-46 (9th Cir. 1997) (discussing the *Hunter* doctrine in the context of California's Proposition 209, which

the rules adopted in *Hunter* and *Seattle School District No. 1*. The Court should have dealt with those rules as it would any other *substantive* law.¹²⁰ The arguments over *process* are largely irrelevant, distracting us from the real issues presented. The real question in *Seattle School District No. 1* was whether Washington's ban on self-imposed busing violated the Equal Protection Clause. That the rule was adopted by referendum was of no consequence; that the statewide rule reversed locally adopted policies was evidence of its broad-based support, not its ill motives.

This is not to say that no rules restricting political processes violate the Equal Protection Clause. Obviously, there are limits. For example, a state could not adopt a rule prohibiting referenda proposed by African-Americans. Nor could a state, without justification, adopt a rule that prohibited only Akron from passing fair housing laws. These limitations exist, however, because the *substance* of the laws treats individuals differently, not because the *process* is unfair. If the Court took its equal process principles seriously, then any change in the process by which any class of laws may be enacted would violate the Equal Protection Clause. This has not been the case.¹²¹

III. *ROMER*, *HUNTER*, AND THE PATH OF LEAST RESISTANCE

How do the principles of the Due Process and Equal Protection Clauses apply to *Romer*? The Colorado Supreme Court thought that the *Hunter* line of equal process cases bore a "close[] resemblance" to the issues surrounding Amendment 2,¹²² while the United States Supreme Court barely deigned to cite them.¹²³ Surely the *Hunter* line of decisions supported the result the Court reached; *Romer* was plainly within the reach of those decisions.¹²⁴ Does the Court's failure to do more than mention that the decisions were the basis for the Colorado Supreme Court's decision suggest that

prohibits all government discrimination and preferential treatment on the basis of race, sex, color, ethnicity, and national origin), *petition for cert. filed*, 66 U.S.L.W. 3181 (1997). At one point in its discussion, the Ninth Circuit stated that the Court's equal process principles left it "a little perplexed." *Id.* at 1441.

¹²⁰ See *Crawford*, 458 U.S. at 538 (noting that "the Court has recognized that a distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters") (footnote omitted).

¹²¹ See, e.g., *Gordon v. Lance*, 403 U.S. 1 (1971); *James v. Valtierra*, 402 U.S. 137 (1971).

¹²² *Evans v. Romer*, 854 P.2d 1270, 1279 (Colo. 1993).

¹²³ See *Romer v. Evans*, 116 S. Ct. 1620, 1624 (1996).

¹²⁴ See Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257, 280 (1996); Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289, 296-99 (1997); Stephanie L. Grauerholz, Comment, *Colorado's Amendment 2 Defeated: The Emergence of a Fundamental Right to Participate in the Political Process*, 44 DEPAUL L. REV. 841 (1995).

Hunter was not persuasive to the Court? Unfortunately, the grounds on which the Court decided *Romer* were not better established.¹²⁵ As I discuss in this section, perhaps the Court recognized that *Hunter* did not solve its problem.

Let me begin with the Supreme Court's analysis of Amendment 2. In Section I of the opinion, Justice Kennedy began with the observation that Amendment 2 "repeal[ed] [the Aspen, Boulder and Denver] ordinances to the extent they prohibit discrimination on the basis of 'homosexual, lesbian or bisexual orientation, conduct, practices or relationships.'"¹²⁶ This statement accurately described one effect of Amendment 2, but, as the Court must have known, was of no legal consequence; the Court did not even bother to recite for the record that repeals do not violate the Fourteenth Amendment.

