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BIAS IN DISGUISE: THE CONSTITUTIONAL PROBLEMS OF ARKANSAS'S INTRASTATE COMMERCE IMPROVEMENT ACT

*John M. A. DiPippa**

I. INTRODUCTION

Arkansas's recently enacted Intrastate Commerce Improvement Act ("Act 137")¹ prohibits local governments from "adopt[ing] or enfor[cin]g an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law."² The discussion surrounding the bill focused on its impact on local ordinances that might provide civil rights protections on the basis of sexual orientation and gender identity.³ The passage and repeal of such a civil rights ordinance in Fayetteville, Arkansas, seemed to be the catalyst for the introduction and passage of Act 137.⁴

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1. 2015 Ark. Acts 137 (to be codified at ARK. CODE ANN. §§ 14-1-401 to -403).

2. *Id.*

3. *See infra* pp. 482–84.

4. *See infra* p. 483 and note 96. Under similar circumstances, the Tennessee legislature adopted a law that attempted to accomplish the same goal as Act 137: prevent local anti-discrimination ordinances in order to improve intrastate commerce. Alex Reed, *Pro-Business or Anti-Gay? Disguising LGBT Animus as Economic Legislation*, 9 STAN. J. C.R. & C.L. 153, 155–57 (2013) (discussing the background to and constitutionality of the Tennessee law and the failed attempts by Montana, Nebraska, Michigan, and Oklahoma to adopt similar laws). On April 8, 2011, the City of Nashville adopted an anti-discrimination ordinance after the dismissal of a popular Belmont University soccer coach who came out as a lesbian. *Id.* at 154–56. A little over a month later, on May 23, 2011, the Tennessee General Assembly adopted the "Equal Access to Intrastate Commerce Act" which voided the enactment or enforcement of any local anti-discrimination act that varied from the definition in the Tennessee Human Rights Act, which did not include any protection against discrimination on the basis of sexual orientation. *Id.* at 155–57. The former Belmont University employee and others challenged the law by claiming that, among other things, it violated the equal protection clause. *See Howe v. Haslam*, No. 11-778-II, 2014 WL 5698877, at *1–3 (Tenn. Ct. App. filed Nov. 4, 2014), available at https://www.tncourts.gov/sites/default/files/howelisaopn_0.pdf. In November 2014, the Tennessee Court of Appeals upheld the trial court's dismissal of the complaint finding that some plaintiffs lacked standing while the controversy was moot as to other plaintiffs. *Id.* at *1. According to the court of appeals, no plaintiff could show the requisite injury in fact because none of them could show any acts of discrimination directed against them caused by the Equal Access Act. *Id.* at *13, *21. At best, the plaintiffs showed a potential for harm in the absence of a local ordinance protecting them. *Id.* at *21. Thus, the court upheld the trial court's dismissal of the case. *Id.* at *22.

Almost immediately after Act 137 was passed and allowed to go into effect by the Governor, several cities in Arkansas looked to pass local ordinances that, in one way or another, extended some legal protections to people based on sexual orientation and gender identity.⁵ If any of these laws conflict with Act 137, then they can survive only if Act 137 is unconstitutional. This essay will explore some of the constitutional problems with Act 137. First, I will discuss how Act 137 applies to any local ordinance that extends protection to people based on sexual orientation or gender identity.⁶ After concluding that Act 137 does apply when protections are extended, I will show how Act 137 would violate the equal protection clause.⁷ Specifically, I will argue that Act 137 may violate the equal protection clause either on its face or as applied when it precludes the enactment or enforcement of a local ordinance.⁸

II. ACT 137 APPLIED TO LOCAL ORDINANCES

Before moving to a discussion on the constitutionality of Act 137, the first question to address is whether or not any local ordinance that extends protection to people based on sexual orientation or gender identity violates Act 137. The Act states:

(a) A county, municipality, or other political subdivision of the state shall not adopt or enforce an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law.

(b) This section does not apply to a rule or policy that pertains only to the employees of a county, municipality, or other political subdivision.⁹

Thus, ordinances like the ones adopted in Conway¹⁰ and North Little Rock¹¹ do not conflict with Act 137 because they apply only to city employ-

5. See *infra* notes 10–14 and accompanying text.

6. See *infra* Part II.

7. See *infra* Part III.

8. This latter assertion assumes that, in fact, local ordinances offering LGBT protections conflict with the act. It is quite possible that they do not. See *infra* pp. 471–73.

9. 2015 Ark. Acts 137 (to be codified at ARK. CODE ANN. §§ 14-1-401 to -403).

10. See David Koon, *Conway Passes Protections for LGBT Workers*, ARKANSAS TIMES: ARKANSAS BLOG (Feb. 24, 2015, 11:50 PM), <http://www.arktimes.com/ArkansasBlog/archives/2015/02/24/conway-passes-protections-for-lgbt-city-workers>. Pulaski County and Hot Springs adopted similar ordinances. See Benjamin Hardy, *Pulaski County Quorum Court to Consider Nondiscrimination Ordinance Today*, ARKANSAS TIMES: ARKANSAS BLOG, (May 12, 2015, 6:30 AM), <http://www.arktimes.com/ArkansasBlog/archives/2015/05/12/pulaski-county-quorum-court-to-consider-nondiscrimination-ordinance-today>; David Koon, *Hot Springs City Board Extends Anti-Discrimination Protections for LGBT City Workers, Requires Same of Contractors*, ARKANSAS TIMES: ARKANSAS BLOG (May 06, 2015, 11:41 AM),

ees. Eureka Springs, on the other hand, deliberately enacted broad anti-discrimination protections in the immediate aftermath of Act 137's passage, inviting a legal challenge.¹²

Little Rock took a different approach. On April 21, it enacted an ordinance that declared that it would not discriminate on the basis of "race, color, creed, sex, national origin, age, disability, marital status, sexual orientation, gender identity, genetic information, political opinions, or affiliation" against city vendors or in the delivery of city services.¹³ In addition, the ordinance declares that the city will not contract with any entity that discriminates on any of the stated bases.¹⁴

On the surface, the ordinance appears to conflict with Act 137 because it goes beyond the city's own employees and creates a protected classification for vendors with whom it contracts and for its citizens to whom the city delivers its services. Moreover, Little Rock's ordinance requires its vendors to agree to a new anti-discrimination provision.¹⁵ City Attorney, Tom Carpenter, however, delivered an opinion arguing that the city ordinance does not conflict with Act 137 because at least one provision of existing state law protects each of the listed protected categories either by way of statute or by constitutional provision.¹⁶ He concluded that the ordinance does not conflict with Act 137 because "every prohibition against discrimination named is already named somewhere in state law."¹⁷

Carpenter raises a question of statutory construction: should a law be interpreted literally, i.e., according to its text only, or should it be interpreted

<http://www.arktimes.com/ArkansasBlog/archives/2015/05/06/hot-springs-city-board-extends-anti-discrimination-protections-for-lgbt-city-workers-requires-same-of-contractors>.

11. See Susanne Brunner, *City of NLR Votes to Protect All City Employees*, ARKANSAS MATTERS (Mar. 3, 2015), http://www.arkansasmatters.com/story/d/story/city-of-nlr-votes-to-protect-all-city-employees/20008/cm7SSj_wBk-IgrEbHIVY9A.

12. See Max Brantley, *Eureka Springs City Council Passes Civil Rights Ordinance, Sets Stage for Potential Lawsuit*, ARKANSAS TIMES: ARKANSAS BLOG (Feb. 10, 2015, 6:58 AM), <http://www.arktimes.com/ArkansasBlog/archives/2015/02/10/eureka-springs-city-council-passes-civil-rights-ordinance-sets-state-for-potential-lawsuit>; see also Max Brantley, *Fayetteville Adopts Civil Rights Ordinance 53-47*, ARKANSAS TIMES: ARKANSAS BLOG (Sep. 8, 2015, 8:00 PM), <http://www.arktimes.com/ArkansasBlog/archives/2015/09/08/early-vote-favors-fayetteville-civil-rights-ordinance-68-32>.

