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In a majority of states, it remains legal to deny people housing, employment, or services because of their sexual orientation or gender identity. The LGBT community has taken great strides to push back against the harms of discrimination, successfully securing municipal antidiscrimination laws in a number of discrete (and typically liberal) cities. While an individual's right to enjoy full, equal citizenship should not depend on their zip code, hard-wrought municipal protections are a crucial step toward achieving more robust civil rights protections.

Hostile state legislators in Arkansas, North Carolina, and Tennessee crafted laws to prohibit localities from protecting classes of people beyond state law with the aim to block LGBT civil rights ordinances. Legislators in a handful of other states have offered similar bills. How should courts treat neutral laws adopted by states that amputate municipal civil rights-making powers? This Article argues that courts should use political restructuring doctrine, evolving LGBT rights jurisprudence, and the landmark decision Arlington Heights v. Metropolitan Housing Development Corporation*, to void municipal civil rights preemption laws as constitutionally deficient.*

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TABLE OF CONTENTS

INTRODUCTION

After twenty-five years of failed attempts to outlaw sexual orientation and gender identity discrimination in Charlotte, North Carolina, lesbian, gay, bisexual, and transgender ("LGBT") rights advocates at long last prevailed upon the Charlotte City Council to act.[1] On February 22, 2016, the City Council passed Ordinance 7056 banning discrimination against LGBT persons by operators of public accommodation, common carriers, and city contractors.[2] The ordinance would take effect on April 1, 2016.[3] Unfriendly intervention by state legislators, however, snuffed out Charlotte's civil rights expansion.

State legislative leaders announced a special session of the North Carolina General Assembly to block Charlotte's ordinance before it became effective.[4] On March 23, 2016, lawmakers introduced House Bill 2. Named the Public Facilities Privacy & Security Act, House Bill 2 ("H.B. 2") sailed through both chambers and was approved by Governor Pat McCrory in less than twelve hours.[5]

Despite the bill's innocuous title, the sweeping legislation crushed local regulatory powers across the board and disparately targeted the LGBT community. The bill curtailed private rights of action under the state's employment discrimination statute.[6] The legislation forbade local governments from raising the minimum wage or expanding labor

1. Steve Harrison, *Charlotte Is Again Weighing LGBT Protections*, CHARLOTTE OBSERVER (Feb. 2, 2016, 6:13 PM), (noting the first failed attempt to amend the Charlotte nondiscrimination ordinance in 1990).

2. Steve Harrison, *Charlotte City Council Approves LGBT Protections in 7–4 Vote*, CHARLOTTE OBSERVER (Feb. 22, 2016, 3:06 PM).

3. Charlotte, N.C., Ordinance 7056 (2016).

4. Jim Morrill, *NC Lawmakers Heading for Special Session Wednesday to Discuss LGBT Ordinance*, NEWS & OBSERVER (Mar. 21, 2016, 7:15 PM).

5. Camila Domonoske, *North Carolina Passes Law Blocking Measures to Protect LGBT People*, NPR (Mar. 24, 2016, 11:29 AM).

6. H.B. 2, 2016 Gen. Assemb., 2d Sess. (N.C. 2016).

rights.[7] Legislators rejected the right of transgender persons to use facilities consistent with their gender identity.[8] To that end, H.B. 2 mandated transgender individuals use public restrooms and changing facilities consistent with the sex listed on their birth certificates.[9]

While H.B. 2 enacted North Carolina's first statewide public accommodation antidiscrimination law, it simultaneously nullified local public accommodations and employment nondiscrimination ordinances inconsistent with state law.[10] Because North Carolina civil rights law did not extend protected class status to lesbian, gay, bisexual, and transgender persons in employment and public accommodations, cities were now barred from expressly doing so. After intense public backlash, the North Carolina General Assembly repealed most of H.B. 2, but left the preemption component in place with a four-year sunset provision.[11]

North Carolina was not the first state to pull back local government power to promulgate civil rights protections. Tennessee and Arkansas passed similar legislation in 2011 and 2015, respectively.[12] The Tar Heel State may not be the last to clamp down on local control and stave off local LGBT-inclusive nondiscrimination protections, either. Legislators in Montana, Michigan, Nebraska, Oklahoma, Texas, and West Virginia have introduced legislation of this sort.[13] Unless the LGBT community gains sufficient political clout to stop state legislators in conservative states from running roughshod over progressive municipalities, LGBT persons will need to seek refuge in the courts to rebalance the political process.

Notably, preemption of local government authority is a more generalizable trend that stretches beyond LGBT civil rights as conservative state legislators work to stymie a broad swath of progressive policies championed in urban pockets of their states.[14] Iowa, Ohio, and Oklahoma, for example, are among the states that prohibited cities from enacting minimum wages greater than the state's

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7. *Id.* § 2.2.

8. *Id.* §§ 1.2, 1.3.

9. *Id.*

10. *Id.*

11. Bruce Henderson & Tim Funk, *Understanding the HB2 Repeal Law—What It Does and Doesn't Do*, CHARLOTTE OBSERVER (Mar. 30, 2017, 8:50 AM).

12. ARK. CODE ANN. tit. 14, §§ 14-1-401–14-1-403 (2017); TENN. CODE ANN. tit. 4, § 4-21-102 (2012).

13. H.B. 516, 62nd Leg., Reg. Sess. (Mont. 2011); H.B. 5039, 96th Leg., Reg. Sess. (Mich. 2011); Leg. B. 912, 102nd Leg., 2d Sess. (Neb. 2012); H.B. 2245, 53nd Leg., 2nd Sess. (Okla. 2012); S.B. 1289, 55th Leg., Reg. Sess. (Okla. 2016); S.B. 694, 56th Leg., Reg. Sess. (Okla. 2017); S.B. 92, 85th Leg., Reg. Sess. (Tex. 2017); H.B. 2899, 85th Leg., Reg. Sess. (Tex. 2017); S.B.6, 85th Leg., Reg. Sess. (Tex. 2017).