The Court then found that Amendment 2 did "more than repeal" the Aspen, Boulder, and Denver ordinances.¹²⁷ It also "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect the named class."¹²⁸ Again, these statements accurately describe Amendment 2, but it is not clear what significance, if any, the Court attached to these facts. Legislative, executive, and judicial actions to protect gays and lesbians were prohibited because the Colorado referendum adopted Amendment 2 as an amendment to the Colorado Constitution. The Court's observation that decisions about a particular subject matter (protected status for homosexuals) had been removed from the control of one level of government (municipalities) to a higher level (state government) set the stage for invoking *Seattle School District No. 1*.¹²⁹

The Supreme Court then summarized its analysis: "[Amendment 2] withdr[ew] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forb[ade] reinstatement of these laws and policies."¹³⁰ In other words, the Amendment repealed protection

¹²⁵ The equal process cases figure prominently in the Ninth Circuit's recent opinion upholding California's Proposition 209 and in the dissents from the denial of rehearing en banc. See *Coalition for Econ. Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997), *reh'g en banc denied*, 1997 WL 563160 (9th Cir. Aug. 28, 1997) (Schroeder, J., dissenting; Norris, J., dissenting), *petition for cert. filed*, 66 U.S.L.W. 3181 (1997). Despite *Hunter*'s absence from *Romer*, the Ninth Circuit cited *Romer* as the Court's "most recent 'political structure' case." *Id.* at 1441.

¹²⁶ *Romer*, 116 S. Ct. at 1623 (quoting COLO. CONST. art. II, § 30b).

¹²⁷ *Id.* at 1623.

¹²⁸ *Id.*

¹²⁹ See *id.* at 1624, 1626-27.

¹³⁰ *Id.* at 1625; see also *id.* at 1624-25 (quoting *Evans v. Romer*, 854 P.2d 1270, 1284-85 (Colo. 1993) (stating that Amendment 2 "repeal[s] existing statutes" and "prohibit[s] any governmental entity from adopting similar . . . statutes . . . unless the state constitution is first amended to permit such measures"))).

and made it more difficult to secure such protection in the future (because the Colorado Constitution would have to be amended). To this point, the Supreme Court offered no concerns that had not been addressed directly—indeed, well-supported—by the *Hunter* line of cases. The Court, while describing the effect of Amendment 2 as a repeal and restructuring of governmental process for homosexuals, had not yet concluded that any of this violated the Equal Protection Clause. The Court's coy observations were a tease—a hint of a violation without any conclusion, analysis, or reference to arguably analogous cases.

In Section II of its opinion, the Court contrasted common law public-accommodations law with “contemporary” statutes, which “depart from the common law by enumerating the groups or persons within their ambit of protection.”¹³¹ Colorado had not limited the enumerated groups to those recognized in the Court's equal protection jurisprudence, but had included “an extensive catalogue of traits,” including age, military status, marital status, pregnancy, and political affiliation.¹³² Amendment 2, the Court said, “bar[red] homosexuals from securing protection against the injuries that these public-accommodations laws address.”¹³³ The Court then speculated that state administrators might be barred from even determining whether government discrimination on the basis of sexual orientation amounted to arbitrary and capricious action.¹³⁴ This consequence “would compound the constitutional difficulties [Amendment 2] creates.”¹³⁵

The Court's analysis in Section II, however, begged the question. Let's start with the Court's claim that homosexuals were not entitled to the protection of the current public-accommodations laws. If the Court meant that homosexuals were barred from claiming discrimination on the basis of age, military status, marital status, or political affiliation,¹³⁶ the statement surely was not true. Nothing in Amendment 2 barred gays and lesbians from claiming, for example, age discrimination. Amendment 2 barred homosexuals from claiming discrimination on the basis of homosexual status. For all other *enumerated* bases of discrimination, gays and lesbians were protected.¹³⁷ If the Court, alternatively, has asserted that homosexuals were barred

¹³¹ *Id.* at 1625.

¹³² *Id.* at 1626.

¹³³ *Id.*

¹³⁴ *See id.*

¹³⁵ *Id.*

¹³⁶ *See id.* (stating “even if, as we doubt, homosexuals could find some safe harbor in laws of general application . . .”).