13. Max Brantley, *Little Rock to Take up a Civil Rights Ordinance Covering LGBT People*, ARKANSAS TIMES: ARKANSAS BLOG (Apr. 21, 2015, 7:18 AM), <http://www.arktimes.com/ArkansasBlog/archives/2015/04/21/little-rock-city-board-adopts-civil-rights-ordinance-to-protect-sexual-orientation>.

14. *Id.*

15. The prohibition against political affiliation discrimination does not extend to private contractors. *Id.*

16. See Op. Little Rock City Att'y No. 2015-001, at 3-7 (2015), available at http://posting.arktimes.com/media/pdf/3615_001__1_.pdf.

17. *Id.* at 9.

in light of its overall purpose?¹⁸ It is a common principle of statutory interpretation that unless a statute is ambiguous a court should interpret a statute according to its plain meaning.¹⁹ The United States Supreme Court has said that “the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”²⁰ In the same vein, the Arkansas Supreme Court has stated that “when reviewing issues of statutory interpretation, we keep in mind that the first rule in considering the meaning and effect of a statute is to *construe it just as it reads*, giving the words their ordinary and usually accepted meaning in common language.”²¹

A statute is ambiguous when “it is open to two or more constructions, or where it is of such obscure or doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning.”²² In the absence of such ambiguity, however, a court should not “search for legislative intent” outside of the statute’s plain language.²³ Thus, an Arkansas court “is very hesitant to interpret a legislative act in a manner contrary to its express language, unless it is clear that a drafting error or omission has circumvented legislative intent.”²⁴

Carpenter argues that Act 137 is not ambiguous and should be interpreted “just as it reads.”²⁵ He reads the operative language of Act 137 to prohibit two actions: 1) the creation of a protected class and 2) prohibiting discrimination on a basis not contained in state law.²⁶ He concludes that Little Rock’s ordinance does not create a new protected class or prohibit discriminating on any basis that is not already covered by state law.²⁷

It would also be acceptable to read the statutory language to say when a city creates a protected classification or prohibits discrimination it can do so

18. A similar interpretative issue is being played out in litigation over the Affordable Care Act. *See King v. Burwell*, 759 F.3d 358, 363 (4th Cir. 2014), *cert. granted*, 135 S. Ct. 475 (2014).

19. *See, e.g., Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

20. *Id.*

21. *Farrell v. Farrell*, 365 Ark. 465, 469, 231 S.W.3d 619, 622 (2006) (emphasis added).

22. *Cave City Nursing Home, Inc. v. Ark. Dep’t of Human Servs.*, 351 Ark. 13, 21, 89 S.W.3d 884, 889 (2002); *see also Nat’l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 473 n.27 (1985) (stating that a contract is ambiguous only if the disputed language is “reasonably susceptible of different interpretations”).

23. *Cave City*, 351 Ark. at 21, 89 S.W.3d at 889 (citing *Ford v. Keith*, 338 Ark. 487, 499–500, 996 S.W.2d 20, 27–28 (1999); *State v. McLeod*, 318 Ark. 781, 786, 888 S.W.2d 639, 642 (1994)).

24. *Farrell*, 365 Ark. at 470, 231 S.W.3d at 623 (citing *Cave City*, 351 Ark. at 21–22, 89 S.W.3d at 889).

25. *See* Op. No. 2015-001, *supra* note 16, at 7.

26. *See id.* at 3.

27. *See id.* at 9.

only if either of those actions has a “basis in state law.” Rather than separating and treating them as separate acts, as Carpenter did, the two are joined and treated as alternative ways to achieve the same purpose. The limiting clause applies to both. This is the better reading. Separating them would prevent a city from adopting a civil rights ordinance even if it were limited to the categories contained in the Arkansas Civil Rights statute because it would be creating a new protected classification at least insofar as the city was concerned.

Even if we read the language as I suggest, Carpenter’s analysis still applies. That is, a local civil rights ordinance will not conflict with Act 137 so long as it protects a class already protected somewhere in state law or prohibits discrimination on a basis contained in state law. Little Rock’s ordinance neither creates any new protected class nor prohibits discrimination “not contained in state law.”²⁸

This reading seems to conflict with the act’s stated purpose, however, which was to subject businesses to uniform state wide non-discrimination laws.²⁹ Carpenter’s interpretation would not advance that purpose because some of the laws cited do not apply to businesses.³⁰ Moreover, none of the cited laws prohibit businesses from discriminating on the basis of sexual orientation or gender identity. The only provisions of state law that provide such protection apply to schools or to domestic abuse shelters.³¹ Discussion of the bill on the house floor shows that no member believed that it would allow cities to pass anti LGBT discrimination laws.³²

Because the law is clear and unambiguous, it means exactly what it says. The legislature could have chosen more limited language but did not do so. For example, the General Assembly could have precluded any classification not already protected by the Arkansas state civil rights statute.³³ As the United States Supreme Court noted:

28. This interpretation reads “contained” to mean “included within.” See THE AMERICAN HERITAGE DICTIONARY 191 (Joseph P. Pickett et al. eds., Dell Publishing, 4th ed. 2001), available at <https://www.ahdictionary.com/word/search.html?q=Contain&submit.x=0&submit.y=0> (last visited June 19, 2015) (providing that contain means “to include” or to “have within”).

29. 2015 Ark. Acts 137 (to be codified at ARK. CODE ANN. §§ 14-1-401 to -403).

30. See e.g., ARK. CODE ANN. § 6-18-514 (Repl. 2013) (protecting public school students and employees from bullying based on, among other things, sexual orientation and gender identity).

31. See *id.* (requiring schools to protect students from bullying on the prohibited bases); ARK. CODE ANN. § 9-4-106 (West 2015) (requiring domestic violence shelters seeking a state grant to develop non-discrimination policies protecting, among other things, sexual orientation).

32. See *infra* notes 96–108 and accompanying text.

33. See ARK. CODE ANN. § 16-123-107 (Supp. 2015) (listing race, religion, national origin, gender, and disability as protected classes).

[I]n interpreting a statute a court should always turn to one, cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. [Indeed, w]hen the words of a statute are unambiguous, then, this first canon is also the last: “judicial inquiry is complete.”³⁴

On the other hand, one can plausibly argue that the law was designed to prevent cities from burdening business with an anti-discrimination requirement that state law did not already impose.³⁵ On this reading, Little Rock could require its contractors to take an anti-discrimination pledge based on the categories in the state civil rights statute or condition a housing grant on the grantee complying with the state Fair Housing Act. It could not, however, import the protections from the anti-bullying statute—which applies only to schools—into its contracts with private vendors because no state law imposes such requirements on any business.

Thus, there is a reasonable argument that Little Rock’s ordinance conflicts with Act 137. Regardless of how this interpretive issue is resolved, however, there is no doubt that Eureka Springs’s ordinance creates the case for a challenge to Act 137’s constitutionality.

III. ACT 137 FAILS EQUAL PROTECTION’S RATIONAL BASIS REVIEW³⁶

To determine whether Act 137 fails equal protection, and thus is unconstitutional, the following section will discuss the analysis employed by courts to identify violations of equal protection. Conventional equal protection clause analysis involves different levels of scrutiny depending on the legislative classification involved. Suspect classifications, like race, receive strict scrutiny: the government must show that the law uses narrowly tai-

34. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

35. There is another plausible purpose: that the law was designed specifically to prevent the enactment of local ordinances that protected against public and private discrimination on the basis of sexual orientation and gender identity. If that was its purpose, then the bill may be unconstitutional on its face. *See infra* pp. 484–85 and notes 111–20.