14. *See* Emily Badger, *Blue Cities Want to Make Their Own Rules. Red States Won't Let Them*, N.Y. TIMES (July 6, 2017), (describing the rising number of state preemption laws aimed at thwarting liberal city policies).

minimum wage.[15] Arizona, Indiana, and Michigan are a few of the states that recently blocked localities from regulating plastic bags.[16] In 2017, Texas became the latest state to ban so-called sanctuary cities, penalizing municipalities that refuse to cooperate with federal immigration enforcement.[17] After St. Louis adopted an ordinance in 2017 banning employment and housing discrimination against women for their reproductive healthcare decisions,[18] Missouri's governor called on legislators to overturn it in a special session, warning that St. Louis would become an "abortion sanctuary city."[19] The Missouri Legislature did so, overturning the St. Louis ordinance via preemption legislation.[20]

As this Article later describes in greater detail, there is an appreciable difference between legislation targeting local economic regulations and legislation intended to burden a disfavored minority group. How should courts treat facially neutral laws adopted by states that amputate municipal civil rights-making and thwart LGBT equality? This Article argues that taken together, political restructuring cases, evolving LGBT rights jurisprudence, and the landmark decision in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*[21] offer a path to void municipal civil rights preemption laws as constitutionally deficient.[22]

The Article proceeds in six parts. Part I reviews the form and function of municipalities in American law. Part II examines courts' treatment of laws restructuring municipal governments to harm racial

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15. H. File 295, 87th Gen. Assemb. (Iowa 2017); OHIO REV. CODE ANN. § 4111.02 (2017); OKLA. STAT. ANN. tit. 40, § 160 (West 2014).

16. ARIZ. REV. STAT. § 11-269.16 (2016); IND. CODE § 36-1-3-8.6 (2017); MICH. COMP. LAWS § 445.591 (2017).

17. S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017).

18. Saint Louis, Mo., Ordinance 70459 (Feb. 1, 2017).

19. *Missouri Governor Calls Special Session on Abortion*, SPRINGFIELD NEWS-LEADER (June 7, 2017, 2:49 PM).

20. H.B. 174, 99th Gen. Assemb., 1st Reg. Sess. (Mo. 2017):

> A political subdivision of this state is preempted from enacting, adopting, maintaining, or enforcing any order, ordinance, rule, regulation, policy, or other similar measure that prohibits, restricts, limits, controls, directs, interferes with, or otherwise adversely affects an alternatives to abortion agency or its officers', agents', employees', or volunteers' operations or speech including, but not limited to, counseling, referrals, or education of, advertising or information to, other communications with, clients, patients, other persons, or the public.

21. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

22. While other scholars have examined this question, some have not focused on *Arlington Heights*, written before recent decisions on same-sex marriage and political restructuring, or before North Carolina's H.B. 2. *See* Terri R. Day & Danielle Weatherby, *The Case for LGBT Equality: Reviving the Political Process Doctrine and Repurposing the Dormant Commerce Clause*, 81 BROOK. L. REV. 1015 (2016); John M. A. DiPippa, *Bias in Disguise: The Constitutional Problems of Arkansas's Intrastate Commerce Improvement Act*, 37 U. ARK. LITTLE ROCK L. REV. 469 (2015); Alex Reed, *Pro-Business or Anti-Gay? Disguising LGBT Animus as Economic Legislation*, 9 STAN. J. C.R. & C.L. 153 (2013).

minorities, and Part III examines the relationship between those cases and litigation concerning LGBT discrimination. Part IV assess critiques that the political restructuring doctrine has lost potency in modern jurisprudence and argues how the doctrine should be used to strike down anti-LGBT municipal preemption laws. In Part V, the Article examines the relationship between political process theories and same-sex marriage cases. Finally, Part VI addresses how courts should tackle the issue of state preemption laws' facial neutrality.

I. LOCALITIES AS CREATURES OF THE STATE

The ability of local governments to regulate and improve the lives of citizens is critical. Their "chief purpose" is to act in the "interest, advantage and convenience of the locality and its people."[23] Municipal governments reduce the cost of political participation and allow constituencies that hold little power on the state level to wield considerable influence over local affairs. For these reasons, local lawmaking must not be treated cavalierly—particularly with respect to disfavored groups. The importance of their representative function notwithstanding, localities remain subject to both the constraints imposed by state legislators and the electorate, who can reign in local governments they deem rogue.

Municipalities' important function with respect to democratic governance, however, is in tension with the idea that local governments exist for the state's convenience. "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into the breath of life, without which they cannot exist."[24] This is a foundational principle of American law.[25] Judge Eugene McQuillan expounded on this concept in his seminal municipal law treatise, noting that barring "a specific constitutional inhibition, a state, by its legislature, may create municipal and public corporations . . . [to] exercise delegated powers . . . as subordinate departments, auxiliaries, or convenient instrumentalities of the state for the purpose of local or municipal rule."[26]

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23. EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 2:11 (3d ed. 2010).
24. City of Clinton v. Cedar Rapids & Mo. River R.R. Co., 24 Iowa 455, 475 (1868).
25. *See* Hunter v. Pittsburgh, 207 U.S. 161, 178 (1907):

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.

26. MCQUILLIN, *supra* note 23, § 1:21.

The dual concepts that municipalities are not sovereign entities yet also constitute the lifeblood of a healthy democratic system can conflict. Because local governments are creatures of the states, states are generally free to enact legislation or adopt constitutional provisions to centralize power. States possess "extraordinarily wide latitude" to delegate authority and define the powers of local governments.[27] However, states cannot erect barriers to political participation when motivated by the desire to harm an identifiable minority group.[28]

The courts have a duty to exercise judicial review to protect the fairness of the political process. When the mechanisms of government are constructed to burden an identifiable class of persons' ability to participate in the democratic process, the courts have the prerogative to clear the channels of policymaking.

II. POLITICAL RESTRUCTURING AND HUNTER-SEATTLE

In the landmark 1969 ruling *Hunter v. Erickson*, the Supreme Court embraced political restructuring theory.[29] In 1964, the Akron City Council enacted a fair housing ordinance to "assure equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry or national origin."[30] The ordinance provided for a city Commission on Equal Opportunity in Housing to investigate housing discrimination and take action against persons violating the nondiscrimination law.[31] After the Ordinance's enactment, the requisite ten percent of voters needed to submit a question for referendum successfully placed a question on the ballot to overturn the anti-discrimination provision and amended Akron's charter.[32] Winning majority approval at the ballot box, the newly-amended city charter voided the preexisting fair housing ordinance and required popular approval of any future housing law:

> Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the

27. Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71 (1978); *see also* MCQUILLIN, *supra* note 23, § 1:21.

28. *See infra* Part III.

29. Hunter v. Erickson, 393 U.S. 385 (1969).

30. *Id.* at 386.