¹³⁷ In fact, for Colorado to decline to protect any otherwise qualified person from discrimination on the basis of an enumerated classification such as age would be a clear violation of the promise of equal protection of the laws. If Amendment 2 meant that homosexuals could not file age discrimination claims, the Amendment was the clearest form of caste legislation and, therefore, violated the Equal Protection Clause. I do not

from claiming discrimination *as homosexuals*, the observation is unremarkable; the Court has not said anything but the obvious, and to make the observation is not to conclude that Amendment 2 violated the Equal Protection Clause. We are left to puzzle over the Court's claim that government non-protection policies towards gays and lesbians would "compound the constitutional difficulties"¹³⁸ because to this point, the Court has not said a word about the Constitution—it has not identified any "constitutional difficulties" that could have been "compounded."¹³⁹ The Court concluded Section II with the observation that "[h]omosexuals [were] forbidden the safeguards that others enjoy or may seek without constraint."¹⁴⁰ Again, the Court merely has identified that Amendment 2 (1) repeals legal protection that homosexuals previously had ("the safeguards that others enjoy") and (2) has restructured the process for obtaining future protection ("the safeguards that others . . . may seek without constraint").¹⁴¹

The Court's analysis in Section II is troubling for an additional reason. The Court faulted Colorado for first enumerating a list of protected classes in public accommodations and then removing sexual orientation from the list.¹⁴² The Court surely did not mean that Colorado would violate the Equal Protection Clause if it did not include age or marital status on its list of protected classes, just as Colorado would not violate the Fourteenth Amendment if it included age, but not marital status, on the list. To say that Colorado must include some class of persons on its list defies Lemma 1. Furthermore, all kinds of categories are not included on Colorado's list—the illiterate, persons with communicable diseases, licensed cosmeticians, the tall, the short, persons with male pattern baldness, and so forth. Surely Colorado's laws are not infirm because persons with these characteristics are not expressly protected. Colorado currently prohibits discrimination based on certain legal, off-duty conduct, such as smoking.¹⁴³ If Colorado voters adopted "Amendment 3" to prohibit its political subdivisions from enacting laws giving smokers preferred, enumerated status, would Amendment 3 suffer from the same "compound[ed] . . . constitutional difficulties" as Amendment 2?¹⁴⁴ Are we so confident of the difference between status

read Amendment 2 to have done this. *See id.* at 1630 (Scalia, J., dissenting) (dismissing as unpersuasive the argument that Colorado would not prosecute assaults against homosexuals).

¹³⁸ *Id.* at 1626.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1627.

¹⁴¹ *Id.*; *see also id.* ("They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution . . .").

¹⁴² *See id.* at 1625-26.

¹⁴³ *See Evans v. Romer*, 882 P.2d 1335, 1346 n.9 (Colo. 1994) (citing 10A COLO. REV. STAT. § 24-34-402.5 (1990)).

¹⁴⁴ The example is Cass Sunstein's. *See* Cass R. Sunstein, *Foreword: Leaving Things*

(being a smoker) and conduct (smoking) that we can either automatically approve Amendment 3 as conduct-driven or disapprove it as status-driven? If Colorado cannot repeal sexual orientation as an enumerated class, it must be because Colorado has a duty to protect sexual orientation. If Section II holds that the Fourteenth Amendment imposes an affirmative duty on states to protect persons on the basis of their sexual orientation, this would be "unprecedented in our jurisprudence."¹⁴⁵ The Court, however, offered no other explanation in Section II.

In Section III of *Romer*, the Court finally addressed the Fourteenth Amendment. The Court's analysis, however, was much too cryptic. Amendment 2, the Court said, disqualified "a class of persons from the right to seek specific protection from the law."¹⁴⁶ The Court might have meant two things by this statement. It might have meant that Amendment 2 impaired the right of homosexuals to petition the government for a redress of grievances.¹⁴⁷ We usually think of the right to petition the government as a First Amendment, rather than a Fourteenth Amendment, right. Given the doctrine of incorporation, however, the Fourteenth Amendment is relevant (although the Court's discussion of general equal protection principles would be out of place since the First Amendment applies to the states by virtue of the Due Process Clause, not the Equal Protection Clause). These problems aside, if the Court had the right to petition in mind, it owed us some explanation of how Amendment 2 denied homosexuals the right to seek redress. In contrast to the voting cases,¹⁴⁸ homosexuals were not forbidden to vote, nor were they denied the right to seek new legislation. What homosexuals in Colorado lost in Amendment 2 was the power to have local governments make homosexuality a statutory suspect class. That, we thought until *Romer*, was a fair political fight.