36. I will focus this analysis on the federal constitution although the result will be the same under the Arkansas Equal Protection Clause because the Arkansas Supreme Court uses the same analysis as the Supreme Court of the United States. *See Medlock v. Leathers*, 311 Ark. 175, 180–81, 842 S.W.2d 428, 431–32 (1992) (analyzing the rational basis of a tax law under Supreme Court precedent). Tennessee passed a similar law in 2011 under similar circumstances. LeGaL Foundation, *Door Reopened*, LESBIAN/GAY LAW NOTES, 510–11 (2014), <http://www.nyls.edu/impact-center-for-public-interest-law/wp-content/uploads/sites/140/2013/07/LGLN-12-2014.pdf>. Such legislation was challenged in court, but was ultimately dismissed by an appellate court due to plaintiff’s lack of standing. *Id.*; *see Howe v. Haslam*, No. 11-778-II, 2014 WL 5698877, at *1–3 (Tenn. Ct. App. filed Nov. 4, 2014), *available at* https://www.tncourts.gov/sites/default/files/howelisaopn_0.pdf.

lored means to pursue a compelling governmental purpose.³⁷ Although a famous scholar remarked that this was “strict in theory and fatal in fact,”³⁸ the Supreme Court has in recent years suggested that some laws could survive strict scrutiny.³⁹ Gender classifications receive an intermediate level of scrutiny: the government must show that it is using substantially related means to pursue an important government interest.⁴⁰

Both race and gender classifications must be intentional.⁴¹ It is not enough to know that the law may have a disparate racial or gender impact.⁴² Rather, the challenger must show that the government chose the law because of its impact, not in spite of it.⁴³ There are three ways that a court can find that a law intentionally discriminates. First, the law may state its discrimination on its face, that is, in the text of the law itself.⁴⁴ Second, the law may be neutral on its face but may be applied in a discriminatory way.⁴⁵ Third, the law may be neutral on its face and applied without discriminatory intent, but it may have been enacted for a discriminatory purpose.⁴⁶

All other laws will be tested by rational basis: the government need only show that the law is rationally related to a legitimate governmental interest.⁴⁷ This is the default setting of constitutional analysis, and the govern-

37. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Korematsu v. United States*, 323 U.S. 214, 215 (1944).

38. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L.REV. 1, 8 (1972).

39. See *Adarand Contractors v. Peña*, 515 U.S. 200, 237 (1995) (holding that strict scrutiny is not necessarily fatal in every case); *Grutter v. Bollinger*, 539 U.S. 306, 326–28 (2003) (upholding affirmative action admissions plan using strict scrutiny); *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2421–22 (2013) (remanding case to district court for consideration using strict scrutiny). See also Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in Federal Courts*, 59 VAND. L. REV. 793, 826 (2006) (stating laws survived thirty percent of federal cases using strict scrutiny).

40. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197–99 (1976) (determining that gender classifications are subject to intermediate scrutiny); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (holding that states must provide “exceedingly persuasive justification” for any gender discrimination).

41. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 276–77 (1979) (explaining purposeful discrimination on basis of gender necessary); *Washington v. Davis*, 426 U.S. 229, 239–40 (1976) (holding invidious racial purpose necessary for Fourteenth Amendment challenge).

42. See *Feeney*, 442 U.S. at 272–74 (stating that something more than a disproportionate gender impact is needed to invalidate a statute); *Davis*, 426 U.S. at 239 (concluding that a law is not “unconstitutionally solely because it has a racially disproportionate impact”).

43. See *Feeney*, 442 U.S. at 278–79.

44. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 4–5, 11–12.

45. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886); *Gomillion v. Lightfoot*, 364 U.S. 339, 341–42 (1960).

46. See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 227–28 (1985).

47. See, e.g., *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314 n.6 (1993) (finding that rational basis will uphold a law if there is any reasonably conceivable set of facts to support the law).

ment almost always wins. Nevertheless, just as strict scrutiny is not always fatal, a state does not always win under rational basis.⁴⁸ A law fails a rational basis challenge under the equal protection clause if it is designed to harm “a politically unpopular group,”⁴⁹ if it reflects “irrational prejudice,”⁵⁰ if it is motivated by “animus,”⁵¹ or if it is based on nothing more than “moral disapproval.”⁵² These different formulations may state a simple and powerful bedrock legal principle: it is wrong for the state to treat people malevolently.⁵³

This sentiment so suffuses our moral and legal tradition that hardly anyone would deny it. “Of course it is our moral heritage that one should not hate any human being or class of human beings,” wrote Justice Antonin Scalia in his dissent in *Romer v. Evans*.⁵⁴ Animus doctrine constitutionalizes this basic precept. It asserts that just as *individuals* have a moral and sometimes legal duty not to act maliciously toward others, the *group* of people elected as representatives (or acting in some other official governmental capacity) in a liberal democracy has a moral and sometimes constitutional duty not to act maliciously toward a person or group of people.⁵⁵

Act 137 fails this basic test. Act 137 fails a rational basis challenge under the equal protection clause for two reasons. Act 137 reflects a bare desire to harm a politically unpopular group, and Act 137 hinders that group’s ability to use the political process to protect its civil rights. Section A will

48. This may not be a new development. See Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 528 (2014) (making the argument that “taking account of the full sweep of the Court’s minimum tier jurisprudence, it is clear that the Court often applies greater than minimal scrutiny where group or rights-based concerns exist”).

49. See *USDA v. Moreno*, 413 U.S. 528, 534 (1973) (“[A] bare . . . desire to harm a politically unpopular group” is not a legitimate state interest).

50. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (striking down zoning ordinance because it was based on an “irrational prejudice against the mentally retarded”).

51. See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (holding the federal Defense of Marriage Act was motivated by *animus* against same sex couples); Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 183–84 (2013) (“Across four decades, the concept of *animus* has emerged from equal protection doctrine as an independent constitutional force . . . As a matter of constitutional law, a legislative process impelled by *animus* is a poisoned and poisonous one.”) (emphasis added).

52. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (holding moral disapproval not sufficient basis to criminalize same sex sodomy).

53. See Carpenter, *supra* note 51, at 185 (“[C]onsider the simple idea that it is wrong for one person to treat another person malevolently.”).

54. *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting).

55. Carpenter, *supra* note 51, at 185. *But see* Steven D. Smith, *The Jurisprudence of Demigration*, 48 U.C. DAVIS L. REV. 675, 677 (2014) (“Justice Kennedy and the Court thereby in essence accused Congress—and, by implication, millions of Americans—of acting from pure malevolence.”).

discuss the former concept, the animus principle, and Section B will discuss the latter, the political process doctrine.

A. The Animus Principle: A Bare Desire to Harm a Politically Unpopular Group

The animus principle has its roots in several disparate cases.⁵⁶ In *Romer v. Evans*, the Supreme Court of the United States struck down a voter approved Colorado constitutional amendment that prohibited every level of state, county, and city government from passing or enforcing gay rights laws.⁵⁷

As Justice Kennedy noted, the Colorado amendment “identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.”⁵⁸ That alone made the law unconstitutional, but the amendment also failed rational basis because it “raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”⁵⁹

The court rejected Colorado’s claim that the amendment simply prevented granting special rights because of its broad sweep:

Sweeping and comprehensive is the change in legal status effected by this law. So much is evident from the ordinances the Colorado Supreme Court declared would be void by operation of Amendment 2. Homosexuals, by state decree, are put in a solitary class with respect to transac-

56. See *Carpenter*, *supra* note 51, at 183 (citing *Windsor*, 133 S. Ct. 2675 (striking down the federal Defense of Marriage Act)); see also *Romer*, 517 U.S. 620 (striking down a state constitutional amendment preventing any gay rights laws in the state); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (striking down a denial of permission to locate a facility for the “mentally retarded”); *USDA v. Moreno*, 413 U.S. 528 (1973) (striking down amendment to WHAT Food Stamp Act that denied benefits to groups of unrelated persons living in a household). I believe the principle political process cases also contain an *animus* component especially after *Schuetz*. See *infra* p. 490. In addition, one can see the roots of the *animus* principle in Justice Stevens’s concurring opinion, *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 180–82 (1980) (Stevens, J., concurring), and in Justice Brennan’s dissenting opinion, *Id.* at 182–83 (Brennan, J., dissenting), in *Fritz*.

