Note

Ruling by Numbers: Political Restructuring and the Reconsideration of Democratic Commitments After *Romer v. Evans*

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I. INTRODUCTION

Over the last decade, politicians and citizen action groups have aggressively deployed direct democratic procedures in order to repeal state and municipal legislation benefiting minorities. The federal courts have been tentative in their constitutional review of these repeals.[1] Direct

1. *Compare* Romer v. Evans, 517 U.S. 620 (1996) (applying minimal equal protection scrutiny to Amendment 2, an anti-gay amendment to the Colorado Constitution), *and* Valeria G. v. Wilson, 12 F. Supp. 2d 1007 (N.D. Cal. 1998) (denying a preliminary injunction to stay the enforcement of Proposition 227, an anti-bilingual education amendment to the California Education Code), *with* Evans v. Romer, 854 P.2d 1270 (Colo. 1993) (applying strict scrutiny to Amendment 2 under equal protection), *and* Ruiz v. Hull, 957 P.2d 984 (Ariz. 1998) (ruling unconstitutional Amendment XXVIII to the Arizona Constitution, which required state subdivisions to conduct all official business in English). Federal courts have been similarly tentative in other cases. *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) (refusing to rule on the constitutionality of Amendment XXVIII because the case was moot and the state courts had not yet had an opportunity to interpret the law); Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997) (denying a preliminary injunction to stay the enforcement of Proposition 209, a state constitutional amendment prohibiting racial and gender preferences at all levels of California government); Equality Found. of Greater Cincinnati v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995) [*Equality Foundation I*] (upholding the denial of a preliminary injunction to stay the enforcement of Article XII, an anti-gay amendment to the Cincinnati city charter), *vacated*, 518 U.S. 1001 (1996), *aff'd on remand*, 128 F.3d 289 (6th Cir. 1997) [*Equality Foundation II*], *reh'g denied*, 1998 WL 101701 (6th Cir. Feb. 5, 1998) [*Equality Foundation III*], *cert. denied*, 119 S. Ct. 365 (1998).

democracy has been called the "most democratic of procedures,"[2] under the view that the purest form of democratic governance is strict majoritarianism, or ruling by numbers. However, the laws reviewed in these cases do more than merely repeal minority protections. They also restructure the political processes of state and local governments in such a way as to impose special burdens upon the interests of minority groups who must seek beneficial legislation at ever higher and more remote levels of government. Three decades ago, the Supreme Court effectively applied strict scrutiny to alterations of state and municipal political processes intended to repeal fair housing laws and to foreclose the future enactment of policies benefiting racial minorities.[3] Recent decisions, however, have made the status of this precedent uncertain.

This Note will examine political restructuring jurisprudence under the Equal Protection Clause, focusing especially upon the Supreme Court's ruling in *Romer v. Evans*. The *Romer* Court held unconstitutional an amendment to the Colorado Constitution (Amendment 2) adopted through a statewide referendum, prohibiting any branch of the state government or any subordinate governmental agency from taking action designed to protect persons on the basis of their homosexual or bisexual orientation. The Court refused to determine whether heightened scrutiny was appropriate to review the anti-gay amendment at issue, holding instead that Amendment 2 was unconstitutional even under the most permissive level of judicial scrutiny. The Court furthermore proclaimed an alternative per se rule under which "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[4]

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2. *Romer*, 517 U.S. at 647 (Scalia, J., dissenting). Additionally, some political theorists have praised direct democracy as a means of revitalizing democratic politics by, for example, breaking the stranglehold of entrenched parties on the political process, decreasing the influence of special interests, and inviting laypersons to participate in policymaking. *See* JAMES S. FISHKIN, THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY 174-75 (1995) (arguing that the introduction of deliberative polling at various levels of American democracy would have the galvanizing effect of promoting considerate citizen participation in public affairs); STEVEN D. LYDENBERG, COUNCIL ON ECONOMIC PRIORITIES, BANKROLLING BALLOTS UPDATE 1980: THE ROLE OF BUSINESS IN FINANCING BALLOT QUESTION CAMPAIGNS 13 (1981) ("The initiative process was established specifically to counteract influences which special interests have over the legislative process."); Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1357 (1985) (reviewing DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984)) (stating that direct democracy opens opportunities for shaping policy agendas to groups that are not "regular players in the game of legislation"). *But see* MAGLEBY, *supra*, at 196-99 (concluding that direct democracy neither increases voter participation nor rescues public policymaking from distortion by special interest groups); Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 18 (1996-1997) (arguing that "special interests, not ordinary citizens, generally form the terms of the debate concerning ballot measures").

3. *See* Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967).

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

Under normal equal protection analysis, heightened scrutiny is triggered upon the use of a suspect classification or the infringement of a fundamental interest.[5] Sexual orientation, however, has not been designated as a suspect classification.[6] The *Romer* Court extended protection against disadvantageous political restructuring to gays and lesbians both without a finding of suspect classification and without invoking the doctrinal apparatus established in the racial restructuring cases. The majority opinion in *Romer* exposes the Court's present inclination to ration the judicial tools of heightened scrutiny and suspect classification in cases in which it might be requested to extend their application to minorities not traditionally

5. The Court has articulated a limited set of fundamental interests that may trigger strict scrutiny under equal protection. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (the right to unrestrained travel across state lines); Reynolds v. Sims, 377 U.S. 533 (1964) (the right to vote). However, the level of judicial scrutiny applied to a particular state action is generally determined by the classification used. Racial classifications draw "the most rigid scrutiny," Korematsu v. United States, 323 U.S. 214, 216 (1944), requiring the governmental defendant to demonstrate that its action is narrowly tailored to serve a compelling governmental interest, regardless of whether the action was intended to benefit the racial groups so classified. *See* Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995) (applying strict scrutiny to race-based affirmative action). Gender classifications draw intermediate scrutiny, requiring the state to show that the classification "serves important government objectives and is . . . substantially related to . . . those objectives." United States v. Virginia, 518 U.S. 515, 533 (1996) (internal quotation omitted). Classifications that are not considered suspect draw the lowest level of scrutiny, rational basis review. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (refusing to grant heightened scrutiny to protect the mentally ill because mental illness is not a suspect classification); *see also* Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 127 ("The Equal Protection Clause is directed at the legality of classifications.").

In contrast, the political restructuring cases are not strictly classification-based, but appear to infer classification from the fact that a political burden has been placed squarely upon the shoulders of a specific minority. *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 485 (1982) ("[W]hen the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly 'rests on distinctions based on race.'" (citation omitted)); *Hunter*, 393 U.S. at 391 ("[A]lthough 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."); *see also* Gregory Ellis, Note, *Rethinking the* Hunter *Doctrine*, 8 S. CAL. INTERDISC. L.J. 323, 333-34 (1998) (arguing that *Hunter* and its progeny invalidated laws that were facially neutral but nevertheless found their racial impact relevant to the application of heightened scrutiny); *cf. Reitman*, 387 U.S. at 381 (stating that a facially neutral state constitutional amendment protecting property rights "was intended to authorize, and does authorize, racial discrimination in the housing market").

6. While the Supreme Court has not weighed in on the issue, several circuits have denied suspect-class status to gays and lesbians. *See, e.g.*, *Equality Foundation II*, 128 F.3d at 293 & n.2; Holmes v. California Army Nat'l Guard, 124 F.3d 1126, 1132 (9th Cir. 1997); Jantz v. Muci, 976 F.2d 623, 629 (10th Cir. 1992); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989). *But see* Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari) (indicating that homosexuals might deserve suspect-class status because they "constitute a significant and insular minority of this country's population" and are "particularly powerless to pursue their rights openly in the public arena"); Watkins v. United States Army, 837 F.2d 1428, 1444-48 (9th Cir.) (concluding that homosexuals constitute a suspect class because they exhibit immutability of their distinctive social trait, political powerless, and a history of discrimination and prejudice), *amended by* 847 F.2d 1329 (9th Cir. 1988), *vacated and aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc).

construed as politically powerless and therefore deserving of special judicial protection.[7]

The political restructuring cases, however, hold a special place in equal protection jurisprudence: They characteristically involve acts of higher lawmaking[8] damaging to the interests of a particular social minority.[9] These are cases in which acts of state discrimination not only reflect pre-existing political powerlessness, but also actively contribute to conditions of powerlessness. In *Romer*, the Court embraced the possibility that the Constitution might intervene in democratic politics when acts of political

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7. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (identifying as suspect classifications those groups "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian process"); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (suggesting that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities"). *But cf.* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485 (1998) (arguing that the Court should return to a political-powerlessness standard because standards of immutability and invisibility have become overdeterminative of the amount of protection given to marginalized groups).

8. I follow the definition of "higher lawmaking" provided by Anthony Dillof: "laws regulating the power of other institutions." Anthony M. Dillof, Romer v. Evans *and the Constitutionality of Higher Lawmaking*, 60 ALB. L. REV. 361, 380 (1996); *see also* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6 (1991) (defining "higher lawmaking" through procedural characteristics rather than in close relation to natural law). As described by Professor Ackerman, decisions of higher lawmaking are undertaken in the requisite "deliberative fora," where particular initiatives are brought before "the People" and resolved on their merits. This is to be distinguished from the process of normal lawmaking in which the People delegate their decisionmaking power to representatives through elections. *See* 1 ACKERMAN, *supra*, at 6. In this sense, higher lawmaking may occur at federal, state, and municipal levels whenever an amendment to a governing charter or constitution is considered. In contrast, Ackerman defines "higher law" as "a set of fundamental commitments" under the law that elected officials are not empowered to modify. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 742 (1985).

9. Because they involve higher lawmaking, the political restructuring cases tend to implicate acts of direct democracy. This Note will not attempt to answer the general question of what are the proper procedural and substantive restraints placed on the exercise of direct democracy. For notable critiques of direct democracy, as well as recommendations for constitutional restraint, see Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143 (1995) (suggesting a supermajority requirement for constitutional amendments through statewide initiative in order to protect the integrity of higher lawmaking); Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978) (arguing that the civil rights of racial minorities are particularly vulnerable under direct democracy); Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998) (arguing that in order for direct democracy to control against its tendency to distort information, deliberation must—and yet presumably cannot—include a means for participants to express their priorities); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990) (presenting the "counter-intuitive" thesis that judicial review of direct democracy calls for less judicial restraint as compared with the review of representative democracy); Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245 (1997) (arguing more generally that the civil rights of social minorities are unacceptably vulnerable under direct democracy); and Clayton P. Gillette, *Is Direct Democracy Anti-Democratic?*, 34 WILLAMETTE L. REV. 609 (1998) (discussing problems of direct democracy, such as insufficient provision of information and capture by special interests).

restructuring impose a "special disability"[10] upon a minority group, regardless of whether that group currently qualifies as a suspect class. Thus, the Court's reasoning engenders an open-ended opportunity to "reconstruct"[11] significant portions of the equal protection doctrine. This Note will attempt to determine what vision of democratic equality best unlocks the meaning of the political restructuring cases after *Romer*, and so can best serve as a guide to the elaboration of future doctrine.