Additionally, the Court might have meant that homosexuals, in order to regain the favored status they enjoyed under the Aspen, Boulder, and Denver ordinances, must run a different gantlet for their efforts to obtain other legislation. This view is consistent with the Court's subsequent declaration that "[c]entral both to the idea of the rule of law and to our own

Undecided, 110 HARV. L. REV. 4, 58 (1996).

¹⁴⁵ *Romer*, 116 S. Ct. at 1628.

¹⁴⁶ *Id.*; see *id.* ("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 . . .").

¹⁴⁷ See generally U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); see *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 655 n.9 (1991) (arguing that depriving a local government of the power to bar discrimination against persons suffering from AIDS "[a]rguably . . . restrict[s] the right to petition the government").

¹⁴⁸ See *supra* notes 46-58 and accompanying text.

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."¹⁴⁹ This is again the language of the equal process cases. If what the Court really had in mind was the running of the gantlet, why did the Court not cite *Hunter*? *Hunter* demonstrates that, to the extent Amendment 2 burdened a class defined by their political views about sexual orientation, there was nothing "unprecedented in our jurisprudence" about it.

The Court's failure to invoke the equal process cases is twice troubling. First, it is troubling because of what this failure says about *Hunter*. The Court's analysis so clearly invited comparisons of *Romer* and *Hunter* that the Court's failure even to mention the equal process cases suggests that those cases are flawed. It was the equal process claims that Justice Scalia addressed when he called the majority's logic "terminal silliness."¹⁵⁰ Had the Court actually pressed its point to its logical conclusion, instead of just hinting at the conclusion, its logic might have been silly. Instead, the logic simply was missing; the Court set up the equal process claim and then walked away from it. *Hunter*'s absence from *Romer* may call into question its continuing validity, or at least *Hunter*'s validity outside the context of race.¹⁵¹

Second, *Hunter*'s absence says something more about the Court's analysis. *Hunter*'s absence may not only show the Court's lack of faith in the equal process cases as precedent; it also may demonstrate that the Court thought the facts distinguishable. Although it would have been instructive for the Court to have mentioned and distinguished the equal process cases from *Romer*, in fact, Colorado's Amendment 2 is different from the laws at

¹⁴⁹ *Romer*, 116 S. Ct. at 1628. At the least, the Court's choice of language is misleading. Nothing in Amendment 2 "disqualif[ies]" homosexuals from seeking new legislation. Amendment 2 does not approach the kind of disqualification that New York visited on Morris Kramer, at issue in *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969). See *supra* text accompanying notes 49-55.

¹⁵⁰ *Romer*, 116 S. Ct. at 1630 (Scalia, J., dissenting):

[T]he principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain *preferential* treatment under the laws, has been denied equal protection of the laws. If merely stating this alleged "equal protection" violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.

¹⁵¹ Some commentators have suggested that *Hunter* is distinguishable from *Romer* because *Hunter* and *Seattle School District No. 1* "involved constitutionally suspect racial classifications, and were thus . . . distinguishable from *Romer*, which did not." Andrew M. Jacobs, *Romer Wasn't Built in a Day: The Subtle Transformation in Judicial Argument Over Gay Rights*, 1996 WIS. L. REV. 893, 957 n.352. Professor Karlan states that when race is removed from the equal process cases, the Court's analysis is "unsatisfying. *Romer* turns out to be a lost opportunity for the Court to have given some teeth to its otherwise entirely hortatory jurisprudence of political fairness." Karlan, *supra* note 124, at 300.