31. *Id.*

32. *Id.* at 387.

> adoption of this section shall cease to be effective until approved by the electors as provided herein.[33]

The charter's housing provision was challenged under the Equal Protection Clause. Ultimately, the Court rejected justifications that the charter amendment served a legitimate function to allow for a more deliberative approach to tackling housing discrimination or that it served some broad democratic interest. Indeed, the *Hunter* Court noted that the Constitution cannot tolerate the diminution of political power in the political process any more than the purposeful dilution of minority voting rights.[34] The Court reasoned in *Hunter* that because the measure "disadvantage[d] 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," it could not withstand constitutional scrutiny.[35]

In 1971, the Court declined to extend *Hunter* to a California constitutional amendment that required municipalities to put up all projects for low-rent housing for referendum.[36] The Court determined that because the California Constitution burdened "any low-rent public housing project, not only for projects which will be occupied by a racial minority" there was insufficient evidence of intentional discrimination to invalidate the referendum requirement.[37] In that vein, the majority pointed out that the added procedural requirement "ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues."[38]

Twice, the Court affirmed rulings against restructuring laws that blocked officials from pursuing policies to remedy discriminatory practices in public education. In 1969, New York enacted a statute prohibiting state education officials and appointed school boards from promulgating any policy aimed to achieve racial equality and balance in school districts.[39] The legislation responded to efforts by the New York

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33. *Id.*

34. Brief of Petitioner-Appellant, Hunter v. Erickson, 391 U.S. 963 (1968) (No. 63), 1968 WL 112644, at *14; *Hunter*, 393 U.S. at 392:

> We are unimpressed with any of Akron's justifications for its discrimination. Characterizing it simply as a public decision to move slowly in the delicate area of race relations emphasizes the impact and burden of [the charter amendment] but does not justify it. The amendment was unnecessary either to implement a decision to go slowly, or to allow the people of Akron to participate in that decision.

35. *Id.* at 391–92.

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

37. *Id.*

38. *Id.* at 143.

39. Lee v. Nyquist, 318 F. Supp. 710, 717 (W.D.N.Y. 1970), *aff'd sub nom.* Chropowicki v. Lee,

Education Commissioner to combat worsening racial segregation in the state's public schools, a problem exacerbated by changing housing patterns and economic shifts.

The statute's defenders argued that the law's intent was not to impede desegregation efforts or wholesale blockade policies to promote greater public school integration, but to guarantee that officials crafted racial diversification policies at the local level attuned to local sensitivities.[40] The three-judge district court rejected the notion that the local deference rationale was race-neutral.[41] Far from the benign justifications offered in support of the law, the statute was designed to empower local biases. The panel held, "To the extent, however, that the statute thus recognizes and accedes to local racial hostility, the existence of which has created in the past a serious obstacle to the elimination of de facto segregation, the purpose is clearly an impermissible one."[42]

In 1982, the Supreme Court struck down a Washington State law, adopted by initiative, barring school boards from promulgating rules that would mandate a student attend any school except the institution geographically closest to the student's residence.[43] The state law, Initiative 350, included a number of exceptions to the rule. Students could be assigned to institutions other than those most proximate to their homes when students required special education, when health or safety hazards precluded such an assignment, when natural or manmade obstacles stood in the way, or "the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities."[44] Initiative 350's practical impact was that school boards retained wide discretion in assigning students to particular schools, but walled off options for tackling racial disparities and segregation patterns in schools.

The district court was unmoved by arguments that the Washington law was, in fact, race-neutral. The court found that the "adverse effects of racially imbalanced schools fall most heavily upon minority students," and that Initiative 350 did not "permit a school board to assign students for the purpose of remedying De jure segregation"

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402 U.S. 935 (1971).

40. *Id.* (quoting Senator Norman Lent ". . . [The legislation is] absolutely necessary if this Legislature is ever going to put a halt to situations where a duly constituted elected board familiar with local conditions and sentiment is forced to implement a plan conceived in and mandated from Albany which, tragically, disrupts the stability and educational climate in the community.").

41. *Id.*

42. *Id.* at 720.

43. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 462 (1982).

44. *Id.*

absent a court order.[45] Nor could a local community opt to innovate policies to encourage diverse classes and combat de facto patterns of discrimination under Washington law.[46] Because Initiative 350 worked to undermine the reach of local powers to fight discrimination, it could not withstand scrutiny.[47]

On the same day that the decision striking Initiative 350 was handed down, the Supreme Court upheld a California Constitution provision that restricted state courts' ability to desegregate schools. In 1963, an action was brought in state court to desegregate the Los Angeles Unified School District. The trial court found the school district was de jure segregated in contravention of the California Constitution and U.S. Constitution.[48] The California Supreme Court affirmed the lower court's decision under the state constitution, holding the state constitution barred de facto and de jure segregation.

After nine years of litigation, while the trial court prepared busing plans to remedy the constitutional infirmity, voters ratified a state constitutional amendment that allowed state courts to mandate pupil reassignment and transportation-based remedies only when federal constitutional law required.[49] The amendment did not, however, overturn state judges' obligation to require that schools remedy de jure segregation. Finding no evidence of intentional discrimination, a state appellate court later blocked the trial court from proceeding further with new integration plans for Los Angeles schools.

The new amendment was challenged under the *Hunter* doctrine. Unlike the case out of Seattle, the California provision did not fundamentally reorder the political structure to the disadvantage of racial minorities. The Court concluded that the electorate's decision to limit the state judiciary's remedial power while "preserving a greater right to desegregation than exists under the Federal Constitution" could not logically be said to violate the Fourteenth Amendment.[50] A

45. Seattle Sch. Dist. No. 1 of King Cty., Wash. v. State of Wash., 473 F. Supp. 996, 1011 (W.D. Wash. 1979), *aff'd in part, rev'd in part sub nom.* Seattle Sch. Dist. No. 1 v. State of Wash., 633 F.2d 1338 (9th Cir. 1980), *aff'd sub nom.* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 102 S. Ct. 3187, 73 L. Ed. 2d 896 (1982).

46. *Id.*

47. *Id.* at 1016.

48. Crawford v. Bd. of Educ. of City of Los Angeles, 458 U.S. 527, 530 (1982).

49. CAL. CONST. art. I, § 7:

> [N]o court of this State may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause . . . .

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

concurring opinion authored by Justice Blackmun, and joined by Justice Brennan, highlighted that the constitutional amendment did not undermine fairness within the political process. Justice Blackmun wrote:

> State courts do not create the rights they enforce; those rights originate elsewhere—in the state legislature, in the State's political subdivisions, or in the state constitution itself. When one of those rights is repealed, and therefore is rendered unenforceable in the courts, that action hardly can be said to restructure the State's decisionmaking mechanism. While the California electorate may have made it more difficult to achieve desegregation when it enacted Proposition I, to my mind it did so not by working a structural change in the political *process* so much as by simply repealing the right to invoke a judicial busing remedy. Indeed, ruling 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.[51]

Importantly, the types of political restructuring held constitutionally infirm under *Hunter-Seattle* are those that burden identifiable classes. This was dispositive in *Gordon v. Lance*, a 1971 challenge to the West Virginia Constitution and statutes governing municipal finances.[52] West Virginia law prohibited political subdivisions from incurring bonded indebtedness or levying tax increases beyond constitutionally proscribed limits without the approval of sixty percent of the voters in a referendum.[53] The Supreme Court reversed the state high court's ruling to strike the state constitutional and statutory supermajority requirements as violative of the Equal Protection Clause. The Court determined that *Hunter* was inapplicable because, unlike the Akron charter amendment, "the West Virginia Constitution singles out no 'discrete and insular minority' for special treatment. The three-fifths requirement applies equally to all bond issues for any purpose, whether for schools, sewers, or highways."[54]

Taken together, *Hunter* and its progeny stand for the proposition that restructuring the political process to stymie policies aimed at eradicating discrimination against vulnerable minority classes cannot meet constitutional muster. That baseline principle was later extended in 1996 to lesbians, gays, and bisexuals in *Romer v. Evans*.

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51. *Id.* at 546–47.
52. Gordon v. Lance, 403 U.S. 1, 2–3 (1971).
53. *Id.* at 3.
54. *Id.* at 5.

III. SEXUAL ORIENTATION, ANIMUS, AND RESTRUCTURING

Like *Hunter*, *Romer* arose from the electorate's resistance to the expansion of local laws protecting against class-based discrimination, in this instance lesbians, gays, and bisexuals ("LGB"). Before 1992, a handful of Colorado municipalities, including the cities of Aspen, Boulder, and Denver, enacted ordinances banning LGB discrimination in housing, employment, education, public accommodations, and healthcare services.[55] In response, Colorado voters ratified Amendment 2 to the state constitution, prohibiting localities from adopting ordinances that expanded civil rights protections on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."[56]

Amendment 2's ambit reached well beyond voiding municipal laws protecting against sexual orientation discrimination. Indeed, the wholesale ban on antidiscrimination protections reached into every area of state government—from the legislature, to the executive branch, to state agencies, to political subdivisions, and to school districts.[57] After Amendment 2's ratification, a number of gay plaintiffs and three Colorado municipalities filed suit in state court.[58] The plaintiffs alleged that Amendment 2 violated the Fourteenth Amendment and requested injunctive relief.[59] A Colorado trial court agreed and the Colorado Supreme Court affirmed.[60]

Along with 1960s-era voting rights cases, the Colorado Supreme Court grounded their analysis of Amendment 2's constitutionality in the *Hunter-Seattle* doctrine. The court determined the anti-gay constitutional amendment "expressly fences out an independently identifiable group" in a manner similar to the measure "invalidated in *Hunter*, which singled out the class of persons" from freely using the channels of government on an equal basis to secure civil rights protections and curb invidious discrimination. "No other identifiable group faces such a burden," the court noted.[61] Applying strict scrutiny, the Colorado Supreme Court struck down Amendment 2 because it purposefully blocked gays, lesbians, and bisexuals from "participating equally in the political process."[62]

55. *Id.*
56. Romer v. Evans, 517 U.S. 620, 623–24 (1996).
57. *Id.* at 624.
58. *Id.* at 625.
59. *Id.*
60. *Id.*
61. Evans v. Romer, 854 P.2d 1270, 1285 (Colo. 1993).
62. *Id.*

The Supreme Court affirmed the state courts' judgments but abandoned strict scrutiny.[63] The Court applied a more exacting rational basis review than traditionally embraced by the Court.[64] Despite the urging of multiple parties,[65] the Court also avoided the *Hunter* doctrine altogether, though the opinion mirrored the Colorado Supreme Court's political process approach. In striking down the state constitutional amendment on equal protection grounds, the Court's majority emphasized that Amendment 2 placed non-heterosexuals "by state decree . . . in a solitary class with respect to transactions and relations in both the private and governmental spheres" because it walled off from LGB persons "but no others, specific legal protection from the injuries caused by discrimination."[66]

The state justified Amendment 2 arguing that it was intended to protect business owners' freedom of association and the rights of religious objectors to homosexuality. Colorado also proffered that there was an economic benefit for businesses gained by ensuring statewide uniformity in nondiscrimination laws in addition to a benefit of shielding localities from contentious fights over homosexuality.[67] While the *Romer* opinion did not address the uniformity or political fragmentation arguments,[68] the majority reasoned that the "breadth of the amendment is so far removed from [the associational and religious liberty] justifications" that it was "impossible to credit them."[69] Rather,

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63. *Romer*, 517 U.S. at 632 (Amendment 2's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.").

64. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 760 (2011) ("In the 1996 case of *Romer v. Evans*, the Court invalidated an antigay state constitutional amendment . . . depart[ing] from the usual deference associated with rational basis review. For this reason, commentators have correctly discerned a new rational basis with bite standard in such cases.").

65. *See* Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363 (2011) ("Many of the briefs in the case addressed the *Hunter* theory, but that argument was explicitly set aside by the high Court without comment.").

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

67.

> The State also benefits from creating an environment where large employers and property owners may operate under uniform laws, thereby providing greater economic and legal predictability in their affairs. Equally important is the necessity of ensuring that the deeply divisive issue of homosexuality does not serve to seriously fragment Colorado's body politic.

Brief for Petitioner at *47, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 310026, at *47.

68. The state trial court noted a discrepancy between the justifications offered by the state for Amendment 2 and the measure's purpose according to Amendment 2's architects. At trial, three major proponents of Amendment 2 stated the goal of the amendment was to "deny protected status to homosexuals and bisexuals," . . . "fend off state-wide militant gay aggression," and "prevent the government from declaring that homosexuals are entitled to protected class status." Evans v. Romer, No. CIV. A. 92 CV 7223, 1993 WL 518586, at *4 (Colo. Dist. Ct. Dec. 14, 1993).