Process-based theories of equal protection have long recognized that some social minorities must receive heightened judicial protection if they are to be prevented from becoming perpetual losers in our political system.[12] Positivist political theorists have acceded to the process-perfection school insofar as it seeks to restore the conditions under which disadvantaged minorities may participate equally in coalition politics.[13] Effective participation by minorities requires that neither their interests nor their identities be so severely stigmatized as to spoil the receptiveness of

10. Romer v. Evans, 517 U.S. 620, 631 (1996).

11. By "reconstruction" I mean that *Romer* affords lawyers an opportunity to reconceive of the constitutional guarantee of equal protection in a way that potentially enlarges its scope. One modest way of effecting this reconstruction is to interpret *Romer* as a signal by the Court that sexual orientation can function constitutionally in a way analogous to suspect classification. Another is to place *Romer* along a continuum of equal protection cases in which state actions were invalidated under rationality review, thus demonstrating the ability of the Equal Protection Clause to protect gays and lesbians, as well as members of other non-suspect classifications, without recourse to higher levels of scrutiny. *See* Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 63 (1996) (hypothesizing a continuum of rationality-review equal protection cases "reflect[ing the Court's] understanding that other groups, not only African Americans, may be subject to unreasoning hatred and suspicion"). Still other commentators have discovered in *Romer* a variety of previously hidden substantive constitutional commitments to preclude governmental collusion in the maintenance of status hierarchies. *See, e.g.*, Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203, 217-20 (1996) (contending that the plaintiffs in *Romer* should have succeeded, regardless of the Equal Protection Clause, because Amendment 2 constituted a status-based punishment impermissible under the Bill of Attainder Clause); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2316-20 (1997) (theorizing a constitutional commitment to the disestablishment of social-status hierarchies supported by Justice Kennedy's claim that the Constitution will not abide the desire to harm a politically unpopular group (referring to *Romer*, 517 U.S. at 639)); Barbara J. Flagg, *"Animus" and Moral Disapproval: A Comment on* Romer v. Evans, 82 MINN. L. REV. 833 (1998) (arguing that *Romer* establishes that moral disapproval toward an unpopular minority cannot constitute a legitimate interest under equal protection); Joseph S. Jackson, *Persons of Equal Worth:* Romer v. Evans *and the Politics of Equal Protection*, 45 UCLA L. REV. 453 (1997) (interpreting *Romer* to establish that government must treat all citizens as persons of equal worth).

12. For the most influential articulation of a process-based theory of judicial review, see JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). Professor Ely articulates a "representation-reinforcing" function for the judiciary, according to which courts should intervene in order to correct democratic malfunction whenever "representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or prejudiced refusal to recognize commonalities of interest." *Id.* at 103.

13. *See, e.g.*, Ackerman, *supra* note 8. But Professor Ackerman cautions that the traditional criteria for political powerlessness—the standards of discreteness and insularity articulated in Justice Stone's famous footnote number four to *Carolene Products*—are in fact poor indicia for political effectiveness. *See id.* at 720 (criticizing the *Carolene* standard as "indiscriminate").

potential coalition partners.[14] In a tiered democratic regime such as our own, majorities may be constructed not only by horizontally rearranging the coalition but also by vertically stepping upward in the level of decisionmaking institutions. Thus, a political loser at one level of government may seek an alternative, higher level at which to construct the majority that will enact its particular point of view.[15] In the case of anti-gay rights initiatives, this means that voters in a local context where gays and lesbians are socially integrated may not view their acceptance of homosexual lifestyles to produce an impermissible social or material cost. They may, therefore, support legal protections for gays and lesbians. But majorities constructed at a jurisdictional level removed from the same social situation may be more easily convinced of the costs of tolerance, and they may oppose such protections on the basis of this remote threat.

Throughout this Note, I will refer to the technique of seeking a sympathetic majority at a higher level of governmental decisionmaking as *strategic majority construction.* This term describes the scenario in which a majority of the electorate uses its majoritarian status at one jurisdictional level in order to repeal the rights of an unpopular minority at various sub-jurisdictional levels of government.[16] The consequence of repealing those

14. *See, e.g.*, PAUL FRYMER, UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA 10 (1999) (discussing African-American voters as an example of a group frequently unable to participate effectively in electoral coalitions because the appeal by political leaders to their interests may cause white voters to resign from the coalition); *see also* WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS 103 (1962) (stating that the success of coalition-building must be limited by the principle that "no decision can be undertaken in such a way that losers would prefer to resign rather than acquiesce").

15. Such a group may additionally benefit from the change in decisionmaking rules attached to the superordinate level of government, as well as from the fact that the decision is now somewhat removed from the intimate situation in which it was first considered. More crucial, however, is the fact that majorities tend not to perceive the change either in rules or in venue as affecting their claim to democratic legitimacy. Rather, precisely because their exercise of power is consistent with formal democratic rules, voters in the majority are easily convinced of their authority to entrench political and social hierarchies. *See* IAN SHAPIRO, DEMOCRACY'S PLACE 238 (1996) ("[P]erhaps especially, when they acquire it legitimately, power holders all too easily convince themselves that their authority should expand in space and time . . . and that subordinates lack the requisite ability to ascend from their inferior roles."). As Professor Shapiro has elaborated, the "allure of power can . . . divert power holders within hierarchies from their legitimate goals," turning their attention to campaigns of domination. *Id.* Thus, a reliance upon hierarchy tends to transform itself into an interest in hierarchy and consequently into domination. For this reason, principles of democratic equality should prevent democratic institutions from being used to establish and to legitimate unjust social and political hierarchies. *Cf.* Balkin, *supra* note 11, at 2368 (arguing that "we care about the inability of minority groups to form coalitions" because democracy entails a substantive commitment to resist "unjust status hierarchies," regardless of whether they are supported by a majority).

16. The idea of strategic majority construction derives from the familiar principle that democratic majorities are contingent and multiform rather than static and uniform entities. *See, e.g.*, Ackerman, *supra* note 8, at 720 ("According to [the pluralist] view, it is a naive mistake to speak of democracy as if it involved rule by a single, well-defined majority over a coherent and constant minority."); Franz Lehner & Hans Gerd Schütte, *The Economic Theory of Politics: Suggestions for Reconsideration*, *in* POWER AND POLITICAL THEORY 139, 157 (Brian Barry ed.,

acts at a higher governmental level is that the institutions ordinarily entrusted to make such determinations will be forced to operate under a gag rule insofar as future acts affecting the rights of the impacted minority are concerned. The issue for judicial consideration is whether such acts of political restructuring should be subjected to special review under the Equal Protection Clause. This Note will argue that they should be.

Part II will discuss *Romer v. Evans* as a pivotal episode in the Supreme Court's political restructuring jurisprudence. In that case, the Court expanded its view that political majorities should be prohibited from imposing special burdens upon minorities to include the protection of gays and lesbians. This Part will argue that, in its political restructuring decisions prior to *Romer*, the Court did not rely upon suspect classification doctrine when it interpreted acts of higher lawmaking imposing a political disability upon a racial minority to trigger strict scrutiny. This Part concludes with the demonstration that the *Romer* Court's failure to reconcile its decision with the racial restructuring cases has caused doctrinal instability.

Part III will examine three views of democratic equality: formalism, process perfection, and deliberative politics. This Part will argue that the third view synthesizes aspects of the first two and yet, in its most general form, remains inadequate to describe with precision the commitment to democratic equality animating the restructuring cases. This Part will consider in particular how one instrument of the deliberative view, the judicial exercise of "decisional minimalism,"[17] may serve as a means to uphold the same commitment to facilitate democracy that is sometimes claimed as the justification for acts of restructuring. It will argue that the danger of decisional minimalism is that it may lead to debilitating doctrinal confusions. This Part will argue in particular that minimalism cannot be justified when the Court has purposefully avoided determining the significance of structural rather than substantive acts.

1976) ("[P]olitical decisionmaking in terms of votes and elections represents a process of changing coalitions that never allows for a stable majority.").

The political restructuring cases propose not simply the question whether majoritarian politics authorizes the repeal of minority protections at any level of government, regardless of the level at which they were initially enacted, but in addition the question whether political actors should be permitted to manipulate the political process precisely in order to construct the majority that will retrench minority interests. The idea of strategic majority construction is intended to call attention to the fact that certain manipulations of political process create the opportunity for certain kinds of majorities to exercise power. *But see* Ackerman, *supra* note 8, at 718-19 (arguing that process theory should also be concerned with the problem of "ineffective majorities" caused by impediments to mass organization). This Note will argue that the political restructuring cases reflect the Court's willingness to curtail the effects of strategy, or power, in politics within an equal protection framework. *See infra* Section IV.B.

17. *See* Sunstein, *supra* note 11, at 6-7 (defining "decisional minimalism" as "the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided").

This Part will also discuss how acts of higher lawmaking, whether at the state or the municipal level, function as gag rules to bind the actions of lower governmental institutions.[18] Either by conserving resources or by retarding activity in a controversial area of legislation, such as antidiscrimination law, gag rules may in fact aid democracies to function. Nevertheless, the kinds of gag rules employed in the political restructuring cases include prohibitions against the consideration of minority interests, thereby generating equal protection controversies. Part III concludes by highlighting problems posed by the use of gag rules, ultimately repudiating the use of the deliberative vision of democratic equality to justify the subjugation of social minorities through higher lawmaking.

Part IV will provide an alternative reading of *Romer* in which the Court's prohibition against the creation of a special disability for minority groups is developed as a core constitutional insight. Although this Part is critical of the reasoning presented in Justice Kennedy's majority opinion, it nevertheless interprets the opinion's fundamental prohibition against imposing political disability upon a minority group to be consistent with the earlier line of restructuring cases. This Part ultimately provides an explanation of why *Romer* is a more egregious, and therefore an "easier," case than the racial restructuring cases, in that Amendment 2 specifically targeted gays and lesbians for unequal treatment.

Part V develops the vision of democratic equality articulated in *Romer*. This Part argues that constitutional democracy contains a commitment to prevent democratic structures from burdening identifiable social groups through a coordinate form of political and social disability. This Part will attempt to revise traditional concerns over unjust classification within the structural dilemma presented by political restructuring. Under this reconstructed model, suspect classifications will not be the lone trigger for heightened scrutiny. Instead, acts of higher lawmaking will draw heightened scrutiny whenever they withdraw minority interests from equal consideration. The final section of this Part will apply the reconstructed doctrine to a variety of cases and hypothetical situations. Part VI concludes by summarizing the arguments of this Note and claiming that this structural account of the political restructuring cases, and the subtending democratic commitments that rationalize their decisions, is a necessary first step toward enriching our understanding of equal protection.

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18. Political theorists have endorsed the use of gag rules in constitutional democracies as a legitimate means for majorities to bind themselves (as well as the minorities under their jurisdiction) against the future possibility of exerting their legitimate authority in a particular area. *See, e.g.*, Stephen Holmes, *Gag Rules or the Politics of Omission*, *in* CONSTITUTIONALISM AND DEMOCRACY 19 (Jon Elster & Rune Slagstad eds., 1988). Holmes defines gag rules through a variety of examples from standing law to constitutional amendments. Gag rules function by removing a particular issue from institutional consideration, even to the point of "officially" or "effectively" discussing its merits.

II. *ROMER V. EVANS* AND THE INSTABILITY OF POLITICAL RESTRUCTURING JURISPRUDENCE

A. Romer v. Evans

On November 3, 1992, the Colorado electorate enacted Amendment 2 to the state constitution by a vote of 53% to 47% in a statewide referendum.[19] The amendment was largely a response to several Colorado municipal ordinances that prohibited discrimination on the basis of sexual orientation.[20] Amendment 2 repealed these ordinances only insofar as they protected individuals on the basis of their homosexual, lesbian, or bisexual status; the State of Colorado claimed that the amendment was not intended to repeal general antidiscrimination ordinances that extended protection on an unrelated basis (for example, racial or legal status). The amendment also prohibited "all legislative, executive or judicial action at any level of state or local government designed to protect the named class."[21] In addition to responding to local statutes, Amendment 2 emerged from a national political and social controversy regarding the validity and of gay rights.[22]

The cities of Denver, Boulder, and Aspen, whose antidiscrimination ordinances were repealed by Amendment 2, sued to invalidate the

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19. *See* Evans v. Romer, 882 P.2d 1335, 1338 (Colo. 1994) (en banc). Amendment 2, entitled "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation," provided as follows:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby 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.

20. *See* Romer v. Evans, 517 U.S. 620, 623-24 (1996); *see also, e.g.*, BOULDER REV. CODE § 12-1-1 (defining "sexual orientation" as "the choice of sexual partners, i.e., bisexual, homosexual or heterosexual"); DENVER REV. MUN. CODE, art. IV, § 28-92 (defining "sexual orientation" as "[t]he status of an individual as to his or her heterosexuality, homosexuality or bisexuality").