57. *Romer*, 517 U.S. at 623. The Colorado amendment read, “[n]either 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 homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.” COLO. CONST. art. II, § 30b, *invalidated* by *Romer v. Evans*, 517 U.S. 620 (1996).

58. *Romer*, 517 U.S. at 633.

59. *Id.* at 634.

tions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.⁶⁰

The amendment not only made it impossible for gays and lesbians to seek protection under public accommodations ordinances but also withdrew all other potential protection in “housing, sale of real estate, insurance, health and welfare services, private education, and employment.”⁶¹ Moreover, the amendment may have also made it impossible for gays and lesbians to seek protection from arbitrary treatment under general laws.⁶² As the court noted:

Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State’s view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury.⁶³

The sheer breadth of the amendment caused it to defy conventional analysis. Ordinarily, rational basis review allows the government to pursue any legitimate purpose even if that goal may not be wise or beneficial.⁶⁴ Most laws are fairly narrow in scope and grounded in some specific factual context so that a court can readily see the connection between the means and a legitimate state purpose.⁶⁵ Amendment 2, however, identified people by “a single trait and then denied them protection across the board.”⁶⁶ Such laws were not “within our constitutional tradition.”⁶⁷ Singling out a class of people for special burdens could not, by any definition, be the equal protection of the laws.⁶⁸

The problem is that Act 137 does neither: it does not single out any class of people, and it does not make civil rights protections impossible. It places the authority to protect civil rights at the state level. Once the state offers protection to a class of people, cities and counties may do the same. Of course, that may make local action superfluous and, realistically, may make passage of gay rights bills highly unlikely. But *Romer* does not say

60. *Id.* at 626.

61. *Id.* at 629.

62. *Id.* at 630.

63. *Id.* at 631.

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

65. *Id.* at 632–33.

66. *Id.* at 633.

67. *Id.*

68. *Id.* at 633–34.

that the state must allow local civil rights ordinances. It just says that it cannot make protection of a specific class of people impossible everywhere in the state.

The *Romer* court did not rest its decision solely on that basis, however. *Romer* holds that laws must not only be fair on their face but also in their purpose as well.⁶⁹ That is, a state may not enact a facially neutral law for an illegitimate purpose.⁷⁰

Romer noted that “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.”⁷¹ Amendment 2 imposed “immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.”⁷² Thus, Amendment 2 failed even rational basis because the state could not show any interest—other than its bare desire to impose special disabilities on gays and lesbians—for the law. It is not a proper governmental purpose to make people “unequal to everyone else.”⁷³

Amendment 2 classified individuals by sexual orientation on its face, making its purpose clear, but the conclusion that a law “born of animosity toward the class of persons affected”⁷⁴ is unconstitutional would seem to apply to any law so motivated whether or not it expressed this animosity on its face. As the Court pointed out, “[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”⁷⁵ The Court cited Justice Stevens’s concurring opinion in *Railroad Retirement Board v. Fritz* that “[i]f the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.”⁷⁶

Fritz involved the restructuring of the Railroad Retirement Act of 1937.⁷⁷ Some railroad employees could qualify for railroad retirement benefits and social security retirement benefits as well as a windfall benefit.⁷⁸ The law reclassified eligible employees by drawing a line at ten years of employment but created exceptions for employees who did not have the

69. *Id.* at 632–34.

70. See Andrew Koppelman, *Romer v. Evans and Individious Intent*, 6 WM. & MARY BILL RTS. J. 89 (1997) (arguing that *Romer* was based on the Second Amendment’s impermissible purpose).

71. *Romer*, 517 U.S. at 634–35 (quoting *USDA v. Moreno*, 413 U.S. 528, 534 (1973)).

72. *Id.* at 635.

73. *Id.*

74. *Id.* at 634.

75. *Id.* at 633.

76. 449 U.S. 166, 181 (1980) (Stevens, J., concurring).

77. *Id.* at 168 (majority opinion).

78. *Id.*

requisite number of years.⁷⁹ This was challenged as a violation of the equal protection component of the due process clause of the Fifth Amendment.⁸⁰ Although the Court held that the law survived rational basis, the decision sparked a spirited dissent from Justice Brennan and a sympathetic response from Justice Stevens.

Justice Brennan argued that the rational basis standard was not “toothless” and that, even under rational basis review, laws must bear some real and substantial relationship to their state goal.⁸¹ For him, rational basis review required courts to ask “first, what the purposes of the statute are, and, second, whether the classification is rationally related to achievement of those purposes.”⁸² The majority, however, refused to take this “realistic” approach. Rather, they hypothesized potential reasons for the law’s classifications whether or not Congress actually held those reasons.⁸³

Justice Brennan continued, arguing that looking solely at the text of the statute rather than its independent objectives was tautological:

It may always be said that Congress intended to do what it in fact did. If that were the extent of our analysis, we would find every statute, no matter how arbitrary or irrational, perfectly tailored to achieve its purpose. But equal protection scrutiny under the rational-basis test requires the courts first to deduce the independent objectives of the statute, usually from statements of purpose and other evidence in the statute and legislative history, and second to analyze whether the challenged classification rationally furthers achievement of those objectives. The Court’s tautological approach will not suffice.⁸⁴

Justice Stevens, although concurring in the majority’s holding, was sympathetic to Justice Brennan’s concerns. Instead of Justice Brennan’s desired focus on the statute’s actual purpose, Justice Stevens argued that courts:

must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasona-

79. *Id.* at 171–73.

80. *Id.* at 173.

81. *Id.* at 184 (Brennan, J., dissenting).

82. *Fritz*, 449 U.S. at 184.

83. *Id.* at 185. Justice Brennan was responding to the following statement by the *Fritz* majority:

Where, as here, there are plausible reasons for Congress’ action, our inquiry is at an end. It is, of course, “constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,” *Flemming v. Nestor*, 363 U.S. [603], at 612 [(1960)] . . . , because this Court has never insisted that a legislative body articulate its reasons for enacting a statute.

Id. at 179 (majority opinion).

84. *Id.* at 187.

bly presume to have motivated an impartial legislature. If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect. If, however, the adverse impact may reasonably be viewed as an acceptable cost of achieving a larger goal, an impartial lawmaker could rationally decide that that cost should be incurred.⁸⁵

These opinions suggest that courts must look behind the text of the law, its stated purpose or claims made in litigation. Doing so prevents legislatures from enacting laws that are either irrational (in an ordinary sense) or discrimination in disguise.

In *United States Department of Agriculture v. Moreno*, the Supreme Court held that an amendment to the Food Stamp Act that changed the definition of an eligible household failed rational basis review.⁸⁶ Congress enacted the Food Stamp Act in 1967 to, among other things, stimulate the farm economy and provide nutritional assistance to low income people.⁸⁷ In 1971, Congress amended the definition of an eligible household to include only groups of related individuals.⁸⁸ Justice Brennan pointed out that reconfiguring the definition of eligible was not, by itself, related to the objectives of the food stamp.⁸⁹ That is, reducing the number of eligible households would neither stimulate the economy nor provide food to impoverished people.⁹⁰ Justice Brennan noted:

[If the 1971 amendment] is to be sustained, the challenged classification must rationally further some legitimate governmental interest other than those specifically stated in the congressional 'declaration of policy.' Regrettably, there is little legislative history to illuminate the purposes of the 1971 amendment The legislative history that does exist, however, indicates that that amendment was intended to prevent so called 'hippies' and 'hippie communes' from participating in the food stamp program. The challenged classification clearly cannot be sustained by reference to this congressional purpose. *For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.* As a result, '(a) purpose to discriminate against hippies cannot, in and of itself and

85. *Id.* at 181 (Stevens, J., concurring).