69. *Romer*, 517 U.S. at 635.

the impetus behind Amendment 2 was an illegitimate desire to harm non-heterosexuals.

Soon after *Romer*, federal courts were asked to consider a challenge to Cincinnati's restriction on local protections for gays, lesbians, and bisexuals in *Equality Foundation of Greater Cincinnati v. City of Cincinnati*. In 1991, the City Council enacted an ordinance prohibiting discrimination in municipal employment on the basis of "race, color, sex, handicap, religion, national or ethnic origin, age, sexual orientation, HIV status, Appalachian regional ancestry, and marital status."[70] In 1992, Cincinnati adopted an ordinance extending civil rights protections in public accommodations, housing, and employment to cover claims of sexual orientation discrimination.[71]

Gay rights opponents filed a petition for a referendum to amend the city's charter to invalidate the sexual orientation antidiscrimination provisions and bar the Cincinnati City Council from enacting any other protections for the LGB community.[72] Anti-gay interests prevailed in November 1992. Like Akron's city charter limitations for housing policy in 1968, any civil rights ordinance to prohibit sexual orientation discrimination would require a popular referendum. That similarity notwithstanding, the Court of Appeals for the Sixth Circuit upheld the charter revision without a substantial treatment of the *Hunter* decision, though the court's opinion thoroughly examined *Romer*.

The Sixth Circuit employed *Hunter* to emphasize the basic proposition that local policies adopted by popular referendum are entitled to judicial deference because they are "designed in part to preserve community values and character" unless those measures "impinge upon any fundamental right or the interests of any suspect or quasi-suspect class."[73] That was the extent of the opinion's treatment of *Hunter* and the political process theory cases.

Relying on *Bowers v. Hardwick*, which upheld laws criminalizing sodomy, the panel held that because "the conduct which define[]

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70. Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 292 (6th Cir. 1997).

71. *Id.* at 292.

72.

> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

Id. at 291.

73. *Id.* at 297.

homosexuals was constitutionally proscribable" and not a suspect or quasi-suspect class, the court was bound to accord the Cincinnati measure with highest degree of deference and applied rational basis review.[74] The court applied a weak rational basis review and differentiated Colorado's Amendment 2 from the Cincinnati charter. The opinion reasoned that Amendment 2 and the Cincinnati initiative were "substantially different enactments of entirely distinct scope and impact."[75]

Whereas Colorado's Amendment 2 in *Romer* left LGB persons "without recourse to any state authority at any level of government for any type of victimization or abuse," the Cincinnati Charter Amendment "merely" forbade them from "obtaining special privileges and preferences" in one municipal jurisdiction.[76] That analysis would carry greater persuasion had the initiative simply reversed the city's discretionary civil rights policy and not imposed an additional political hurdle to overcome. In the years since *Equality Foundation* was handed down, a number of lower courts in the Sixth Circuit called the decision's currency into question,[77] noting that it came before *Lawrence v. Texas*' overturning *Bowers* in 2003.[78]

Despite the panel's flawed pre-*Lawrence* reasoning that failed to apply *Hunter* with any rigor, the opinion was not silent on the permissibility of laws on the state level to suffocate civil rights on the local level. In that vein, the panel proffered that while a city's self-imposed limitation on sexual orientation discrimination protections could withstand rational basis review, a statewide blanket ban on local civil rights measures to shield LGB persons from invidious treatment would fall under *Romer* even when justified on economic and associative freedom grounds:

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74. *Id.* at 293. The court followed similar logic employed by the D.C. Circuit Court of Appeals. *See* Steffan v. Perry, 41 F.3d 677, 684 n. 3 (D.C. Cir. 1994) (en banc) ("It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause.").

75. *Equal. Found.*, 128 F.3d at 295.

76. *Id.* at 296.

77. *See* Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 986 (S.D. Ohio 2013) ("*Equality Foundation* no longer stands as sound precedential authority for the proposition that restrictions on gay and lesbian individuals are subject to rational basis analysis.") *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388, 415 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015); Bassett v. Snyder, 951 F. Supp. 2d 939, 961 (E.D. Mich. 2013) (emphasizing that the *Equality Foundation* reliance on *Bowers* makes its precedential value "worthy of reexamination").

78. Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

> A state law which prevents local voters or their representatives, against their will, from granting special rights to gays, cannot be rationally justified by cost savings and associational liberties which the majority of citizens in those communities do not want. Clearly, the financial interests and associational liberties of the citizens of the state as a whole are not implicated if a municipality creates special legal protections for homosexuals applicable only within that jurisdiction and implements those protections solely via local governmental apparatuses. For this reason, the justifications proffered by Colorado for Colorado Amendment 2 insufficiently supported that provision, and implied that no reason other than a bare desire to harm homosexuals, rather than to advance the individual and collective interests of the majority of Colorado's citizens, motivated the state's voters to adopt Colorado Amendment 2.[79]

Though dicta, the *Equality Foundation* court recognized that the economic justifications a state might offer in defense of preempting localities from combating discrimination against sexual minorities merely belie anti-gay animus. The court erred in upholding the Cincinnati charter amendment because it was unable to project the trend *Romer* would spark while *Bowers* remained good law. That myopic application of *Romer* notwithstanding, the court nevertheless still understood—well before *Lawrence*—that the courts should reject economic and associational rationalizations for statewide policies that amputate local bodies from the rights-making process as window dressing.

IV. RETHINKING *HUNTER*'S "RETRENCHMENT"

The *Hunter* doctrine took center stage in a 2013 challenge to the Michigan Constitution's limitations on affirmative action programs. In 2003, the Supreme Court ruled in *Grutter v. Bollinger* that the affirmative action policy at the University of Michigan's law school withstood constitutional scrutiny because it took into limited consideration applicants' race in a holistic fashion.[80] In a companion case, *Gratz v. Bollinger*, the Court struck down the University of Michigan's undergraduate admissions policy that rigidly assigned a numerical value to applicants if they were from an underrepresented racial group.[81]

Soon after the pair of decisions, Michigan voters adopted a state constitutional amendment, Proposal 2, which prohibited state and local governments as well as public institutions, like public colleges and universities, from using any race conscious policies. The amendment compelled the state and its subdivisions to "not discriminate against, or

79. *Equal. Found.*, 128 F.3d at 300.
80. Grutter v. Bollinger, 539 U.S. 306, 337 (2003).
81. Gratz v. Bollinger, 539 U.S. 244, 271, 275–76 (2003).

grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[82] A collection of organized interest groups subsequently filed suit in federal court challenging the constitutional provision, theorizing it violated the Equal Protection Clause because it rigged the architecture of policymaking to disadvantage racial minorities.