21. *Romer*, 517 U.S. at 624.

22. *See* Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905, 1905 & n.1 (1993) (noting that the laws of 139 jurisdictions in the United States protect gays and lesbians from discrimination); *id.* at 1908-09 (describing national political campaigns organized to repeal these laws). In the early 1990s, measures similar to Amendment 2 were reviewed by statewide referenda in Oregon, Idaho, and Maine. *See* Jackson, *supra* note 11, at 458 n.24 (listing several media sources for coverage of these initiatives). Although the fact was not reflected in its language, the sponsors of Amendment 2 (like those of similar amendments in other states) portrayed antidiscrimination legislation benefiting gays and lesbians as the first step in a gay rights agenda that would ultimately lead to a social plague, including child molestation. *See, e.g.*, Brief for Respondents at 48, *Romer* (No. 94-1039) (reporting a leaflet distributed by Amendment 2 sponsors that stated that "[s]exual molestation of children is a large part of many homosexuals' lifestyle—part of the very lifestyle 'gay-rights' activists want government to give special class, ethnic status!").

amendment nine days after its adoption. The trial court granted a preliminary injunction against enforcement of the amendment, and the case reached the Colorado Supreme Court on appeal. The state supreme court decided the case according to the equal protection doctrine established to review popular lawmaking targeting unpopular groups.[23] The court found that Amendment 2 should be reviewed under strict scrutiny, because it denied the "fundamental right to participate equally in the political process" to an "identifiable class of persons."[24] The court upheld the injunction and remanded the case for further proceedings. The United States Supreme Court rejected this reasoning but approved the result, invalidating the Colorado amendment under the rational basis test without relying upon the *Hunter* doctrine[25] to justify heightened scrutiny.

Justice Kennedy's majority opinion relied upon two separate arguments. Kennedy first claimed that Amendment 2 failed the equal protection challenge because it violated a novel per se rule against imposing a "broad and undifferentiated disability on a single named group."[26] Second, he argued that the amendment's "sheer breadth is so discontinuous with [the state's offered justifications] that the amendment seems inexplicable by anything but animus towards the class that it affects."[27] Justice Kennedy rejected the state's claim that Amendment 2 merely "puts gays and lesbians in the same position as all other persons"[28] by repealing the so-called "special rights" conferred under several municipal ordinances. Rather, because these ordinances extended protection against discrimination on the basis of sexual orientation, removing their protection as to gays and lesbians would not repeal the statutes entirely: Heterosexuals would retain the same protection repealed from the targeted class.[29] While this observation does something to support the Court's contention that Amendment 2 was based impermissibly upon animus,[30] it does little to explain just how the amendment constituted a "denial of equal protection of

23. *See* Evans v. Romer, 854 P.2d 1270, 1279-82 (Colo. 1993) (discussing Supreme Court precedent); *see also infra* Section II.B.

24. *Evans*, 854 P.2d at 1282.

25. *See infra* Section II.B.

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

27. *Id.*

28. *Id.*

29. Kennedy went so far as to suggest (probably correctly) that these protections are in fact "taken for granted by most people either because they already have them or do not need them." *Id.* at 631. Therefore, it is absurd that they should be maintained for this social majority to whom they are either irrelevant or effectively secured without need of additional protection, and withdrawn from those for whom they have some meaning.

30. For the position that the Court's finding of animus remains woefully unsupported, see Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 135-36 (1997); Robert F. Nagel, *Playing Defense*, 6 WM. & MARY BILL RTS. J. 167, 171-72 (1997); and Roger Craig Green, Note, *Interest Definition in Equal Protection: A Study of Judicial Technique*, 108 YALE L.J. 439, 447-48 & n.31 (1998).

the laws in the most literal sense."[31] Justice Kennedy explained that Amendment 2 represented a kind of per se violation of equal protection because it declared "that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government."[32]

Justice Scalia rejected the Court's arguments. Contrary to the majority's conclusion that Amendment 2 emanated from a bare desire to harm gays and lesbians, Justice Scalia characterized the amendment as "rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."[33] Referring to the Court's decision in *Bowers v. Hardwick*,[34] Justice Scalia claimed that "[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct."[35] This argument is attractive because Justice Kennedy conspicuously declined to discuss *Bowers* at all. The argument is incomplete, however, because it depends upon collapsing the distinction between conduct and status.[36] Furthermore, even at its most formidable, the argument can prevail only against the Court's application of rational basis scrutiny and not against its per se argument.[37]

In response to the per se argument, Justice Scalia declared that "[t]he central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others."[38] Scalia illustrated his observation by claiming that, under the majority's logic, "a state law prohibiting the award of municipal contracts to relatives of mayors or city councilmen"[39] would violate equal protection because these relatives would have to vindicate their collective interest through a higher level of political decisionmaking than would non-relatives who need only plead their case before the municipality. One may take exception with this interpretation of the per se rule, by claiming that the rule prohibits not the unequal burdens caused by political restructuring but the status harms caused by selecting a

31. *Romer*, 517 U.S. at 633.
32. *Id.*
33. *Id.* at 636 (Scalia, J., dissenting).
34. 478 U.S. 186 (1986) (upholding a gay man's conviction under an anti-sodomy statute on the grounds that homosexual sodomy is not a constitutionally protected activity).
35. *Romer*, 517 U.S. at 641 (Scalia, J., dissenting).
36. *See* Amar, *supra* note 11, at 231-32.
37. *See The Supreme Court, 1995 Term—Leading Cases*, 110 HARV. L. REV. 135, 163 (1996).
38. *Romer*, 517 U.S. at 639 (Scalia, J., dissenting).
39. *Id.*

particular group from which to withhold basic legal protections.[40] Under this view, however, courts might resist using heightened scrutiny to review the repeal of *preferential* policies, such as affirmative action, because the latter involve "special" protections the retrenchment of which is less easily attributable to an invidious purpose.

Professor Cass R. Sunstein has further developed this view. Sunstein argues that the "underlying judgment in *Romer* must be . . . that it is no longer legitimate to discriminate against homosexuals as a class simply because the state wants to discourage homosexuality or homosexual behavior."[41] Instead, the state must justify its actions on "some other, public-regarding ground."[42] Sunstein suggests that the state might satisfy this burden by showing that laws disadvantaging homosexuals were constructed in order to curb behaviors that harm legitimate governmental interests.[43] This interpretation fails to resolve whether the repeal of "special" protections would similarly require a public-regarding justification since the state in denying them could not be said to have discriminated.[44] More crucially, Sunstein's interpretation seems both to overstate the nature of the state's accountability to homosexuals (and other minority groups) after *Romer*[45] and to understate the significance of political restructuring to the Court's condemnation of Amendment 2 as a per se violation of equal protection.

Justice Kennedy portrayed Amendment 2 to have created a "special disability" for gays and lesbians by withholding from them the "safeguards that others enjoy or may seek without constraint."[46] He further described

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40. *See, e.g.*, *The Supreme Court, 1995 Term—Leading Cases*, *supra* note 37, at 161 ("[T]he per se rule is not about levels of decisionmaking, but about the very meaning of equal protection of the laws."); *see also* Jay S. Bybee, *The Equal Process Clause: A Note on the (Non)relationship Between* Romer v. Evans *and* Hunter v. Erickson, 6 WM. & MARY BILL RTS. J. 201, 227 (1997) ("[T]he problem in *Romer* is not the process.").

41. Sunstein, *supra* note 11, at 62.

42. *Id.* On this point, while citing Sunstein in order to describe the limitations of the *Romer* holding, the Sixth Circuit crucially misstates his meaning. *See Equality Foundation III*, 1998 WL 101701, at *1 (6th Cir. Feb. 5, 1998) (falsely equating Sunstein's statement that *Romer*, as an example of decisional minimalism, leaves open issues for further democratic deliberation with the meaning that the Court's ruling is narrowly crafted to decide the factual question of relocating decisionmaking power at a higher level of government (citing Sunstein, *supra* note 11, at 7)). That so much explanation should produce so much confusion may itself be a telltale sign of *Romer*'s explanatory deficiencies.

43. *See* Sunstein, *supra* note 11, at 98.

44. Professor Sunstein suggests that this is a plausible view in an earlier work discussing the logic of the racial restructuring cases. *See* Sunstein, *supra* note 5, at 157 ("Race-specific classifications are not . . . all the same. Opposition to busing for purposes of racial balance is different from opposition to antidiscrimination legislation, because it is more easily supportable with noninvidious justifications."). This view does find limited support in Justice Kennedy's opinion. *See, e.g.*, *Romer*, 517 U.S. at 631 ("We find nothing special in the protections Amendment 2 withholds.").

45. Indeed, if under minimal scrutiny courts should inquire whether a particular minority *deserved* to be disadvantaged, this innovation seems to obviate the need for tiered scrutiny.

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

Amendment 2 as having abandoned homosexuals to "obtain specific protection against discrimination only by enlisting the citizenry of Colorado."[47] Justice Kennedy invoked the per se rule in order to protect gays and lesbians from being disabled by a special political impediment to the pursuit of their interests through the democratic process. Thus, his opinion suggests a moderate alternative to both Justice Scalia's and Professor Sunstein's interpretations: that an act of political restructuring singling out a particular minority for the repeal of policies benefiting its interests, thereby subjecting its subsequent policy ventures to a higher and more remote level of political decisionmaking, should be considered a per se violation of equal protection. Although Justice Kennedy's neglect of earlier restructuring precedent complicates the work of tracing a connection between *Romer* and those cases, the remainder of this Note will demonstrate that such a connection not only is possible, but is fruitful as a means of illuminating *Romer* and of resolving many of the controversies that have issued in its wake.

B. *The* Hunter *Doctrine*

In 1964, the Akron, Ohio, city council enacted a fair housing ordinance prohibiting discrimination in the transfer of real property on the basis of race, religion, or ancestry. Opponents of the ordinance responded by petitioning for an amendment to the city charter, requiring approval by a majority of the electorate for any city ordinance that regulated the transfer of real property "on the basis of race, color, religion, national origin or ancestry."[48] At a general election, the amendment was adopted as section 137 of the Akron city charter. Nellie Hunter, an African-American citizen of Akron, filed a complaint under the pre-existing ordinance after a real estate agent refused to show her any homes whose owners had articulated a prejudice against black buyers. Her claims were denied on the ground that section 137 had repealed the city's fair housing ordinance.[49] In *Hunter v. Erickson*,[50] the Supreme Court overturned the state court's ruling, concluding that section 137 violated the Equal Protection Clause by hindering blacks as a group from enacting legislation in their collective interest.

The *Hunter* decision gave rise to an area of equal protection jurisprudence authorizing the use of heightened scrutiny to review the constitutionality of political restructuring that disadvantaged minority groups. The *Hunter* doctrine embodies the democratic principle that

47. *Id.*
48. AKRON CITY CHARTER § 137, *quoted in* Hunter v. Erickson, 393 U.S. 385, 387 (1969).
49. *See* Hunter v. Erickson, 233 N.E.2d 129 (Ohio 1966), *rev'd*, 393 U.S. 385.
50. 393 U.S. 385.

democratic majorities retain the right to restructure the political process so long as they do so by neutral rather than discriminatory means. The fact that section 137 was the product of direct democracy could not immunize it against constitutional review, Justice White wrote for the majority.[51] Nor could the city justify the amendment as an effort "to move slowly in the delicate area of race relations."[52] The Court concluded that the government "may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."[53] Thus, although the Akron amendment itself made no specific racial classification, the *Hunter* Court invoked the judicial machinery of strict scrutiny because the amendment imposed "*special burdens* on racial minorities within the governmental process."[54]

Justice Harlan's concurrence provides further insight into the restructuring dilemma. Justice Harlan distinguished mere statutes from laws that, as examples of higher lawmaking, "define[d] the structure of political institutions."[55] The legitimate purpose of higher lawmaking, according to Justice Harlan, is to provide "a just framework within which the diverse political groups in our society may fairly compete" rather than to assist "one particular group in its struggle with its political opponents."[56] Such a framework depends upon the allocation of political power according to "neutral principles," whereby every group within a community should experience an equal degree of difficulty when attempting to enact laws in its self-interest.[57] Majorities, in other words, should not be permitted through institutions of higher lawmaking to construct expressions of their interests as structural barriers to the interests of minorities.