86. 413 U.S. 528, 538 (1973).

87. *Id.* at 533.

88. *See, e.g.*, ARTHUR S. LEONARD, SEXUALITY AND THE LAW: AN ENCYCLOPEDIA OF MAJOR LEGAL CASES 226 (Routledge 2013).

89. *Moreno*, 413 U.S. at 534.

90. *Id.*

without reference to (some independent) considerations in the public interest, justify the 1971 amendment.⁹¹

The government argued that the law was constitutional notwithstanding that “hippies” were its intended target because it was rationally related to the legitimate purpose of preventing fraud.⁹² Justice Brennan rejected this argument, finding that the Food Stamp Act already included anti-fraud provisions and the 1971 amendment would not prevent fraud in any practical way.⁹³

Moreno shows that a court employing rational basis review should not simply accept the purposes of a law stated in its text or provided by government attorneys in litigation. Rather, it can and must look behind the statute to its legislative history or its operation to determine if the declared goal is a smokescreen for a prohibited purpose.⁹⁴

Romer unified these two threads. Rational basis was not toothless or tautological, as the *Fritz* majority seemed to imply. Rather, a court must conduct a threshold inquiry to determine if the law is pursuing a legitimate purpose. This inquiry will include not only the text of the statute but, more importantly, the context in which the law was enacted, the legislative history of the enactment, and contemporaneous statements related to its purpose. Specific to discrimination, this inquiry should:

[determine] whether invidious discriminatory purpose was a motivating factor [by inquiring] into such circumstantial and direct evidence of intent as may be available . . . [and includes] “[t]he impact of the official action[,] . . . [t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes[,] . . . [t]he specific sequence of events leading up the challenged decision[,] . . . [d]epartures from the normal procedural sequence, . . . [or] [s]ubstantive departures [from the] factors usually considered important by the decisionmaker[,] or legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.⁹⁵

Using this approach shows that Act 137 may be constitutionally defective. Although the bill’s declared purpose was to “standardize” business regulation across the state, it was passed against the backdrop of Fayetteville, Arkansas’s failed attempt to enact an anti-discrimination ordinance

91. *Id.* at 534–35 (emphasis added) (citations omitted).

92. *Id.* at 535.

93. *Id.* at 534–35.

94. See also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (determining that irrational prejudice is not a legitimate government purpose).

95. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

that included protections for LGBT individuals.⁹⁶ Members who spoke on the bill referred to these events. For example, Representative Ballinger discussed the Fayetteville events in his closing statement in favor of the bill,⁹⁷ while Representatives Tucker⁹⁸ and Whitaker⁹⁹ referenced those events in statements opposing the bill.

The speakers clearly understood that this bill was designed to prevent the enactment of protections for the LGBT community. Indeed, Representative Bentley began her remarks in favor of the bill saying that she did not want members to “hide behind an acronym” and she wanted to “get the truth” out there that the bill was about “lesbians, gays, bi-sexuals and transgender.”¹⁰⁰ She went on to say that the reason for the bill was to protect the “pastor [who] holds a firm conviction that the word of God says that gay marriage is wrong” and who “stands on the word of God” or a “baker [who] loves the word of God” and who is raising children to “honor God and to worship God” from being fined or forced to participate in a gay wedding.¹⁰¹ That baker should not have her business “destroyed” for refusing to bake a cake for “someone [who] is transgender.”¹⁰² Similarly, Representative Copeland referred to “the baker” and “the wedding planner” who have been “attacked because of their religious beliefs.”¹⁰³ He distinguished racial dis-

96. After the city adopted civil rights protections for the LGBT community, Fayetteville voters repealed the ordinance. See Max Brantley, *Fayetteville Vote: Gay Civil Rights Ordinance Repealed*, ARKANSAS TIMES: ARKANSAS BLOG (Dec. 9, 2014, 7:43 PM), <http://www.arktimes.com/ArkansasBlog/archives/2014/12/09/fayetteville-ordinance-early-vote-opposes-repeal-of-gay-civil-rights-ordinance>.

97. See *Presentation of H.B. 1228 to Ark. H.R.*, ARKANSAS HOUSE OF REPRESENTATIVES (February 13, 2015), http://arkansas-house.granicus.com/MediaPlayer.php?view_id=&clip_id=1436&meta_id=45931 at 1:54:42–1:55:56. Only seven members of the House spoke on the bill. Representative Ballinger presented the bill, and Representatives Hammer, Copeland, and Bentley spoke in favor of it. See, e.g., *id.* at 1:29:19–1:57:22. Representatives Tucker, Sabin, and Whitaker spoke against it. See, e.g., *id.*

98. See *id.* at 1:34:54 (stating, “I know that the ordinance is primarily what brought this legislation about”).

99. See *id.* at 1:39:34–1:40:56.

100. See *id.* at 1:50:58–1:51:25.

101. See *id.* at 1:51:40–1:52:20.

102. See *id.* at 1:52:20–1:52:26. She explained that “enough is enough” and that “business owners have rights as well.” *Id.* at 1:52:31–1:52:54.

103. See *Presentation of H.B. 1228*, *supra* note 97, at 1:43:38–1:43:43; see also Kendra LaCour, Comment, *License to Discriminate: How a Washington Florist Is Making the Case for Applying Intermediate Scrutiny to Sexual Orientation*, 38 SEATTLE U. L. REV. 107 (2014) (discussing several cases in which businesses that refused to provide services for same sex weddings ran afoul of state public accommodations laws); Joshua Bauers, Note, *The Price of Citizenship: An Analysis of Anti-Discrimination Laws and Religious Freedoms in Elane Photography, LLC v. Willock*, 15 RUTGERS J. L. & RELIGION 588 (2014) (discussing *Elane Photography, LLC v. Willock*, 309 P.3d 53, 60 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014)). Representatives Bentley and Copeland may have been referring to these incidents.

crimination from LGBT discrimination by saying that one is based on “preferences” while the other is based on “birth.”¹⁰⁴ Finally, few businesses actually seemed to be bothered by the potential lack of uniformity.¹⁰⁵

Members opposing the bill also understood that it was aimed at the LGBT community: Representative Tucker argued that the bill was unconstitutional under *Romer*.¹⁰⁶ He noted that it would place Arkansas out-of-step with major corporations, the vast majority of which “provide protections for members of the LGBT community.”¹⁰⁷ He went on to say that neither marriage equality nor LGBT civil rights laws were before the House.¹⁰⁸ Rather, the issue was whether or not the House would adopt a “pro-active act of discrimination” against the LGBT community.¹⁰⁹ The House adopted the bill overwhelmingly, as did the Senate, and sent it to the Governor. In the end, Governor Hutchinson refused to sign the bill and it became law without his signature.¹¹⁰

Considering the context in which the bill was adopted and its design and purpose, it is apparent that Act 137 was motivated by “irrational prejudice” and a desire to burden “politically unpopular group[s].”¹¹¹ Although it did not single out gays and lesbians as Amendment 2 did in *Romer*, it functionally achieved the same result, making civil rights protections based on sexual orientation impossible to enact anywhere in the state.¹¹² A law, neutral on its face, cannot survive constitutional challenge when it is enacted for an illegitimate purpose.¹¹³

On the other hand, Act 137 is not identical to either Amendment 2 or to the “anti-hippie” amendment of *Moreno*. Amendment 2 was unique. There was no other purpose to it other than to burden gays and lesbians. The law targeted them on its face and imposed an undifferentiated burden.¹¹⁴ This made it impossible for the court to conduct a conventional equal protection analysis and, at the same time, for the law to survive rational basis review.