Rejecting the plaintiff's equal protection claim, the district court granted a motion for summary judgment by the Michigan Attorney General.[83] On appeal, the Sixth Circuit reversed the grant of summary judgment.[84] After granting en banc review, the Sixth Circuit again reversed the lower court's decision, holding that Michigan Constitution's constraints on affirmative action ran afoul of the Equal Protection Clause because it constituted impermissible political restructuring. Using the example of legacy admissions policies that benefit the children of alumni, the court illustrated the disparate impact of Proposal 2. The court said:

> An interested Michigan citizen may use any number of avenues to change the admissions policies on an issue outside the scope of Proposal 2. For instance, a citizen interested in admissions policies benefitting . . . sons and daughters of alumni of the university w may lobby the admissions committees . . . may petition higher administrative authorities at the university . . . may seek to affect the election . . . of any one of the eight board members . . . [and] may campaign for an amendment to the Michigan Constitution.[85]

The Supreme Court, 6-2, reversed the Sixth Circuit in a series of opinions. The plurality opinion by Justice Kennedy defended the Michigan amendment as a legitimate exercise of the democratic process:

> Our constitutional system embraces . . . the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure.[86]

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82. MICH. CONST. art. 1, § 26.

83. Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 539 F. Supp. 2d 924, 957 (E.D. Mich. 2008).

84. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN) v. Regents of Univ. of Michigan, 652 F.3d 607, 610 (6th Cir. 2011).

85. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary v. Regents of Univ. of Michigan, 701 F.3d 466, 484 (6th Cir. 2012), *rev'd sub nom*. Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623, 1645 (2014).

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

The lead opinion went on to explain that the political process remained open for voters to consider what types of "programs designed to increase diversity—consistent with the Constitution—[might be a] necessary part of progress to transcend the stigma of past racism."[87]

While *Schutte* could be understood as striking a blow to political process theory, the jurisprudential foundation of affirmative action cases disfavors painting the Court's decision with such a broad brush. When the Supreme Court first considered the constitutionality of affirmative action programs in *Regents of California v. Bakke*, Justice Lewis Powell writing for a 4-1-4 fractured court, rejected claims that affirmative action programs were constitutionally justifiable as a tool to ameliorate past discrimination. Powell wrote that a public institution of higher education "helping certain groups . . . perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages" on some in the application process "who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."[88]

Heeding Justice Powell's opinion in *Bakke*, when the Supreme Court blessed the University of Michigan School of Law's race-conscious admissions policy in 2003, the Court did so because the school had "a compelling interest in a diverse student body" that advanced the school's "proper institutional mission."[89] Given the constitutionally permissible interests the state had in promulgating affirmative action policies under *Grutter*, Proposal 2 did not target remedial policies for past discrimination or policies that prohibit invidious discrimination. Rather Proposal 2, however arguably imprudent, ultimately shut down one method of achieving diversity in higher education. Michigan's public colleges and universities remain free to ask—and do ask—for supplemental information, inviting applicants to express how they might contribute to the student body's diversity.

V. MARRIAGE AND POLITICAL RESTRUCTURING

After state courts in Hawaii and Alaska struck down state statutes that excluded same-sex couples from marriage rights in 1996 and 1998, respectively,[90] both states' constitutions were amended to foil litigation to expand the scope of marriage rights.[91] The Hawaii amendment did

87. *Id.* at 1638.

88. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978).

89. Grutter v. Bolinger, 539 U.S. 306, 329 (2003).

90. Baehr v. Lewin, P.2d 44, 48 (Haw. 1993), *as clarified on reconsideration* (May 27, 1993) *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (Ala. Super. Ct. Feb. 27, 1998).

91. ALASKA CONST. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only

not outright ban same-sex marriage. Rather it removed same-sex marriage claims from the courts' purview. Thus, while same-sex couples' appeals to the judiciary were dead-ended in Hawaii, they could continue to advocate for more inclusive family law on an equal basis with other family law reforms in the legislature.

While it delayed the realization of same-sex couples' fundamental rights, the Hawaii Constitution did not impose a unique burden on same-sex couples in the political branches. No other state followed Hawaii's decision to curb the jurisdiction of state courts without clamping down on the political process. Indeed, every state followed the Alaska model, which banned same-sex relationship recognition as a matter of state constitutional law. Despite having ample ammunition, the legal attacks on state constitutional amendments banning same-sex marriage did not focus on political restructuring with the exception of an early lawsuit in Nebraska.

Nebraska was the third state to amend its state constitution to block the spread of LGB family law equality in 2000. It was the first state to take action in the wake of the Vermont Supreme Court's decision in *Baker v. State*,[92] which resulted in Vermont adopting civil unions for same-sex couples. Nebraska Initiative 416 asked Nebraskans to ratify a constitutional provision that outright forbade affording any state benefits to same-sex couples.[93] Seventy percent of voters approved it.[94]

In 2003, a coalition of pro-LGB rights organizations filed suit in federal court against Nebraska Attorney General Jon Bruning, challenging Initiative 416.[95] The political restructuring theory offered by the organizations gained some traction in 2005 when the groups prevailed in federal district court.[96] That ruling, however, was overturned by the Court of Appeals for the Eighth Circuit, which determined that "the political burden erected by a constitutional

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between one man and one woman."); HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

92. Baker v. State, 744 A.2d 864 (Vt. 1999).

93. Pam Belluck, *Nebraskans to Vote on Most Sweeping Ban on Gay Unions*, N.Y. TIMES (Oct. 21, 2000).

94. Robynn Tysver, *Same-Sex Union Fight Is Not Over*, OMAHA WORLD-HERALD (May 13, 2005).

95. Complaint, Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005) (No. 4:03 cv 3155).

96. "Members of all groups, which include those that are controversial, have a fundamental right to ask for the benefits and protections from the government . . . . Section 29 goes beyond a mere definition of marriage. Plaintiffs are denied access to the legislative process that is afforded to all citizens of the State of Nebraska. As previously set forth, the Nebraska Attorney General interprets Section 29 to mean that any proposed legislation that would give rights to domestic partners would violate Section 29 . . . . Thus, Section 29 makes it more difficult for this group, a minority, to enact favorable legislation." Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980, 1003 (D. Neb. 2005), *rev'd sub nom.* Citizens for Equal Prot. v. Bruning, 455 F.3d 859 (8th Cir. 2006).

amendment [like Nebraska's] would find support" if sexual orientation were a suspect classification.[97] The court rubber-stamped the constitutional amendment under a traditional rational basis review.