In *Washington v. Seattle School District No. 1*,[58] the Court followed *Hunter* by invalidating an amendment to the Washington Constitution

51. *See id.* at 392.

52. *Id.*; *see also id.* at 395 (Harlan, J., concurring) (rejecting the proffered justification).

53. *Id.* at 393.

54. *Id.* at 391 (emphasis added).

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

56. *Id.* at 393.

57. *Id.* at 394-95. The Court reiterated Harlan's view in *Gordon v. Lance*, 403 U.S. 1 (1971). In *Gordon*, the Court reviewed the constitutionality of a 60% supermajority requirement imposed by West Virginia upon its political subdivisions before they could either incur bonded indebtedness or exceed constitutional tax rates. A proposal by the Roane County school board received only slightly more than 50% approval from county voters. Proponents of the proposal challenged the supermajority requirement on equal protection grounds. Writing for the majority, Justice Burger stated that while "any departure from strict majority rule gives disproportionate power to the minority" there "is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue." *Id.* at 6. Applying Harlan's idea of neutrality, the Court concluded that "so long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause." *Id.* at 7 (footnote omitted).

58. 458 U.S. 457 (1982).

adopted through statewide initiative.[59] That amendment ("Initiative 350") prohibited school boards from requiring any student to submit to forced busing.[60] The initiative, however, contained so many exceptions to this prohibition that it allowed school boards considerable discretion to assign pupils for reasons other than to enforce a policy of racial desegregation.[61] The initiative repealed a desegregation policy instituted by the Seattle School District.[62] Writing for the majority, Justice Blackmun concluded that Initiative 350 was indistinguishable from the *Hunter* charter amendment because each repealed policies that "inure[d] primarily to the benefit of the minority."[63] Initiative 350 restructured the political process by removing race-based pupil assignment to the control of the state legislature, while other issues germane to the electoral majority of non-blacks were left in the hands of local government. Thus, the Court determined that Initiative 350 "subtly distort[ed] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation."[64]

The *Seattle School District* majority faced powerful opposition in a dissenting opinion written by Justice Powell and joined by Justices Rehnquist and O'Connor.[65] Powell argued that Washington was under no constitutional obligation to maintain the availability of mandatory busing as a racial remedy to school segregation.[66] He thus characterized the Court's ruling as an "unprecedented intrusion into the structure of a state government"[67] because it had effectively established that "*only* the local or subordinate entity that approved [a racial remedy] will have authority to change it."[68] Powell warned that "[i]n a democratic system there are winners and losers,"[69] and that whenever a state addresses controversial questions, some significant segment of its population will be disadvantaged.[70] Furthermore, he argued that Initiative 350 did not constitute an act of political restructuring, because the state had not

59. *See id.* at 462-66, 486-87.
60. *See id.* at 462.
61. *See id.*
62. *See id.* at 463-64.
63. *Id.* at 472; *see also id.* at 474 ("[I]t is enough that minorities may consider busing for integration to be 'legislation that is in their interest.'" (quoting Hunter v. Erickson, 393 U.S. 385, 395 (1969) (Harlan, J., concurring))).
64. *Id.* at 467.
65. *See id.* at 488 (Powell, J., dissenting).
66. *See id.* at 491-92.
67. *Id.* at 489.
68. *Id.* at 494-95. In a prescient counterexample, Justice Powell invited the Court to consider whether its present rule would permit any governmental official or institution not traditionally granted authority over school admissions policies to revoke an affirmative action admissions policy established by the admissions committee of a state law school. *See id.* at 498-99 n.14.
69. *Id.* at 496.
70. *See id.*

constructed a new and extraordinary political barrier to policies benefiting a racial minority.[71] He distinguished the charter amendment invalidated by *Hunter* because that law had required that future fair housing legislation be subjected to a mandatory referendum process, an obstacle that the city of Akron did not uniformly impose on new legislation.[72]

Justice Blackmun's response to Justice Powell was twofold: First, he argued that Initiative 350 fell into the category of suspect legislation established by *Hunter* because it repealed "legislation designed to benefit minorities 'as minorities,' not legislation intended to benefit some larger group of underprivileged citizens among whom minorities were disproportionately represented."[73] Second, Blackmun reiterated that the "evil" condemned in *Hunter* was "the comparative structural burden placed on the political achievement of minority interests."[74]

Justice Blackmun developed this idea further in his concurrence in a companion decision, *Crawford v. Los Angeles Board of Education*.[75] In the latter case, the Court similarly reviewed the constitutionality of a state constitutional amendment (Proposition I) prohibiting the use of busing for purposes of racial desegregation. In *Crawford*, however, the California electorate had merely repealed the availability of busing as a judicial remedy for school segregation under the state constitution.[76] In his majority opinion, Justice Powell reiterated the principle that a state may repeal protections that it provides in excess of those that the Federal Constitution requires.[77] Blackmun assented to this view, but argued in addition that, while Proposition I may have hampered desegregation within the state, it was nevertheless constitutional because it had not effected a "structural change in the political *process*."[78] Instead, Blackmun saw the amendment as a mere repeal, since it had been both created and repealed at the state constitutional level.[79] Blackmun found Proposition I to be constitutional

71. *See id.* at 497-98.

72. *See id.* at 497.

73. *Id.* at 485.

74. *Id.* at 474-75 n.17.

75. 458 U.S. 527 (1982).

76. Prior to the passage of Proposition I, the California Supreme Court had interpreted the Equal Protection Clause of the state constitution to permit state courts to compel desegregation through mandatory busing, whether segregation within the school district was de facto or de jure in origin. *See id.* at 530-31 (citing Crawford v. Los Angeles Bd. of Educ., 551 P.2d 28, 34 (1976)). Proposition I limited the power of the state courts by permitting busing as a judicial remedy only in order to address violations of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and then only in cases in which "a federal court would be permitted under federal decisional law to impose that obligation" upon an offending school district. *Id.* at 532.

77. *See id.* at 535; *accord Seattle Sch. Dist.*, 458 U.S. at 491-92 (Powell, J., dissenting).

78. *Crawford*, 458 U.S. at 546 (Blackmun, J., concurring).

79. *See id.* at 547 ("In short, the people of California—the same 'entity' that put in place the State Consitution, and created the enforceable obligation to desegregate—have made the desegregation obligation judicially unenforceable."); *see also* Sunstein, *supra* note 5, at 157-64

because its function of mere repeal conformed to Justice Harlan's view that political structures should establish a "just framework" for competition between political groups.[80] By contrast, Blackmun viewed Initiative 350 as an allocation of political power "plac[ing] unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice,"[81] thereby violating Harlan's neutrality principle. For this reason, Blackmun argued that it would be an "*excessively formal* exercise" to argue "that the procedural revisions at issue in *Hunter* imposed special burdens on minorities, but that the selective allocation of decisionmaking authority worked by Initiative 350 does not erect comparable political obstacles."[82]

Like Justice Scalia, Justice Powell has espoused principles of democratic formalism,[83] arguing that the legitimacy of the *process* by which the initiative was enacted should be sufficient to justify its alterations to the political process.[84] This formalist view holds that political majorities are sovereign whenever they obey established democratic procedures and avoid substantive areas construed to infringe upon a fundamental right. Under the formalist view, the Constitution "permits majorities to impose their vision of morality as long as no fundamental right or suspect classification is affected."[85] The doctrinal instability of the political restructuring doctrine creates an opportunity for formalist arguments to prevail over the positions taken by the Court in *Seattle School District* and *Romer* because democratic formalism has the advantage of permitting courts to decide cases without appearing to intrude into political matters.[86] It has the appearance,

(arguing that California's Proposition I can be distinguished from Washington's Initiative 350 because the former is a mere repeal of minority protection while the latter is a "repeal *plus*," an act of restructuring that places special burdens upon the targeted minority).

80. *Crawford*, 458 U.S. at 546 (Blackmun, J., concurring) (citing Hunter v. Erickson, 393 U.S. 385, 393 (1969) (Harlan, J., concurring)).

81. *Seattle Sch. Dist.*, 458 U.S. at 486 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)).

82. *Id.* at 474-75 n.17 (emphasis added).

83. Professor Cass Sunstein has developed this term to describe Justice Scalia's jurisprudence. *See* Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 530-31, 533 (1997) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997)) (defining democratic formalism as an approach designed to ensure that democratic judgments are treated with extreme deference but criticizing this approach for "identif[ying] democracy with whatever happens to emerge from majoritarian politics").

84. It should be noted, however, that Justice Scalia's preference for democratic formalism appears to be more entrenched than Justice Powell's. *Compare* Romer v. Evans, 517 U.S. 620, 636, 644-46 (1996) (Scalia, J., dissenting) (approving of the Colorado electorate's attempt to express its moral disapproval of homosexual lifestyles through constitutional amendment), *with* Plyer v. Doe, 457 U.S. 202, 240 (1982) (Powell, J., concurring) ("[T]he exclusion [of children who are not U.S. citizens] from state-provided education is a kind of punitive discrimination based on status that is impermissible under the Equal Protection Clause.").

85. Balkin, *supra* note 11, at 2318 (characterizing the view expressed by Justice Scalia in *Romer*).

86. In a final footnote to the *Seattle School District* dissent, Justice Powell revealed that he did not agree with the substance of Initiative 350 as a matter of policy (that is, removing local

moreover, of permitting the people to rule according to the neutrality of their numbers.

C. *Doctrinal Instability After* Romer*: The Appeal of Democratic Formalism*

After deciding *Romer* in 1996, the Court remanded to the Sixth Circuit for review consistent with its ruling a case involving an amendment to the Cincinnati city charter (Article XII) prohibiting any branch of the municipal government from conferring protection upon homosexual persons on the basis of their sexual status.[87] A coalition of individuals and community organizations in Cincinnati had challenged the new charter provision on federal constitutional grounds. In *Equality Foundation of Greater Cincinnati v. City of Cincinnati*,[88] the Sixth Circuit upheld Article XII because it served the purportedly constitutional purpose of liberating individuals who chose to "disassociate themselves from homosexuals" by eliminating their exposure to punishment under local antidiscrimination ordinances.[89] On remand, the circuit court distinguished Article XII from Colorado's Amendment 2 by arguing that the political disability created by the former did not reach the magnitude of a disadvantaging amendment to the state constitution.[90] The Sixth Circuit thus distinguished *Romer* on its facts, claiming that it had involved a "substantially different enactment[] of entirely distinct scope and impact."[91] Because the Supreme Court in *Romer* had not presented its ruling as a development of the *Hunter* doctrine, the circuit court was able to infer that the racial restructuring cases did not control the question of political disability suffered by gays and lesbians.

One might describe the Sixth Circuit decision as an anomaly because it focused falsely and repeatedly upon distinctions without a difference.[92] The Sixth Circuit, however, buttressed its decision with a formalist argument reminiscent of Justice Powell's *Seattle School District* dissent. The court

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control over educational remedies from regional school boards), though his formalist arguments were intended to indicate that he, unlike the majority, was not allowing his personal preferences to sway him toward judicial activism. *See Seattle Sch. Dist.*, 458 U.S. at 501 n.17 ("In my view [as a former school board member], the local school board—responsible to the people of the district it serves—*is* the best qualified agency of the state government to make decisions affecting education within its district.").

87. *See Equality Foundation II*, 128 F.3d 289, 291 (6th Cir. 1997).

88. *Equality Foundation I*, 54 F.3d 261 (6th Cir. 1995).

89. *Id.* at 270.

90. *See Equality Foundation II*, 128 F.3d at 294-95; *see also id.* at 297 ("[T]he opponents of that strictly local enactment need not undertake the monumental political task of procuring an amendment to the Ohio Constitution as a precondition to achievement of a desired change in the local law . . . .").