104. See *Presentation of H.B. 1228*, *supra* note 97 at 1:47:12–22.

105. For example, Wal-Mart came out against the bill. See *Wal-Mart Opposes Arkansas Law Some See as Allowing LGBT Bias*, YAHOO! NEWS (Feb. 23, 2015, 6:40 PM), <http://news.yahoo.com/wal-mart-opposes-arkansas-law-see-allowing-lgbt-234020201.html>.

106. See *Presentation of H.B. 1228*, *supra* note 97 at 1:31:48–1:33:04.

107. See *id.* at 1:33:37–1:34:11.

108. *Id.* at 1:35:50–1:36:11.

109. *Id.*

110. Ironically, Wal-Mart came out against the bill after it was adopted. See YAHOO!, *supra* note 105.

111. See *supra* notes 89–95 and accompanying text.

112. Cf. Andrew Koppelman, *Beyond Levels of Scrutiny: Windsor and “Bare Desire to Harm”*, 64 CASE W. RES. L. REV. 1045, 1059 (2014) (“[S]tereotypes are illegitimate because they devalue the interests of some citizens, treating them as less than full members of the community.”).

113. See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985).

114. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

Act 137 does not single out gays and lesbians and has an ostensibly neutral purpose stated on the face of the law.¹¹⁵

Although there are floor statements that suggest a discriminatory motive, they may not be enough to overcome the ordinary presumption of constitutionality. In *Moreno* the “anti-hippie” amendment failed to advance the Food Stamp Act’s overall goals without regard to its discriminatory motive.¹¹⁶ Failing to find a connection between the amendment’s redefinition of eligible households and the Food Stamp Act’s twin goals of stimulating the economy and fighting hunger, the Court was left only with the few discriminatory floor statements to determine the amendment’s purpose.¹¹⁷

Here the law stands alone and is not part of any broader scheme with which it conflicts. On its own, it accomplishes what it says it wants to: it sets a statewide standard for civil rights protections. Of course, as Justice Brennan pointed out in his *Fritz* dissent, every bill accomplishes what it states and even rational basis review requires more than a simple tautology.¹¹⁸

On balance, however, Act 137 should be struck down. Act 137 was designed to isolate the LGBT community by making it impossible for local communities to protect them. It deprives them of the equal protection of law as surely as it stated so in its text.¹¹⁹ There was never any doubt that the law was designed to prevent the LGBT community from acquiring civil rights protections. The LGBT community has no protection from discrimination in state law, and Fayetteville’s now repealed ordinance was the first at the city level. No business in Arkansas was going to have to provide services for a gay wedding. Indeed, these businesses could refuse to serve gay people entirely. Rather, the General Assembly’s concerns were preemptive. They wanted Act 137 to pre-empt and block any future LGBT protections. They clearly assumed that the General Assembly would never adopt such protections. Otherwise, their desire to protect businesses would be incoherent. The parade of horrors they laid out could also happen if and when the General Assembly adopts LGBT protections statewide. Their statements clearly indicate that state wide opposition to LGBT rights was the only “uniformity” the law sought. If the idea of political equality has any meaning, governments cannot hide discriminatory motives behind otherwise neutral language. As the *Romer* court noted:

115. See, e.g., 2015 Ark. Acts 137 (to be codified at ARK. CODE ANN. §§ 14-1-401 to -403).

116. See U. S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528, 541–53 (1973).

117. See *id.*

118. See U.S. R.R. Ret. Bd. v. *Fritz*, 449 U.S.166, 187 (1980).

119. See, e.g., Susannah W. Pollvog, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 937 (2012) (“Animus means not only ‘hostility,’ but also ‘animating spirit.’ We see that the Supreme Court’s animus jurisprudence patrols all state action relying on status-based classifications for an impermissible animating spirit.”).

One century ago, the first Justice Harlan admonished this Court that the Constitution “neither knows nor tolerates classes among citizens.” *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 1146, 41 L.Ed. 256 (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle.¹²⁰

B. The Political Process Doctrine

The second line of attack in an equal protection analysis derives from the so-called “political process doctrine.” Although not without controversy, the most recent Supreme Court decisions hold that a state may not erect obstacles in the way of gaining or enforcing civil rights if the obstacles themselves violate the Constitution.¹²¹

The political process doctrine has its roots in *Reitman v. Mulkey*,¹²² *Hunter v. Erickson*,¹²³ and *Washington v. Seattle School District*.¹²⁴ In *Reitman v. Mulkey*, the Court held that a California constitutional provision violated the Equal Protection Clause by involving the state in private racial discrimination.¹²⁵ California added a provision to its constitution that declared that the state could not “deny, limit, abridge directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any or all of his real property to decline to sell or lease or rent such property to such person or persons as he, in his absolute discretion, chooses.”¹²⁶ Looking at the law’s “immediate objective, its ultimate effect,” and the historical context in which it was adopted, the court found that the statute unconstitutionally involved the state in permitting and approving private racial discrimination.¹²⁷ Significantly, the Court found that the law was designed to nullify two California statutes that banned private racial discrimination.¹²⁸ In this context, the Supreme Court upheld the California Supreme Court’s finding that the new law expressly authorized racial discrimination.¹²⁹

120. *Romer v. Evans*, 517 U.S. 620, 623 (1996).

121. *Fourteenth Amendment—Equal Protection Clause—Political-Process Doctrine—Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (Bamn)*, 128 HARV. L. REV. 281, 286–90 (2014).

122. 387 U.S. 369 (1967).

123. 393 U.S. 385 (1969).

124. 458 U.S. 457 (1982).

125. *Reitman*, 387 U.S. at 378–79.

126. *Id.* at 371.

127. *Id.* at 373.

128. *Id.* at 374.

129. *Id.* at 376.

Thus, the Fourteenth Amendment does not obligate a state to have an anti-discrimination law, but a state violates the constitution when a statute not only repeals existing anti-discrimination provisions, but also sanctions private racial discrimination and makes official state policy.¹³⁰

In *Hunter v. Erickson*, the Supreme Court struck down an amendment to the city charter that required all civil rights ordinances involving real property to be approved by a majority of the city's voters.¹³¹ Not only did the amendment apply to future ordinances, it also suspended the existing law pending approval by the city's voters.¹³² The Court noted that the law created an express racial classification and, therefore, was subject to strict scrutiny.¹³³ Once again, the Court insisted that it had to assess the act's constitutionality against the context in which it was adopted.¹³⁴ The state could not provide sufficient justification for such an express racial classification with the Court specifically rejecting the city's arguments that the city could distribute power as it saw fit: "[T]he state could no more disadvantage any particular group by making it more difficult to enact legislation on its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."¹³⁵

In *Washington v. Seattle School District No. 1*, the Supreme Court struck down a statute approved by a statewide voter initiative that required schools to assign children to the nearest school but also contained exceptions that permitted assignments away from neighborhood schools in virtual-

130. *Id.*

131. 393 U.S. 385, 393 (1969).

132. *Id.* at 387.

133. *Id.* at 388. The court noted that even though the procedures also applied to religious discrimination, it was still a racial classification because it did not apply to all forms of discrimination. *Id.* The court concluded:

[The Akron ordinance] nevertheless disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor. The automatic referendum system does not reach housing discrimination on sexual or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes. Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. *The majority needs no protection against discrimination* and if it did, a referendum might be bothersome but no more than that.