Despite the absence of political restructuring theories in marriage litigation targeting state-level marriage discrimination, it was arguably at the heart of the Supreme Court's decision in *Windsor v. United States*.[98] In *Windsor*, the Supreme Court invalidated the Defense of Marriage Act ("DOMA"), a 1996 law aimed to thwart the spread of same-sex marriage. DOMA had altered the Dictionary Act and defined "marriage" and "spouse" to exclude same-sex couples from the over 1,000 federal statutes and regulations that conferred benefits on married couples.[99] Among the many federal benefits that DOMA took out of the reach of same-sex couples were Social Security, housing, taxation, copyright, and veterans' affairs benefits.[100]

The *Windsor* Court held that DOMA violated the equal protection guarantees incorporated in the Fifth Amendment because it had the purpose and effect of imposing inequality on married same-sex couples.[101] The *Windsor* majority opinion was a hybrid of substantive due process, equal protection, and federalism, but it stressed the unusual step Congress took in 1996 to supplant state family law with an extraordinary federal edict:

> The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class.[102]

Undoubtedly, *Windsor* is an amalgam of doctrines in an evolving line of dignity jurisprudence. The opinion, however, is heavily threaded with political restructuring undertones carried from *Romer* and reinforces the principle that dramatic shifts in standard practice raise red flags that call for added judicial inspection. As the next Part details,

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97. Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 866 (8th Cir. 2006), *abrogated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

98. Windsor v. United States, 133 S. Ct. 2675 (2013).

99. Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2012)) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

100. *Windsor*, 133 S. Ct. at 2694.

101. *Id.* at 2693.

102. *Id.*

whether a law causes a substantial departure from traditional practice, like DOMA, is instructive for divining whether a facially neutral law was adopted for improper reasons.

VI. FACIAL NEUTRALITY AND POLITICAL BARRIERS

The problem in challenging municipal civil rights preemption laws is that they are facially neutral and plaintiffs must proffer evidence that their nondiscriminatory justifications are merely pretext—here, that statewide uniformity is simply good economic policy. Business-related defenses of these laws ring hollow and are disingenuous. They do not and should not enjoy immunity from judicial inspection.

Laws that have a disparate impact on minority groups do not violate the Constitution unless the plaintiff demonstrates that the law has a discriminatory intent.[103] While intent is easily discerned when a law explicitly targets a minority group like in *Romer*, a particular challenge arises when laws are facially neutral but were intended to have a discriminatory effect. As the Supreme Court articulated in *Arlington Heights v. Metropolitan Housing Development Corporation*, courts are empowered to conduct a "sensitive inquiry into . . . circumstantial and direct evidence of intent" to divine if a discriminatory motive undergirded legislative action.[104]

The *Arlington Heights* Court delineated five lines of inquiry for courts to examine when inquiring into whether discriminatory interests impermissibly motivated a particular piece of legislation or regulation: (1) the historical backdrop of the controversy, (2) the events preceding the challenged action, (3) significant departures from standard procedures, (4) substantive departures from typical practice, and (5) the legislative or administrative history.[105] An application of the *Arlington Heights* framework to state civil rights preemption laws brings into focus legislators' improper, invidious motivations.

The recent wave of municipal preemption laws cropped up in the wake of a national trend of expanding state statutory protections for LGBT persons and litigation favoring LGBT litigants. Most importantly, these state preemption laws were immediate and direct responses to local governments taking action to expand human rights ordinances to cover LGBT persons while their state legislators resisted the national trend. There is no better example of hostility toward sexual minorities triggering the enactment of restrictive statewide laws than North Carolina. First, H.B. 2 was an unmistakable response to Charlotte

103. Washington v. Davis, 426 U.S. 229, 242 (1978) (explaining that "impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.").

104. Village of Arlington Heights v. Metro. Hous. Div., 429 U.S. 252, 266 (1977).

105. *Id.* at 267–68.

extending civil rights protections to LGBT persons. Second, H.B. 2 was enacted in a rare and hurried special session, a considerable digression from regular legislative procedure.[106] The events leading up to similar legislation in Tennessee and Arkansas are, unsurprisingly, also similar.

In Tennessee, the bill to nullify local antidiscrimination protecting sexual minorities was introduced less than a month after Nashville introduced an ordinance to achieve that very end. The LGBT-inclusive amendment to Nashville's human rights law was introduced in January 2011 and adopted in April 2011.[107] The municipal preemption bill, H.B. 600, was filed in February 2011 and signed into law in May 2011.[108] Dubbed the Equal Access to Intrastate Commerce Act, it limited localities to protecting classes of persons defined under state human rights law.[109] State law did not expressly protect LGBT persons. And while Governor Bill Haslam offered support for the law as a pro-business measure, the bill's author saw his legislation as social policy. The sponsor said H.B. 600 was intended to stop Nashville from "dictating moral policy."[110]

To disabuse observers of any notion that legislators were of illegitimate intent, H.B. 600 also amended Tennessee's statute outlawing discrimination on the basis of creed, color, religion, sex, age or national origin in connection in employment and public accommodations, and against discrimination on the basis of race, color, creed, religion, sex or national origin in housing. H.B. 600 took the added step of defining "sex" under the state's Human Rights Act as "the designation of an individual person as male or female as indicated on the individual's birth certificate" in an attempt to bar claims that LGBT discrimination is sex discrimination under theories of sex stereotyping and gender nonconformity.[111]

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106. *See supra* INTRODUCTION.

107. Nashville, Tenn., Ordinance BL2011-838 (Apr. 8, 2011).

108. H.B. 600, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011); *Bill Information for HB 600*, TENN. GEN. ASSEMBLY, http://www.captiol.tn.gov/Bills/107/Bill/HB0600.pdf; Amanda Terkel, *Tennesee Anti-Gay Bill, Backed By State Chamber of Commerce, Puts Big Business in a Tough Spot*, HUFF POST (May 23, 2011, updated July 23, 2011).