91. *Id.* at 295.

92. *See* Jason D. Kimpel, Note, *"Distinctions Without a Difference": How the Sixth Circuit Misread* Romer v. Evans, 74 IND. L.J. 991 (1999).

argued that the people of Cincinnati retained the right to restrain the policy decisions of their elected officials, including members of the city council, because in so doing they were not in fact raising the decision to a higher level of government. In both instances, the decision was made at the jurisdictional level of the city. Therefore, Article XII merely represented a "direct expression of the local community will"[93] rather than a usurpation of jurisdictional authority. This argument parallels Justice Powell's claim that an agent of the state cannot usurp the state's plenary governing authority any more than the state can be restrained from engaging in political reorganization within its subdivisions.[94]

The Ninth Circuit in *Coalition for Economic Equity v. Wilson*[95] adopted a similar formalist rationale when it declined to enjoin the enforcement of Proposition 209, an amendment to the California Constitution prohibiting the use of race- and gender-based affirmative action programs by governmental agencies. The circuit court paused rhetorically to acknowledge the awesome responsibility of reviewing the amendment, stating that "[a] system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy."[96] Following Justice Powell's formula, the court first declared that removal of racial remedies from governmental consideration did not itself constitute a violation of equal protection.[97] It then repudiated the significance of political restructuring in the case, stating that the fact "[t]hat a law resolves an issue at a higher level of state government says nothing in and of itself."[98] The court claimed that the *Seattle School District* majority had not intended the result, prophesied by Powell, that a subdivision of the state might be able to usurp state authority by granting benefits to minorities in excess of any constitutional requirement. Instead, it claimed that *Seattle School District* permits the state to relinquish racial remedies provided by its subdivisions when the repeal serves a neutral purpose, including the repeal of race- and gender-based benefits.[99]

However, these explanations fail to acknowledge that the Supreme Court might have decided *Romer* in such a way as to preclude the circuit court's evasive rationale. The Court's avoidance of the *Hunter* doctrine has

93. *Equality Foundation II*, 128 F.3d at 297 & n.8.

94. *See supra* text accompanying note 72.

95. 122 F.3d 692 (9th Cir. 1997).

96. *Id.* at 699.

97. *See id.* at 702 ("A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender. Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense."); *see also id.* at 704 ("No one contends that individuals have a constitutional right to preferential treatment solely on the basis of their race or gender.").

98. *Id.* at 706.

99. *See id.* at 707.

led to doctrinal instability insofar as future political restructuring cases are concerned. The *Romer* Court repudiated the notion that an act of political restructuring is neutral because the protections that it repeals are not constitutionally required. Had the *Romer* Court looked for a way to harmonize its decision with existing precedent regarding political restructuring, it might have avoided the confusion exploited in *Equality Foundation*. It might, furthermore, have strengthened the credibility of *Hunter* and *Seattle School District* so as to discourage the Ninth Circuit from searching for ultimately insignificant differences between these cases and *Coalition for Economic Equity* rather than deciding the latter according to its obvious congruities.

III. THREE VIEWS OF DEMOCRATIC EQUALITY

Although democratic formalism remains an informative outlying principle, traditional process theories of equal protection have outworn their initial luster. Under the competing procedural view of deliberative politics,[100] political deliberation must sometimes avoid resolving controversial issues too conclusively in order to "enable diverse people to live together."[101] This is the vision of liberal democracy that optimistically interprets gag rules as democracy-reinforcing. The deliberative view rejects the equation of democracy with strict majoritarianism construed as a "mere statistical affair."[102] Furthermore, it rejects the view that politics is ultimately reducible to a play of "strategic interaction."[103] However, it does

100. *See, e.g.*, JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 287-328 (William Rehg trans., 1996) (discussing deliberative politics as a procedural theory of democracy); David Gauthier, *Constituting Democracy*, *in* THE IDEA OF DEMOCRACY 314, 320 (David Copp et al. eds., 1993) (describing deliberative politics as a procedural view "establishing standards or conditions of interaction from which all benefit").

101. Sunstein, *supra* note 11, at 21; *see also* JOHN RAWLS, POLITICAL LIBERALISM 430 (2d ed. 1996) (stating that "the deliberative conception of democracy . . . restricts the reasons citizens may use in supporting legislation to reasons consistent with the recognition of other citizens as equals"); Gauthier, *supra* note 100, at 319 (stating that in deliberative politics the constitution is expected to answer "what are the optimal conditions under which the members of a society may interact for their mutual advantage and to express their equal respect?"); Holmes, *supra* note 18, at 20 (stating that a properly formulated gag rule can "profitably shift attention away from areas of discord" and so disencumber the democratic process); John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 231 (1985) (stating that the objective of deliberative public agreement depends upon the implementation of a "method of avoidance").

102. Sunstein, *supra* note 11, at 37.

103. Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 293 (1989) (arguing that deliberative politics refers to an "attitude toward social cooperation" requiring "openness to persuasion by reasons," in contrast to a mere "strategic outcome represent[ing] not a collective judgment of reason but a vector sum in the field of forces"); *see also* Gauthier, *supra* note 100, at 322-23 (arguing that democratic constitutions serve the deliberative function of controlling and redirecting the strategic dimension of everyday politics).

sometimes justify avoiding discussion of issues that might threaten the smooth functioning of democratic institutions, even if the determination to do so may also be a consequence of political power.

In Part V, I will introduce an alternative argument for a fundamental commitment to democratic equality, focusing upon concerns for how the reallocation of political power may impose special disabilities upon minority groups. It is first necessary, however, to explore the prevailing paradigms in order to understand what deficiencies must be overcome.

A. *Between Democratic Formalism and Process Perfection*

As discussed above, democratic formalism possesses the virtue of granting broad discretion to actions receiving the support of a democratic majority.[104] Judicial decisions made according to this principle uphold actions based on the legitimate exercise of majoritarian authority and tend to favor clear but select substantive limitations to the exercise of that authority.[105] Democratic equality under formalism merely requires that all groups submit to the presumptive neutrality of ruling by numbers.

It would be inaccurate to suggest that formalism cannot be moderated sufficiently so as to acquire a centrist role in constitutional jurisprudence. Deference to the democratic process will sometimes require that courts ratify strategic conduct by a legitimate majority.[106] Even justices who have voted against formalist outcomes in the restructuring cases have not condemned majoritarian decisions purely on the grounds that they were executed strategically rather than through the exercise of public reason.[107]

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104. *See supra* notes 83-86 and accompanying text. For this reason, formalists also tend to grant less discretion to decisions made by governmental institutions that are neither representative in nature nor maintain some direct connection to the electorate. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 309 (1978) (opinion of Powell, J.) (arguing that "isolated segments of our vast governmental structures are not competent to make . . . decisions [regarding the remedial use of racial classifications], at least in the absence of legislative mandates and legislatively determined criteria").

105. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (insisting that the precedent of *Bowers v. Hardwick*, upholding the constitutionality of anti-sodomy laws as applied to homosexuals, establishes that the Colorado electorate was not substantively precluded from enacting an anti-gay constitutional amendment); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 498 n.14 (1982) (Powell, J., dissenting) (arguing that the Court's decision was illegitimate because it could not be construed to limit special protection to the right of racial minorities to mandatory busing); *cf.* Keyes v. Denver Sch. Dist. No. 1, 413 U.S. 189, 219-20 (1973) (Powell, J., concurring in part and dissenting in part) (arguing that if a school district is substantively prohibited from maintaining a segregated school system, then it should be so restricted regardless of whether such segregation is de jure or de facto).

106. *See, e.g.*, Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982) (upholding the constitutionality of a state constitutional amendment repealing mandatory busing as a judicial remedy for de facto school segregation); James v. Valtierra, 402 U.S. 137 (1971) (upholding the constitutionality of a state constitutional amendment requiring that the development of low-income housing receive prior approval through local referendum).

107. *See supra* Section II.B (discussing restructuring cases).

Strict formalism, however, is deficient as a theory of equal protection because it only reticently takes into account the fact that majoritarian decisions may suffer from constitutional defects.

Theories of process perfection attempt to take such defects into account. Expanding upon Justice Stone's famous theory of judicial review in footnote four of *United States v. Carolene Products Co.*,[108] John Hart Ely has constructed a process theory under which courts are authorized to intervene when representative government has malfunctioned so substantially as to render the democratic process "undeserving of trust."[109] Professor Ely developed his theory from Justice Stone's intuition that "prejudice against discrete and insular minorities may be a special condition"[110] causing a defect in the political process whenever governmental acts contain invidious purposes or refer explicitly to suspect classifications.[111] Thus, under process theory, democratic equality requires that effective political participation be extended across the pluralist spectrum of social groups by principled judicial intervention in order to counteract legislative malfunctions.

Rather than using the Constitution antidemocratically to compel morally desirable outcomes, Ely preferred that courts should target legislative malfunctions for special scrutiny as a way of "'flushing out' unconstitutional motivation."[112] Like formalism, however, process perfection has become hobbled by vexing doctrinal rigidities that sometimes lead courts to sacrifice common sense in favor of consistency.[113]

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108. 304 U.S. 144 (1938). In footnote four, Justice Stone set forth three categories of legislation for which the presumption of constitutionality might be eroded, including laws violating explicit constitutional guarantees, laws "restrict[ing] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," and laws "directed at particular religious, or national, or racial minorities." *Id.* at 152 n.4 (citations omitted). Stone argued most notably that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *Id.*

109. ELY, *supra* note 12, at 103.

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

111. Following Justice Stone's suggestion, Ely interprets prejudice to distort fatally the ordinary workings of pluralist politics. *See* ELY, *supra* note 12, at 153 ("We are a nation of minorities and our system thus depends on the ability and willingness of various groups to apprehend those overlapping interests that can bind them into a majority on a given issue; prejudice blinds us to overlapping interests that exist in fact.").

112. *Id.* at 146. By establishing prejudice as a process defect, Ely circumvents the problem of hypothesizing forbidden outcomes and preserves the ideal of judicial deference that continues to define constitutional jurisprudence. In this respect, his theory attempts to avoid the pitfall of converting constitutional law into an open forum for extra-constitutional principles of moral philosophy. *See* John Hart Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 33-39 (1978) (repudiating an inclination among his contemporaries to seek constitutional values in works of moral philosophy).

113. Professor Jed Rubenfeld has argued that equal protection no longer satisfies its cardinal function, because current doctrine has substituted an unprecedented cost-benefit analysis for the process-perfecting function of "smoking out" invidious purposes. *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 428 (1997). This new analysis, however, is at least in part the

Furthermore, contemporary restructuring cases provide additional problems for process perfection. First, the status of direct democracy under process theory is unclear, because "the people" may be entitled to a certain measure of imperfection in the direct expression of their legislative preferences. Second, strategic choices are not devalued unless they result in process malfunctions. Yet it is unclear whether repeal through restructuring should incur judicial distrust in order to preserve a deeper democratic commitment to equal participation.

B. *Deliberative Democracy and the Method of Constructive Avoidance*

Liberal democratic theory acknowledges the utility of allowing the people to bind themselves against possible future commitments and against permitting the project of self-governance to come to grief over strong, moral disagreements concerning public values and the appropriateness of their expression through government.[114] The deliberative-politics paradigm hypothesizes that democratic objectives can be both reinforced and facilitated by occasionally undemocratic means. John Rawls describes such means collectively as a "method of avoidance"[115] necessary to extend democracy beyond mere procedural commitments to an ideal of social cooperation and consensus. Nevertheless, the same constitutional protections interpreted by the process school to compensate for legislative malfunction can be reinterpreted under a deliberative model as barriers against the ratification of strategic outcomes in politics.[116]

1. *The Judicial Method of Avoidance: Decisional Minimalism*

Courts may deploy the deliberative paradigm through the use of "decisional minimalism." Professor Sunstein defines the term as "the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided."[117] The principle of decisional

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consequence of the Supreme Court's attempt to decide equal protection cases according to a rigid principle of consistency that interprets racial classifications as producing stigmatic harms regardless of whether the group classified is a majority or minority, dominant or disfavored, and therefore to apply strict scrutiny to all racial classifications regardless of whether they are intended to be remedial. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200, 230 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

114. *See* Holmes, *supra* note 18; Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY, *supra* note 18, at 195; *see also* RAWLS, *supra* note 101, at 430-31; Rawls, *supra* note 101, at 226-31.