Id. at 390–91 (emphasis added).

134. *Id.* at 390.

135. *Id.* at 393; *see also* *Hunter v. Erickson*, 393 U.S. 385, 395 (1969) (Harlan, J., concurring). Harlan would allow structural obstacles that "attempted to allocate governmental power on the basis of any general principle" but would strike down those that have "the clear purpose of making it more difficult for certain racial or religious minorities to achieve legislation that is in their interest." *Hunter*, 393 U.S. at 395.

ly all circumstances except for purposes of racial desegregation.¹³⁶ The Court held that a state violates the constitution when it uses the political process to single out race and only race for “peculiar and disadvantageous treatment.”¹³⁷ The court reaffirmed *Hunter*, saying that it, like the *Seattle* case, used explicitly racial criteria to structure the community’s political process, which impeded “the operation of those political processes ordinarily to be relied upon to protect minorities.”¹³⁸

The Court looked beyond the text of the statute to determine that “the initiative was effectively drawn for racial purposes.”¹³⁹ Although the law did not expressly mention race or integration, “the initiative’s sponsors . . . had [no] difficulty perceiving the racial nature of the issue settled by” the initiative.¹⁴⁰ The text carefully created exceptions to the neighborhood schools’ requirement for everything but desegregation.¹⁴¹ Proponents of the measure argued that schools would retain flexibility—except for racial desegregation busing—and that the initiative would only apply to school districts with mandatory integration programs.¹⁴² Thus, the initiative’s purpose and its practical effect removed the authority to address a racial problem—and only a racial problem—from existing decision-making processes in such a way as to burden minority interests.¹⁴³ As in *Hunter*, the state’s power to structure its political process did not allow it to violate the constitution while doing so.¹⁴⁴

In *Romer*, the lower court relied on the political process doctrine to strike down the Colorado law.¹⁴⁵ The Supreme Court upheld that decision but did not apply the political process doctrine, however.¹⁴⁶ Colorado’s constitutional amendment imposed such far reaching burdens that it could not survive even rational basis; therefore, there was no need to go further. Still, *Romer*’s holding and analysis are not inconsistent with the political process

136. 458 U.S. 457 (1982).

137. *Id.* at 485.

138. *Id.* at 485–86 (quoting *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938)).

139. *Id.* at 471.

140. *Id.*

141. *Id.*

142. *Washington*, 458 U.S. at 471.

143. *Id.* at 480–81.

144. *Id.* at 487.

145. *See Evans v. Romer*, 854 P.2d 1270, 1282–86 (Colo. 1993) (en banc) (holding that the political process cases required that the amendment be tested by strict scrutiny, the Colorado Supreme Court remanded the case to the trial court); *Evans v. Romer*, 882 P.2d 1335, 1350 (Colo. 1994) (en banc) (on remand, the trial court struck down the amendment, and the Colorado Supreme Court upheld that decision).

146. *Romer v. Evans*, 517 U.S. 620, 626 (1996) (“We . . . affirm the judgment, but on a rationale different from that adopted by the State Supreme Court.”).

cases; up to that time, each of them found an illegitimate purpose behind the state's attempt to restructure its political process.

In *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary*, the Supreme Court upheld a voter-approved amendment to the Michigan Constitution that prohibited the use of race in college and university admissions decisions.¹⁴⁷ A plurality led by Justice Kennedy found that the amendment did not unconstitutionally restructure the political process because it did not, by itself, inflict or aggravate a constitutional injury.¹⁴⁸ Two justices would have eliminated the political process doctrine and upheld the law using conventional equal protection review.¹⁴⁹

The Sixth Circuit struck down the Michigan amendment finding that it violated the political process doctrine as stated in *Seattle* because it made it more difficult for racial and religious minorities to vindicate their interests in the political process.¹⁵⁰ Justice Kennedy found that “[t]he broad language used in *Seattle*, however, went well beyond the analysis needed to resolve the case.”¹⁵¹

In *Reitman*, however, the amendment to the California Constitution prevented racial minorities from taking advantage of California civil rights statutes, while in *Hunter* the Akron ordinance overturned laws meant to address “widespread racial discrimination” in housing.¹⁵² Thus, *Seattle* should not be understood as imposing a broad rule prohibiting states from placing decision-making authority over matters affecting minorities at a different level of government. Rather, *Seattle* is best understood as a case in which the state action had a “serious risk, if not the purpose, of causing specific injuries on account of race.”¹⁵³ The Michigan amendment did not inflict the kind of constitutional injury present in *Reitman* or *Hunter*. Rather, the Michigan amendment resolved a policy issue: should voluntary race-based preferences continue to be used in college and university admissions?¹⁵⁴ Unless a state encourages or commands an unconstitutional injury, the people are free to restructure their political process to reflect their policy preferences.¹⁵⁵

After *Schuette*, the political process doctrine survives under these conditions: a state may not purposefully redesign the political process to en-

147. 134 S. Ct. 1623 (2014).

148. *Id.* at 1634–38.

149. *Id.* at 1639 (Scalia, J., concurring).

150. *Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by Any Means Necessary v. Regents of the Univ. of Mich.*, 701 F.3d 466, 488–89 (6th Cir. 2012).

151. *Schuette*, 134 S. Ct. at 1634.

152. *Id.* at 1631–32.

153. *Id.* at 1633.

154. *Id.* at 1636.

155. *Id.*

courage, ratify, or command unconstitutional injury. That is, the state can neither deprive a protected class of the protection of its laws nor single out a protected class for disparate treatment.

The political process doctrine may be limited to race because each of the cases involved racial classifications, and thus, such a doctrine would not be applicable to Act 137. On the other hand, the political process doctrine may prevent states from undermining constitutional protections for protected classes.¹⁵⁶ Like *Reitman* and *Hunter*, Act 137 seems to be aimed at thwarting the development and enforcement of legal protections based on sexual orientation and gender identity.¹⁵⁷

Nonetheless, assuming that the post-*Schuette* political process doctrine applies beyond racial settings, it will play itself out in two different scenarios in regard to Act 137. Act 137 prohibits the enactment of certain local civil rights laws but does not go into effect into July 22, 2015.¹⁵⁸ Its application to laws enacted after that date may fall on the *Schuette* side of the line. That is, those ordinances may have to bow to the state's resolution of its policy preference to decide all civil rights questions at the state level. On the other hand, Act 137 also prohibits the enforcement of civil rights protections not mentioned in state law. Its application to local civil rights laws enacted prior to July 22, 2015, may fall on the *Reitman/Hunter* side of the line. In these cases, Act 137 seems to create "the serious risk, if not the purpose of causing specific injuries" on account of sexual orientation and gender identity.¹⁵⁹ Even though neutral on its face, the law purposefully targeted an unpopular political minority, aggravated their existing constitutional injuries, and involved the state in further injury.¹⁶⁰

Act 137, however, is similar to the Michigan amendment *Schuette* upheld. As a result, it may simply be the state's resolution of a policy preference. The state may not directly engage in actions that violate the constitution, but it is not required to either enact a statewide civil rights law or allow

156. Steve Sanders, *Mini-Domas as Political Process Failures: The Case for Heightened Scrutiny of State Anti-Gay Marriage Amendments*, 109 NW. U. L. REV. ONLINE 12, 24–25 (2014).

157. Intrastate Commerce Improvement Act, 2015 Ark. Acts 137 (to be codified at ARK. CODE ANN. §§ 14-1-401 to -403).

158. *Id.* Arkansas Constitution Amendment VII requires a two-thirds vote by the General Assembly for legislation to go into effect immediately. See ARK. CONST. art. 5, § 1. Otherwise, legislation goes into effect ninety days after the legislature adjourns. See *Little v. Flemings*, 333 Ark. 476, 484, 970 S.W.2d 259, 264 (1998).