109. H.B. 600; *see also* TENN. CODE ANN. § 4-21-102 (2012).

110. Lisa Keen, *Activists: Anti-gay Tennessee Law Will Be Challenged*, DALLAS VOICE 23 (May 28, 2011) https://digital.library.unt.edu/ark:/67531/metapth239169/m1/23/.

111. H.B. 600. A number of LGBT discrimination claims have advanced under the theory that sexual orientation discrimination is a form of sex discrimination. *See, e.g.*, Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 340–41 (7th Cir. 2017):

> For many years, the courts of appeals of this country understood the prohibition against sex discrimination [under the federal Civil Rights Act] to exclude discrimination on the basis of a person's sexual orientation. The Supreme Court, however, has never spoken to that question. In this case, we have been asked to take a fresh look at our position in light of developments at the Supreme Court extending over two decades. We have done so, and we conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination.

Arkansas' story mirrors North Carolina's and Tennessee's stories. Before 2015, a handful of Arkansas municipalities adopted measures to guarantee equal citizenship in the public square for LGBT persons.[112] Arkansas' municipal preemption law came on the heels of a failed, high-profile, and divisive fight in Fayetteville over a measure favoring LGBT civil rights. On August 19, 2014, the Fayetteville City Council approved a civil rights ordinance to proscribe LGBT discrimination in housing, employment, and public accommodations.[113] After a petition successfully placed the new ordinance up for referendum, voters narrowly overturned the ordinance on December 9, 2014.[114]

Responding to the high profile campaign in Fayetteville and voicing religious opposition to LGBT-inclusive human rights ordinances,[115] state legislators worked to foreclose the issue altogether with SB202.[116] In fact, SB202's sponsor wasted little time to announce his intentions, posting his plan to restrict localities from expanding LGBT rights as vote counting was underway in Fayetteville.[117] Despite naming SB202 the "Intrastate Commerce Improvement Act" to obscure the municipal preemption statute as a vanilla economic regulation, legislators repeatedly referred to the failed Fayetteville ordinance throughout debates.[118] Governor Asa Hutchison used debate over SB202 to voice opposition to LGBT civil rights laws even while he withheld support for the bill.[119]

In each of these states, statewide laws that choked off rights-making at the local level were direct responses to pro-LGBT campaigns. That these states gave localities freedom to promulgate civil rights protections before state usurpation of local power constitutes a substantive departure from usual practice. Applying the *Arlington*

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112. Max Brantley, *Fayetteville Adopts Civil Rights Ordinance 53-47*, ARK. TIMES (Sept. 8, 2015, 8:00 PM) (listing Little Rock, Maumelle, North Little Rock, Pulaski County, Garland County and Eureka Springs as banning LGBT discrimination by local ordinance).

113. Fayetteville, Ark., Ordinance 5703 (Aug. 20, 2014) (repealed 2014).

114. Todd Gill, *Voters Repeal Civil Rights Ordinance in Fayetteville*, FAYETTEVILLE FLYER (Dec. 9, 2014).

115. *Updated: Bill Barring Discrimination Ordinances at City, County Level Becomes Law*, ARK. NEWS (Feb. 24, 2015) ("Some supporters [of SB202] also have said they support the right of businesses to deny certain services to customers based on sexual orientation—such as baking a wedding cake for a same-sex couple—and that the Fayetteville ordinance would have interfered with that right.").

116. S.B. 202, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); *Bill Status History*, ARK. GEN. ASSEMB., http://www.arkleg.state.ar.us/assembly/2015/2015R/Pages/BillInformation.aspx?measureno=sb202 (last visited Nov. 21, 2017).

117. *See* Brantley, *supra* note 112 (reporting on a tweet from State Sen. Bart Hester calling for a state preemption law as election results were tabulated).

118. *See* John M. A. DiPippa, *Bias in Disguise: The Constitutional Problems of Arkansas's Intrastate Commerce Improvement Act*, 37 U. ARK. LITTLE ROCK L. REV. 469, 483 (2015).

119. Michael R. Wickline, *Senate Approves Ban on Localities' Anti-Bias Laws*, DEMOCRAT GAZETTE (Feb. 10, 2015, 1:00 AM).

Heights factors in tandem with the *Hunter* and its progeny of political restructuring cases, courts can readily sweep away the false economic pretenses offered to justify stamping out home rule to blockade rights for a disfavored community.

CONCLUSION

In a majority of states, it remains legal to deny people housing, employment, or services on the basis of their sexual orientation or gender identity.[120] The LGBT community has taken great strides to push back against the harms of discrimination, successfully securing municipal antidiscrimination laws in discrete municipal jurisdictions.[121] While an individual's right to enjoy full, equal citizenship should not depend on their zip code, hard-wrought municipal protections are a crucial step toward achieving more robust civil rights protections.

Hostile state legislators must not be allowed to stand athwart the advancement of civil rights and restructure government to harm LGBT persons. Just as the courts dismantled state and local laws intended to stifle racial antidiscrimination policies at the local level, courts must strike down municipal preemption laws aimed to harm the LGBT community, and reinvigorate the democratic process. Importantly, judges must not give credence to legislative window dressing crafted in anticipation of litigation. Courts should rule with clarity that business "concerns" are insufficient to deny persons the mere opportunity to meaningfully ask for basic civil rights protections from their local representatives. Indeed, it makes little sense for the Constitution to protect same-sex couples' right to form intimate relationships and marry,[122] transgender persons' right to be free from discrimination in the public workplace and schools,[123] and yet allow states to deny LGBT persons a seat at the table in municipal government.

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120. Katy Steinmetz, *Why so Many States Are Fighting over LGBT Rights in 2016*, TIME (Mar. 31, 2016).

121. *Local Non-Discrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, www.lgbtmap.org/equality-maps/non_discrimination_ordinances (listing municipal LGBT civil rights protections).

122. Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015):

> Especially against a long history of disapproval of their relationships, [the] denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.

123. *See* Glenn v. Brumby, 663 F.3d 1312,1321 (11th Cir. 2011) (ruling in favor of transgender woman's employment discrimination claim under the Equal Protection Clause); Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1050–51 (7th Cir. 2017) (holding that the Equal Protection Clause protects transgender public school students from discrimination).

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