115. Rawls, *supra* note 101, at 231.

116. *See* Sunstein, *supra* note 11, at 8 (stating that constitutional process protections function according to deliberative principles because "they serve to ensure against outcomes reached without sufficient accountability and reflecting factional power instead of reason-giving in the public domain").

117. *Id.* at 6.

minimalism places restrictions for deliberative technique directly upon the courts. Sunstein argues that decisional minimalism "grants a certain latitude to [nonjudicial] branches of government by allowing the democratic process room to adapt."[118] If, however, the argument for decisional minimalism is that it restrains the courts from usurping powers of democratic discretion in the disposition of controversial issues, this is still not an argument for minimalism across the totality of judicially cognizable issues. For example, it does not explain why minimalism should be practiced with regard to issues of political structure that are not socially contentious. The crucial question here is whether political mechanisms facilitating minority-disadvantaging strategic choices should be treated with the same circumspection as the content of these choices themselves.

Sunstein's unassailable intuition is that jurists might agree about an outcome, but not about the principles justifying that outcome; therefore, the avoidance of those principles should facilitate agreement. According to his interpretation of *Romer*, the decision represents an agreement between six Justices that the particulars of the case justify an outcome, but not necessarily an agreement about why.[119] However, to call *Romer* an example of decisional minimalism under this definition may oversell its virtues. Minimalism, in order to be an effective judicial technique, cannot be practiced simultaneously across a broad range of adjudicative issues.[120] This is precisely the rule that *Romer* violates. If political restructuring is immaterial to the *Romer* decision, then it may be that its minimalism is virtuous, but such a finding of immateriality is itself controversial. How can the per se violation of equal protection be cast as a limitation on the right to *seek* favorable legislation if the level of government at which one's right to the legislation has been repudiated holds no significance? It seems, moreover, that too cleverly practiced a form of judicial minimalism will force a kind of derailing misdirection, by permitting particular adjudicative principles to come into unnecessary conflict.

2. *The Method of Avoidance in Lawmaking Institutions: Gag Rules*

Within lawmaking institutions, such as institutions of direct democracy and the legislature, the method of avoidance may take a form that is potentially more structural and hence more tailored to the task of allocating power through political arrangements. This second class of restrictions falls under the general heading of "gag rules," though it comprises a variety of institutions. In an influential essay, Stephen Holmes has identified a wide

118. *Id.* at 19.

119. *See id.* at 21.

120. *See id.* at 25 ("Decisions are not usually minimalist or nonminimalist; they are minimalist *along certain dimensions*.").

range of gag rules that may be deployed in order to enhance democratic governance. Holmes describes gag rules as "disencumbering strateg[ies]" put in place by political agents upon their own structures of self-governance.[121] Gag rules function by blocking politically divisive issues from entangling democratic processes, thereby allowing remaining issues to be resolved through reason and compromise. Some notable examples of gag rules include the Gag Rule of 1836,[122] preventing Congress from raising the issue of slavery; the Establishment Clause, intended to depoliticize religious conflict;[123] nonjusticiability doctrines, including political question and standing; and amnesties.[124]

C. *Preliminary Problems with Gag Rules*

Holmes recognizes a distinction between gag rules that bar issues from being deliberated in all democratic institutions under a particular jurisdiction and those that bar their deliberation only in discrete institutions.[125] He observes that some gag rules "debar everyone from raising a ticklish question [while] others are more narrowly targeted, silencing only a selected class of speakers."[126] However, he does not elaborate from this distinction which gag rules are democracy-enhancing and which are distortive. His broad list of gag rules elides the analytic problem that certain structures bar particular substantive areas of decision within a particular institutional context (or in all contexts) and so can depend for their justification on drawing a rational connection between subject matter and a likelihood of decisional impasse, while other gag rules remove specific parties from the decisionmaking apparatus.[127] The latter tactic may or may not be related to improving the deliberative process. For example, standing doctrine prevents particular parties from raising a claim of legal right that may nevertheless exist as a matter of positive law and be available for use by other parties. When a party is thus prevented from

121. Holmes, *supra* note 18, at 23-24.

122. *See id.* at 31-35. *See generally* WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY (1996) (discussing the history of the Gag Rule of 1836).

123. *See* Holmes, *supra* note 18, at 43-50 (discussing the Establishment Clause as a means of containing political divisiveness).

124. For a more comprehensive list, see *id.*

125. *See id.* at 25-26; *see also id.* at 30-31.

126. *Id.* at 26.

127. Holmes's failure to be clear on this matter is exacerbated by the space that he appears to leave open for equating political parties with forms of gag rules because they may tend to be constituted through primordial or prepolitical solidarities (such as class, religious, or ethnic affiliations). *See id.* at 29-30. Certainly not all political institutions that exclude certain kinds of participants can be placed under the general heading of gag rules, especially if gag rules are defined precisely in terms of their purpose to construct opportunities for rational debate. Holmes, however, declines to draw such a bright line.

adjudicating a claim of right, it is prevented not only from securing available remedies, but also from shaping that right for future cases.

Gag rules of this type tend to distort rather than disencumber democracy by violating the principle of equal participation in the process of self-rule. For the same reason, it is important to ascertain (a) whether the exclusion of certain subject matters from democratic consideration should be barred when it has the effect of driving identifiable groups from the deliberative table, since they will no longer be able to vindicate their specific interests through the democratic process; or (b) whether this effect can sometimes be deemed a legitimate consequence of properly followed procedures for collective self-rule. Holmes provides no guidance in these areas, and, to a certain degree, his enthusiasm for gag rules as disencumbering strategies reflects a comparative analysis in which they appear crucially important for emerging democracies.[128] Perhaps "mature" democracies have a greater threshold for disagreement as a result of the solidity of their political power-sharing arrangements or extra-political factors, such as wealth and the patterns of its distribution. Unfortunately, Holmes does not specify whether we should expect that a democracy at a certain stage in its life should not resort to gag rules in order to avoid the challenges of moral disagreement. This question intensifies when a society has grown to reject the use of gag rules in certain kinds of cases (for example, slavery and racial discrimination), but does not reject them in like cases as they emerge (for example, gay rights).

Finally, tools of judicial review sometimes include gag rules. For example, the *Romer* Court's prohibition against a bare desire to harm subordinate groups could be interpreted as a forbidden interest rule.[129] Such a rule places a structural brake upon a majority's potential inclination to wield political power according to its prejudices; but its applicability is as narrow as governmental motivations are elusive. Alternatively, the Court could have decided *Romer* according to a mandatory rule that required acts of higher lawmaking to provide "a just framework"[130] for groups to engage in pluralist politics. Under such a rule, state governments might be compelled to defend acts of political restructuring with a showing that they promote democratic inclusion by enhancing the participatory effectiveness of minorities.[131] However, this application would far exceed Justice

128. *See id.* at 28-30 (discussing amnesties). *See generally* AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES (1977) (comparing pluralist democracies).

129. *But see* Green, *supra* note 30, at 476 (arguing that it is unclear exactly what the forbidden interest in *Romer* might be). For an explanation of how forbidden interest rules function in equal protection jurisprudence, see *id.* at 469-72.

130. Hunter v. Erickson, 393 U.S. 385, 393 (1969) (Harlan, J., concurring).

131. *See* Green, *supra* note 30, at 475 (describing such a rule as "moderate" when compared with the alternative that governments demonstrate their adherence to a just framework even where no act of restructuring has occurred). It should be noted that this argument is the structural

Harlan's meaning in *Hunter*, where he argued that the government's duty to provide a just political framework would be satisfied where the reallocation of political power took place according to neutral (that is, non-invidious) principles.[132] It would also exceed the Court's ruling in *Romer*, since the Court at no point invites Colorado to rebut the inference of discriminatory animus by showing that Amendment 2 actually functions to broaden participation. Nor has the Court suggested in any restructuring case that a burden of justification shall transfer to the governmental defendant without a showing that the act under review effected a policy repeal as well as a reallocation of political power. Unfortunately, the theory of democracy-enhancing gag rules does not determine in particular instances which sort of rule we ought to pick or even what sort of interpretation to give an established rule.

IV. A FOURTH VIEW: *ROMER*'S COMMITMENT TO PRECLUDE SPECIAL DISABILITY THROUGH POLITICAL RESTRUCTURING

A. Romer *Reconsidered*

As discussed above,[133] Justice Kennedy's majority opinion relies upon two arguments: a weak argument that Amendment 2 fails the equal protection challenge because, even under rational review, government cannot constitutionally base its policies upon "a bare . . . desire to harm a politically unpopular group,"[134] and an ambiguous argument that it fails because it violates a per se rule against "impos[ing] a broad and undifferentiated disability on a single named group."[135] Justice Kennedy's first line of argument is weak because the means of divining animus are woefully unclear. Kennedy claimed that the amendment's "sheer breadth is so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class it affects."[136] He has thus suggested that the lack of factual support to justify rational relatedness is equivalent to a finding of illicit motivation.[137]

Viewed optimistically, the *Romer* Court may have laid the groundwork for an inquiry into the social consequences of law that is not triggered by

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correlate of Sunstein's claim, discussed above, that governments might be permitted to discriminate against homosexuals only if they could affirmatively establish that their reasons were public-regarding. *See supra* notes 42-45 and accompanying text.

132. *See supra* notes 56-57 and accompanying text.

133. *See supra* Section II.A.

134. Romer v. Evans, 517 U.S. 620, 634-35 (1996) (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

135. *Id.* at 632.

136. *Id.*

137. *See id.* at 634 (describing the inference of discriminatory motivation as "inevitable").

findings of deficiency in the political process.[138] It seems improbable, however, that this was its intention because, if it were, robust inquiry into the social consequences of lawmaking ought to be appropriate under equal protection regardless of the level of scrutiny deployed or the use of political restructuring. Under such an interpretation, the Court would appear to have argued that majoritarian preferences are insufficient to sustain minority-disadvantaging outcomes unless accompanied by reasons justifying strategic behavior.[139] It seems more prudent, however, to interpret Justice Kennedy as having inquired into the social controversy surrounding Amendment 2 because it culminated in a broadly disadvantaging act of political restructuring.[140]

Justice Kennedy's second argument regarding per se equal protection violation is ambiguous because future courts cannot be sure when to apply it. Kennedy claimed that Amendment 2 confounded the conventional model of means-ends equal protection review. Amendment 2 was anomalous, according to Kennedy, because it "identifie[d] persons by a single trait and then denie[d] them protection across the board."[141] Kennedy leaves unclear whether the targeting of homosexual persons for disadvantageous treatment on the basis of their sexual status was a sufficient condition to constitute per se violation, or whether an additional structural component must attach. If the former condition is sufficient, then this appears to be a justification for separating *Romer* from the *Hunter* doctrine.

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138. In a manner uncharacteristic of conventional rationality review, Justice Kennedy appears to endorse a searching inquiry into the social contest in which Amendment 2 functions to isolate and subordinate homosexuals. *See id.* at 623 (remarking upon the "contentious campaign" through which Amendment was enacted); *id.* at 626-27 (discussing at length the statutes repealed or diluted by the amendment). If indeed this is his approach, then it would be far more at odds with the discriminatory purpose doctrine of *Washington v. Davis*, 426 U.S. 229 (1976), than the limited acceptance of impact analysis in the political restructuring cases. In other words, the use of searching social inquiry to identify animus is a much broader judicial power than the use of impact analysis to determine whether a facially neutral act of political restructuring in fact targeted a minority group.