issue in the equal process cases in one respect. The equal process cases dealt with rules that made the adoption of certain laws more difficult. Those rules—for example, the Akron amended charter,¹⁵² Washington's Initiative 350,¹⁵³ and California's constitutional amendments¹⁵⁴—did not expressly identify any particular classes of persons except by reference to their political views on particular issues. Akron imposed additional procedures on all those who favored fair housing legislation; that group might include, but was not limited to, persons who would benefit from fair housing legislation.¹⁵⁵ Like those cases, Amendment 2 also erected a procedural hurdle—the requirement of a constitutional amendment—shared by all persons who might seek protection for gays and lesbians, whatever their sexual orientation. As Justice Scalia pointed out, that group would include many persons who were not homosexuals.¹⁵⁶ Unlike the equal process cases, however, Amendment 2 also singled out a class of persons identifiable through means other than their political views. It arguably did not merely burden a class of persons disappointed in the repeal of gay and lesbian-protective statutes and interested in the future protected status of gays and lesbians; Amendment 2 actually burdened the class of gays and lesbians. Akhil Amar has argued that, as written, Amendment 2 would protect heterosexuals from discrimination in public accommodations.¹⁵⁷ If so, Amendment 2 expressed a bare preference for persons who are heterosexually oriented.

Despite the Court's professed concern with the *process* Colorado imposed on future laws favoring sexual orientation, the problem in *Romer* is not the process. Indeed, for all of the Court's fussing over the additional process homosexual-protective legislation would have to endure, the Court could not—or would not,—make anything of it.¹⁵⁸ The majority might be right, after all, that Amendment 2 preferred a class of persons. For that reason, however, as demonstrated in Justice Scalia's dissent, the Court was quite wrong to refuse to discuss *Bowers* and to confront the equal protection question head on. In the final analysis, the Court's concern over repeal and

¹⁵² See *Hunter v. Erickson*, 393 U.S. 385 (1969); see also *supra* text accompanying notes 59-66.

¹⁵³ See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); see also *supra* text accompanying notes 88-99.

¹⁵⁴ See *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527 (1982); *James v. Valtierra*, 402 U.S. 137 (1971); *Reitman v. Mulkey*, 387 U.S. 369 (1967); see also *supra* text accompanying notes 100-08, 79-83, 67-78.

¹⁵⁵ See *Hunter*, 393 U.S. at 389-91.

¹⁵⁶ See *Romer*, 116 S. Ct. at 1633-34 (Scalia, J., dissenting).

¹⁵⁷ See Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 207 (1996).

¹⁵⁸ Sections I and II are so disjunctive from Section III that it suggests that Section III was drafted independently. Perhaps Section III is not the original equal protection analysis that followed Sections I and II.

structure were atmospheric, a distraction from the question to which we are entitled an answer. The real question in *Romer* is the question that whole generations of students of the law wish to know: Is the class defined by sexual orientation a suspect or quasi-suspect class, and does *Bowers v. Hardwick*¹⁵⁹ inform this judgment?

IV. CONCLUSION

Hunter did not govern *Romer* (nor should it), but not for reasons well articulated by the Court. If Amendment 2 violates the Equal Protection Clause, it does so for reasons other than the repeals worked by the Amendment, or the process it imposes on future efforts to secure favorable legislation. If Amendment 2 violates the Equal Protection Clause, it does so because, under the Court's jurisprudence, homosexuals are entitled to strict or heightened scrutiny. Whether, however, homosexuals are entitled to strict or heightened scrutiny is the one thing the Court could not bear to ask, much less answer.

My analysis can be put to a simple test. If Colorado wants an Amendment 2 that works, it simply should forbid laws that take sexual orientation into account. Suppose Colorado adopted the following:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities, or school districts, shall enact, adopt, or enforce any statute, regulation, ordinance, or policy whereby sexual orientation, conduct, practices, or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to, a claim of protected status.

This proposal would repeal the three city ordinances that gave rise to Amendment 2. It also would make it more difficult for persons in Colorado to obtain preferences in any law based on sexual orientation. The incidence of law would remain on those who favor a protected political status for homosexuals, but the law would be phrased in neutral terms. The law no longer would confer a formal preference on heterosexuals. The proposal would fit squarely within *Hunter* and the equal process cases. Most importantly, the proposal would force the Court to say what it means.

¹⁵⁹ 478 U.S. 186 (1986).