159. See *Schuette*, 134 S. Ct. at 1633.

160. See *id.* at 1632 ("*Hunter* rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities. The facts in *Hunter* established that invidious discrimination would be the necessary result of the procedural restructuring. Thus, in *Mulkey* and *Hunter*, there was a demonstrated injury on the basis of race that, by reasons of state encouragement or participation, became more aggravated.").

its subdivisions to do so.¹⁶¹ For example, Michigan public colleges and universities may not discriminate on the basis of race in their admissions decisions, but they do not have to adopt voluntary race based admissions policies.¹⁶²

Applying the current political process doctrine turns on whether or not the “restructuring” inflicts a constitutional injury on its own. Here, the political process doctrine melts into the *Romer/Moreno* principle. If the act is an attempt to harm a “politically unpopular” group, then it fails even conventional equal protection analysis.¹⁶³ If that is the Act’s purpose, then it would also seem to fail under the *Schuette* version of the political process doctrine.

Schuette understood that an invidious purpose would not save even facially neutral laws.¹⁶⁴ For example, *Reitman* focused on the “immediate design and intent” of California’s law, the result of which was to establish a state constitutional right to discriminate.¹⁶⁵ *Hunter* looked at the context in which the city ordinance was adopted and rejected the city’s attempted neutral explanations.¹⁶⁶ In his concurring opinion, Justice Harlan explained that:

a statute may have the clear purpose of making it more difficult for racial and religious minorities to further their political aims. Like any other statute which is discriminatory on its face, such a law cannot be permitted to stand unless it can be supported by state interests of the most weighty and substantial kind.¹⁶⁷

Finally, *Schuette* explicitly noted that the states’ purpose was crucial in each political process case. Even as it was liming the read of *Seattle*, it approvingly declared that the case is “best understood” as a case where the state law “had the serious risk, if not the purpose, of causing specific” constitutional injuries just as had been the case in *Reitman* and *Hunter*.¹⁶⁸

Thus, Act 137 is unconstitutional whether a court employs the political process doctrine or general equal protection. A state may not purposefully seek to harm or burden a politically unpopular group either by targeting it for harmful treatment or by restructuring the political process to inflict harm. The equal protection clause may not require a state to act, but when it

161. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369, 374–75 (1967) (holding that the state may be neutral toward private racial discriminations and is not required to outlaw them but it may not involve itself in them).

162. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

163. See *Romer v. Evans*, 517 U.S. 620, 634 (1996).

164. *Schuette*, 134 S. Ct. at 1637 (holding “not inconsistent with well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or state action, the Constitution requires redress by the courts”).

165. *Reitman*, 387 U.S. at 374.

166. *Hunter v. Erickson*, 393 U.S. 385, 391–92 (1969).

167. *Id.* at 393 (Harlan, J., concurring).

168. *Schuette*, 134 S. Ct. at 1633.

does, it requires it do so with a proper purpose.¹⁶⁹ Here, Act 137 fails that basic test.¹⁷⁰

IV. CONCLUSION

Whether Act 137 withstands constitutional challenge will depend on whether or not a court looks behind the statutory language to the Act's purpose. If so, then its apparent targeting of the LGBT community is problematic. It either evinces the illegitimate governmental purpose of a "bare desire to harm a politically unpopular group" or shows that the law was designed to cause specific constitutional injuries. Finally, the outcome will also depend on the context of the challenges. Act 137 may not apply so broadly as many people originally thought. If it is interpreted to allow local ordinances to create protections for groups mentioned anywhere in state law, then Act 137 will have virtually no effect. Local politics will determine whether or not a city adopts LGBT protections, and, thus, Act 137 will have nothing to say. If, however, Act 137 is understood to allow cities and counties to adopt only the specific protections mentioned in state law, then ordinances enacted prior to the Act's effective date present the most salient challenges under either line of attack.¹⁷¹

169. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

170. *Reed*, *supra* note 4, at 158 (reaching the same conclusion about a similar Tennessee law) ("[T]he Intrastate Commerce Act and its progeny were written, introduced, and advanced because of—not merely in spite of—their adverse effects upon the LGBT community in contravention of the Equal Protection Clause.").

171. While this article was going to press, Arkansas Attorney General Leslie Rutledge issued an opinion concluding that Act 137 preempted the local ordinances in Little Rock, Fayetteville, Hot Springs, Eureka Springs, and Pulaski County and made them unenforceable. *See Op. Att'y Gen. No. 2015-088*, at 1 (2015), available at <http://ag.arkansas.gov/opinions/docs/2015-088.pdf>. She claims that Act 137 was intended to "hold the field" with respect to state civil rights protections. *Id.* at 3. Thus, she concludes that because no state anti-discrimination statutes protect gender identity or sexual orientation, each of the five local ordinances cannot be enforced. *Id.* at 1.

Her opinion is flawed for the following reasons. First, she overstates the scope of Act 137. She claims that it "renders unenforceable any ordinance that prohibits discrimination on a basis not already contained in state law," but the act itself declares that it does not apply to "a rule or policy that pertains only to the employees of a county, municipality, or other political subdivision." Thus, the North Little Rock and Conway ordinances are not preempted by Act 137 because they protect only their own employees. Similarly, those portions of the ordinances passed by Pulaski County and Hot Springs that extend protection to their own employees are also valid.

Second, she fails to properly apply her preemption analysis. She argues that Act 137 "expressly preempts" local ordinances, but that is a conclusion that must be reached by first interpreting the law. In other words, Act 137 preempts local ordinances only if it conflicts with those ordinances. One must first interpret Act 137 before reaching its preemptive effect. As I point out in the text, the Arkansas Supreme Court has noted that an unambiguous law

must be read “just as it is.” Reading the Act “just as it is” shows that it includes two components: local ordinances cannot create a new “protected classification” nor “prohibit[] discrimination” unless “contained in state law.” If state law protects a particular category of people or prohibits discrimination against them, then a local ordinance that does the same is not preempted by Act 137.

Third, General Rutledge’s reading of the anti-bullying statute creates a distinction without a difference and disregards the plain language of the statute. She concludes that the anti-bullying statute is not an anti-discrimination statute because bullying is different from discrimination and all bullying is prohibited whether or not it is done on the basis of one of the protected attributes defined in the statute. Bullying is a form of discrimination or differential treatment because it targets individuals for abusive treatment. The bully may target someone for many different reasons, but it is without dispute that gender identity and sexual orientation form the basis for much school bullying. If the legislature had intended bullying to be a “stand alone offense,” the inclusion of the protected attributes in the statute would have been unnecessary. It is a fundamental canon of interpretation that a statute must be interpreted so that each part of it has meaning and, therefore, the entire statute must be read so as to harmonize its individual parts. That leads to a reading that the anti-bullying statute created the protected classifications of gender identity and sexual orientation. Nothing in General Rutledge’s analysis negates this conclusion.

Fourth, General Rutledge consistently overstates the reach of Act 137 by claiming that it preempts local ordinances if they “vary at all from state laws that prohibit non-discrimination.” If that is what the legislature meant, it could easily have said so. The plain, unambiguous language of Act 137 states that only two things trigger its preemptive effect: new protected classifications or discrimination on a basis not contained in state law. The fact that the anti-bullying statute may apply only to schools and not employment is beside the point. The anti-bullying statute protects people based on their gender identity or their sexual orientation. That is either a protected classification or an anti-discrimination statute. In either case, it justifies local ordinances that do the same whether or not they apply solely in an educational context.

Finally, if General Rutledge is correct, her conclusion strengthens the constitutional case against Act 137. Her interpretation requires a court to focus on the motivation behind the statute. As I have argued above, that inquiry leads to the conclusion that Act 137 was motivated by bias, animus, and irrational prejudice. It was not a neutral attempt to “hold the field.”