139. *See supra* notes 41-45 and accompanying text (discussing Professor Sunstein's view).

140. Thus, Justice Kennedy's opinion reminds us that there exists a crucial distinction between rejecting the view that politics is ultimately reducible to a legitimate play of "strategic interaction" and arguing positively that judges cannot review political actions without an understanding of how they culminate to a "vector sum in the field of forces." Michelman, *supra* note 103, at 293.

141. *Romer*, 517 U.S. at 633. If this were the sole meaning of Kennedy's per se rule, then it would equal Professor Akhil Amar's arguments for why Amendment 2 violates the spirit of the Bill of Attainder Clause. Amar reminds us that the Bill of Attainder Clause was originally intended to protect social groups against attempts by government to stigmatize and punish them specifically. *See* Amar, *supra* note 11, at 218. Amar explains that "the sociology and principles underlying the Attainder Clause powerfully illuminate the facts of *Romer*," and thus reminds us that government cannot single out particular social groups and nominate them as outlaw castes through its laws. *Id.* at 203-04. Amar's observations are insightful in that they point to a meaningful distinction between *Romer* and the racial restructuring cases. *See infra* note 146 and accompanying text. Nevertheless, they fail to illuminate all that Kennedy means by special disability as an element of per se equal protection violation. I intend to demonstrate this in the discussion that follows.

However, Kennedy does emphasize that Amendment 2 imposed a "special disability" upon gays and lesbians in that it forbade them "the safeguards that others enjoy or may *seek without constraint*."[142] As Kennedy describes it, there is an asymmetry and overbreadth in this political disability because "no matter how local or discrete the harm, no matter how public and widespread the injury,"[143] seeking protection in all cases requires seeking a remedy through state higher lawmaking. Both the logic and language of special disability echo the *Hunter* Court's touchstone, "special burden."[144] Moreover, the *Romer* Court seems implicitly to regard homosexuals, like African Americans, to be the kind of minority that is vulnerable to subjugation through political disability because its interests are socially stigmatized.[145]

What then is the salient structural difference between Amendment 2 and the provisions examined by *Hunter* and its progeny? In the earlier cases, the offending provisions executed classifications based upon the *impartial category* of race, and not upon the suspect classification of particular racial statuses. Amendment 2, by contrast, employs a classification based upon the *partial category* of homosexual, lesbian, and bisexual statuses.[146] Amendment 2 exemplifies an especially pernicious kind of political restructuring because, by explicitly naming the minority targeted for disadvantage, the majority can fully insulate itself from the consequences of its political attack. In other words, an impartial category would be overinclusive of the target minority, causing some of the cost of retrenching the minority's civil and political rights to be paid by the majority. For example, if whites should find that protection against racial discrimination is indeed in their interests, or if heterosexuals should find that protections against discrimination on the basis of sexual orientation in fact have some utility for them, then either group might support

142. *Romer*, 517 U.S. at 631 (emphasis added).

143. *Id.*

144. Hunter v. Erickson, 393 U.S. 385, 391 (1969).

145. Justice Kennedy observes that protection on the basis of sexual orientation—rather than homosexuality—constitutes a valued gain in the interests of homosexuals to obtain legal protection and a dis-valued gain for heterosexuals who act as though the protection contributes nothing to their feeling of social or political security. *See Romer*, 517 U.S. at 630-31.

146. To make this distinction clear, my use of "partial" and "impartial" relies upon an analogy of part to whole. Acts of restructuring, for example, might repeal laws granting protection against racial discrimination or laws granting protection to a particular racial group, such as African Americans. The former would deploy an impartial category ("race"), and the latter would deploy a partial category ("African Americans"). It should also be noted that impartial here does not mean fair or neutral, for certainly racial considerations will affect some groups more consistently and directly than others. Nor is this distinction intended to illuminate conventional equal protection doctrine, apart from cases involving political restructuring. Rather, the distinction is useful for considering how Amendment 2 differs from the initiatives considered in *Hunter* and *Seattle School District* insofar as it constitutes a per se equal protection violation.

withdrawing "special" protections from blacks or from homosexuals while leaving more general protections intact.

B. *The Meaning of Special Disability*

That Amendment 2 was a constitutional amendment and not simply several movements to repeal a variety of city ordinances was crucial to the *Romer* decision. The use of political restructuring gave the Court an opportunity to define a new per se rule against any majority's explicit targeting of particular groups for political disadvantage. This rule is a natural consequence of the Court's disapproval of special disabilities that might prevent minority groups from seeking policy benefits without constraint, a disapproval originating with the *Hunter* doctrine.[147]

However, the prohibition against special disability is confined in application to acts of political restructuring. In this sense, it aims to restrain majorities from entrenching political and social hierarchies by reallocating political power, without imposing limitless justificatory burdens upon state and local governments. For example, as discussed above,[148] neither *Romer* nor *Hunter* proposes a mandatory rule under which governments must establish that reallocations of power promote political inclusion. Furthermore, the prohibition against special disability through political restructuring does not rely upon a broader fundamental right to political participation. Unlike the Colorado state court,[149] neither the *Romer* nor *Hunter* Courts proposed a fundamental interest in political participation that would define the level of scrutiny appropriate to review political restructuring.[150] Rather, the prohibition against special disability reflects the Court's evolving understanding that the manipulation of political power raises equal protection questions when it has the practical effect of disadvantaging vulnerable minorities.

V. RECONSTRUCTING THE RESTRUCTURING DOCTRINE

Jürgen Habermas has written that "[a] reconstructive sociology of democracy must . . . choose its basic concepts in such a way that it can identify particles and fragments of an 'existing reason' already incorporated in political practices, however distorted these may be."[151] To this

147. *See supra* notes 54, 74-79 and accompanying text.

148. *See supra* text accompanying notes 130-132.

149. *See, e.g.*, Evans v. Romer, 854 P.2d 1270, 1282-84 (1993) (supporting a fundamental right to equal political participation).

150. *Cf.* James v. Valtierra, 402 U.S. 137 (1971) (declining to extend the *Hunter* doctrine to protect low-income residents against disadvantageous political restructuring under the theory that such restructuring infringes upon a fundamental right of political participation).

151. HABERMAS, *supra* note 100, at 287.

reconstructive end, I have attempted to examine constitutional democracy as a structural entity and to criticize the reification of its most fundamental structural component: the majority. Holmes's structural account of democratic restraints provides a useful means of interpreting democracy as a system, but the normative justification of gag rules has proven insufficient to explain the nature of the systemic failure represented by political disability as discussed in cases like *Romer* and *Hunter*. This Part will therefore deploy the prohibition against imposing political disability as a possible alternative reason that can be used to gather *Romer* and the *Hunter* line of cases together into one coherent doctrine. It will posit that these cases reveal a deep democratic commitment to preventing political structures from burdening identifiable social groups through a coordinate form of political and social disability. It will attempt to develop this commitment across an initial stage of doctrinal reconstruction, setting aside the arguably more contentious second stage for future elaboration.

A. *The First Stage*

1. *Why Restructuring Matters*

The first step in this reconstruction must be to debunk the notion that majorities should enjoy a presumption of legitimacy drastically overpowering our concern for democratic equality, moderated only within extremely narrow substantive parameters (that is, that the right of the majority is absolute unless the minority enjoys a specific right to equal treatment or has suffered the infringement of a fundamental right). Direct democracy encourages romantic deference toward majorities, for through it the people express themselves in a way that makes their preferences and interests appear transparent. However, as I have protested above, a majority is not a majority is not a majority.[152] In fact, it seems more accurate to say that "the people" are a function of the means of their expression.[153]

What do *Hunter* and *Romer* reveal about democratic equality? They reveal that democratic equality will be advanced against disadvantaging practices of political restructuring by first analyzing the specific ways in which this restructuring reconstitutes or entrenches power: from the structural, or political, to the social. Thus, in *Romer*, the Court should first have interpreted Amendment 2 in its structural capacity as a gag rule. Amendment 2 qualified as a gag rule because it removed the issue of

152. *See supra* note 16 and accompanying text.

153. *Cf.* Iris Marion Young, *Deferring Group Representation*, *in* ETHNICITY AND GROUP RIGHTS 349, 359 (Ian Shapiro & Will Kymlicka eds., 1997) ("The ideal of representing the 'will of the people' presumes, that 'the people' exist prior to and independently of the process of representation . . . .").

protection on the basis of gay and lesbian status from the deliberations of all governmental institutions, except through the most remote apparatus of the statewide initiative. As a matter of popular sovereignty, Amendment 2 performed a strong functional role of recommitment to the ideal of proscribing legal protections for gays and lesbians on the basis of their sexual status and possibly also to the ideal of expressing moral disapproval for homosexual lifestyles. Amendment 2 permitted a majority of state voters to vest themselves with the authority to intercede in procedures and policies of local governance in order to effect an outcome that appears to have only a symbolic relation to their own interests.

Because Amendment 2 operated at the jurisdictional level of the state, it performed the following structural functions: (1) It bound legislators and other state agents, including those within state subdivisions, against the influence of powerful municipal governments, national interest groups, or residents of the state (including especially gays and lesbians) that tend to favor legal protections of the sort proscribed. (2) It bound future selves qua future popular sovereigns under this proscription, pending further amendment of the state constitution. (3) It specifically subverted the political equality of gays and lesbians by precluding them from pursuing political satisfaction of their specific interests in laws protecting them against discrimination on the basis of sexual orientation, and instead required that they first undertake to generate the broad statewide agreement necessary to overturn the constitutional proscription.

Functions (1) and (2) are legitimate exercises of majoritarian power, if we leave to one side the content of the constitutional provision. It is within the authority of the popular sovereign to recommit itself and its agents, and to do so may in fact enhance democracy even as it creates new hurdles for future recommitment. The reasons for invoking structural functions (1) and (2) matter when considering their compatibility with specific expressive functions. For example, if the popular sovereign claims to have bound itself and its agents against considering a particular issue outside of the amendment process because that issue is so contentious that it might otherwise bring individual democratic institutions to grief, this reason is not compatible with the reason to express moral disapproval.[154] The former justification for invoking (1) and (2) contains an admission that democratic

154. In *Romer*, the state did in fact argue that part of the amendment's purpose was to deter factionalism and to preserve the integrity of the state's political process. *See* Evans v. Romer, 882 P.2d 1335, 1339-40 (Colo. 1994) (en banc). The trial court explicitly denied that the political purposes of deterring factionalism and preserving the right of Colorado citizens under the Tenth Amendment to amend their state constitution could be considered compelling. The trial court concluded that the interest in deterring factionalism was in fact no more than an attempt to restrict the expression of "a difference of opinion on a controversial political question." *Id.* at 1340 (quoting the Colorado district court). It seems apparent, however, that deterring factionalism should qualify as a legitimate interest under rationality review.

institutions have been rendered incompetent by this issue, not that they have been wayward in their expression of a particular viewpoint concerning the issue and are now in need of correction.

By contrast, function (3) must be balanced against other political and expressive purposes. We should consider whether the utility of disencumbering gag rules outweighs the structural disadvantage that they impose upon identifiable minorities. Instances where this would be appropriate would be rare, but they may occur in times of great social strife. In such circumstances, however, the significance of preserving the integrity of the democratic process must be balanced not only against the structural harm of special political disability but against collateral expressive harms as well, which no doubt will compound this disability.[155] For this reason, such acts of restructuring should be met with a more exacting standard than mere rational basis scrutiny.

Under the facts of *Romer*, it is nearly impossible to imagine how the issue of gay rights could so fracture society as to threaten to bring democracy itself to grief, unless, of course, one decides to hold a referendum on the morality of gay lifestyles. Ordinarily, it will be the case that recommitment at a higher level of government is not necessary to the goal of recommitment itself, for majorities do retain the right to repeal laws they grow to disfavor. The question is whether that right is generalizable to a right to repeal at a higher form of government. Because certain majorities will be constituted only superordinate to the level at which offending legislation is passed, we must recognize that the majority has constituted itself structurally by the choice of constitutional recommitment. In other words, majorities are not organic entities in the world, but they inhere in particular political processes. By choosing the process, the majority chooses and defines itself. Therefore, it is appropriate to weigh the interest in recommitment against the special disability that it imposes upon an identifiable group, precisely because a majority does not have a singular moral content apart from its choice as to how specific commitments might be enacted and enforced.

Finally, Amendment 2 functioned as a gag rule in that it caused a restructuring of the normal political process. The structural function of the amendment was inextricable from its targeting of gays and lesbians as a partial social-status category. It would seem to be uncontroversial that gag rules formally excluding specific parties from political fora should be particularly suspect.[156] The *Hunter* doctrine extends this insight by

155. In the case of *Romer*, evidence of a contentious initiative process cannot be considered evidence of political and social strife sufficient to warrant the creation of the political disability, because the effort to create the disability is precisely the source of contention.

156. *But see* Holmes, *supra* note 18, at 26 (arguing that laypersons might legitimately be excluded from collective decisions requiring technical expertise).

recognizing that laws precluding the consideration of subject matters especially relevant to an identifiable social minority should also be suspect because of the special disability that they impose upon minority participation.

Part IV of this Note posited that there is a meaningful distinction between restructuring provisions that involve classifications employing partial group-based categories (such as African Americans or gays and lesbians) and classifications according to impartial categories (such as race or sexual orientation). Part IV explained that the use of a partial category in Amendment 2 may shed light on the Supreme Court's decision not to follow the *Hunter* doctrine. Nevertheless, the flaw in the majority opinion is that it so alienates the *Hunter* doctrine as to occlude the fact that *Romer* is its limit case. This is the case because *Romer* involves burdens to an identifiable social group through the use of a partial rather than an impartial category.[157] *Romer* on this point constitutes a per se application of the *Hunter* doctrine: While *Hunter* applied strict scrutiny when confronted with an impartial act of political restructuring that disadvantages a particular minority (such as on the basis of sexual orientation), *Romer* held per se invalid a partial act that did the same (but on the basis of sexual status).

2. *Application*

This reconstruction of equal protection doctrine could potentially stabilize a presently spiraling area of doctrinal development. As discussed above, ambiguities in the *Romer* majority opinion have contributed to the Sixth Circuit's controversial *Equality Foundation* decision.[158] In *Equality Foundation*, the Sixth Circuit found constitutional Article XII, an amendment to the city charter of Cincinnati prohibiting the city and its public agencies from enacting or enforcing any ordinance or policy "which provides that homosexual, lesbian, or bisexual orientation . . . entitles, or otherwise provides a person with the basis to have any claim of minority or protected status."[159] On remand from the Supreme Court, the Sixth Circuit distinguished *Romer*, arguing that the two cases "involved substantially different enactments of entirely distinct scope and impact, which conceptually and analytically distinguished the constitutional posture of the

157. In this sense, Amendment 2 involved a more primitive kind of gag rule than the provisions reviewed by the Court in *Hunter* and *Seattle School District*. This is likely to be the case because the crafters of Amendment 2 saw nothing inherently illegitimate in targeting gays and lesbians as a social group, while no doubt they would have if the amendment had targeted blacks.

158. *See supra* Section II.C (discussing how the doctrinal ambiguity of the Supreme Court in *Romer* promoted the Sixth Circuit's misapprehension of *Romer*'s meaning).

159. *Equality Foundation I*, 54 F.3d 261, 264 (6th Cir. 1995) (quoting city charter Article XII).

two measures."[160] It is here that Justice Kennedy's ambiguous rejection of the *Hunter* doctrine has teeth. *Hunter* itself invalidated an amendment to a city charter; *Romer*'s neglect of *Hunter* removes it from the circuit court's view of germane precedent. Furthermore, the Sixth Circuit distinguished Amendment 2 from Cincinnati's Article XII by stating that the latter "could not dispossess gay Cincinnatians of any rights derived from any higher level of state law" and thus could not render them "virtual non-citizens . . . without legal rights under any and every type of state law."[161]

Under reconstructed equal protection doctrine, after acknowledging Article XII's restructuring characteristics, the Sixth Circuit should have identified its anti-gay content as invoking a partial social-status classification, thereby instantly triggering *Romer*'s per se rule. One might object that if Article XII had been intended as a global repeal of affirmative action policies benefiting gays and lesbians, it should not be called a per se violation simply because it invoked their partial social group status. I disagree. It should violate equal protection just as the repeal of a school district's authority to effect a desegregation plan through mandatory busing violates equal protection.[162] The fact that there is no constitutional obligation for either the city or the state to provide the repealed benefit does not justify the removal of a benefit from a specific minority group through an act of political restructuring that introduces obstacles to its future achievement of similar protections.

A similar rationale can be applied to the Ninth Circuit's *Coalition for Economic Equity* case. Proposition 209, an amendment to the California Constitution, provides in relevant part that "[t]he state shall not discriminate against, or 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."[163] The district court granted an injunction against the amendment's enforcement, finding that it was not narrowly tailored to serve a compelling governmental interest.[164] The Ninth Circuit reversed, holding that strict scrutiny did not apply because Proposition 209 invoked no explicit racial classification nor could its repeal of race and gender preferences be construed as a non-neutral act impermissibly burdening a political minority.[165]

160. *Equality Foundation II*, 128 F.3d 289, 295 (6th Cir. 1997).

161. *Id.* at 296-97.

162. *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).

163. Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 696 (9th Cir. 1997) (quoting CAL. CONST. art. 1, § 31(a)).

164. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996).

165. *See supra* Section II.C (discussing the formalist aspects of the Ninth Circuit's decision).

The Ninth Circuit appealed to recent Supreme Court precedent regarding the constitutionality of race-based public affirmative action programs in order to determine (a) that the repeal of such programs in and of itself does not amount to a racial classification or otherwise trigger heightened scrutiny, and (b) that heightened scrutiny under equal protection is triggered only by the use of suspect classifications.[166] Thus, the circuit used recent Supreme Court precedent to redefine which acts of restructuring should qualify as racial classifications triggering heightened scrutiny under *Hunter* and *Seattle School District*. The court concluded that because the repeal of race and gender preferences should be interpreted as a facially neutral policy for constitutional purposes, the use of political restructuring to bring about that repeal was irrelevant in that the *Hunter* doctrine determined that an act of restructuring triggers heightened scrutiny only when it violates "neutral principles."[167]

By placing questions of classification before a consideration of just how Proposition 209 constitutes an act of political restructuring, the Ninth Circuit lost sight of the relevant conception of neutrality. Laws are neutral and therefore free from heightened scrutiny under *Hunter*, not because they fail to invoke suspect classifications in the conventional sense, but because they do not restructure the political process in order to impair the achievement of policy objectives benefiting an identifiable minority. Proposition 209 constitutes a "suspect category" of legislation under *Hunter* because it removes traditional decisionmaking authority over racial matters from subordinate levels of the state government to the higher and more general level of the statewide initiative.[168] Under the reconstructed *Hunter* doctrine, if Proposition 209 had specifically barred preferences for blacks and Latinos, it would have triggered the per se rule established in *Romer* by resorting to a partial categorization in order to identify precisely those minorities that would suffer a special disability. In its present form, Proposition 209 should elicit strict scrutiny under the long-established *Hunter* doctrine, whereby it can be defended only through evidence that it is narrowly tailored to serve a compelling state interest.

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166. *See Coalition for Econ. Equity*, 122 F.3d at 702-708 (arguing that the question of whether a repeal of affirmative action represented a non-neutral policy should be determined under the recent precedent of *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

167. *Compare id.* at 707 ("When . . . a state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender, it has promulgated a law that addresses *in neutral-fashion* race-related and gender-related matters." (emphasis added)), *with* Hunter v. Erickson, 393 U.S. 385, 394 (1969) (Harlan, J., concurring) ("The existence of a bicameral legislature or an executive veto may on occasion make it more difficult for minorities to achieve favorable legislation; nevertheless, they may not be attacked on equal protection grounds since they are founded *on neutral principles*." (emphasis added)).

168. *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 485 (1982) (explaining *Hunter*).

In summary, *Romer* and *Hunter* do not propose discontinuous equal protection doctrines. Rather, their distinction is based upon the presence of partial or impartial categories of social-status classification as part of the restructuring provision placed under judicial review. Whenever an identifiable social group claims to have experienced a special disability as a consequence of political restructuring, courts should first ask whether the provision employs a partial or impartial social-status category in order to determine whether the per se rule of *Romer* is available.[169] If so, then adjudication can follow the model established by *Romer*, without concern for whether the restructuring constructively disables a particular group by impacting its interests. If the categorization is impartial, then the court should refer to the *Hunter* doctrine in order to determine the availability of heightened scrutiny. It is irrelevant under either standard whether the repealed benefit was constitutionally required. The only attendant question, to be pursued at a second stage of developing this reconstructed doctrine, is whether the complaining group is the kind of group that can suffer a coordinate form of social and political disability as a result of the social stigmatization of its identity or interests.

B. *The Second Stage: For Whom Restructuring Matters*

This Note has focused primarily upon the first stage of equal protection reconstruction after *Romer*: describing why restructuring matters in defending minority groups against the imposition of special political disabilities. But the elaboration of structural considerations at the first stage raises a series of questions that must be addressed at a later stage of doctrinal development. These questions fall under the general heading of *for whom restructuring matters*.

For example, the use of partial or impartial categories by the restructuring law determines whether the per se rule or heightened scrutiny (or neither) is available to the reviewing court. The above application assumes that the groups deserving protection against special disability include at least racial minorities and homosexuals, since these are the groups protected under *Hunter* and *Romer*. But the question remains whether they should be protected in exactly the same way. In other words, perhaps gays and lesbians deserve protection against the use of partial categorizations burdening their interests in the political process, but not against the use of impartial categorizations since these require an inquiry into the practical effect of the restructuring law.

169. The latter case may include no explicit category at all, as in Initiative 350 reviewed in *Seattle School District*.

I disagree with this view. As discussed above, the *Romer* Court did in fact assess the practical effect of Amendment 2 when inferring from the latter a motivation of discriminatory animus.[170] In addition, the commitment to preclude the establishment of special disabilities for groups participating in the political process is not limited to racial minorities after *Romer*, nor is there any apparent reason for the synthesis of cases that do not rely upon suspect classification to result only in the protection of groups that can be identified by the conventional criteria of suspect classification. Notable efforts have been undertaken to expand the range of groups protected under suspect classification by introducing the powerful claim of homosexuals to protected status.[171] However, the present rationale would expand the list of groups protected without recourse to the traditional criteria of suspect classification but only against the effects of political restructuring. As discussed above, the restructuring cases constitute a unique area of equal protection in which the commitment to preclude special disability suggests that protection should extend to all identifiable minority groups whose social stigmatization and subordinate status make them vulnerable to coordinate forms of social and political disability.[172] Therefore, the repeal of protections based on the impartial category of sexual orientation should receive heightened scrutiny (whether strict or intermediate constitutes yet another, second-order question) because gays and lesbians are vulnerable to political attack in a way that should spark judicial concern that their interests not be unjustly burdened by manipulation of the democratic process.[173]

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170. *See supra* notes 138-140 and accompanying text.

171. *See, e.g.*, Ackerman, *supra* note 8, at 729-30 (arguing that the *Carolene* standard of discreteness and insularity is insufficient to determine whether homosexuals deserve protected status, because it is their anonymity that produces additional organizational costs and so increases their relative political powerless); Yoshino, *supra* note 7, at 509-38 (arguing that standards of immutability and invisibility are similarly insufficient to explain why homosexuals deserve constitutional protection).

172. *See supra* Section V.A.

173. Like the busing cases of the 1980s, school voucher programs may provide an interesting heuristic device for assessing how this reconstructed doctrine might evolve. For example, the city of Milwaukee currently operates a parental choice voucher program (the Milwaukee Parental Choice Program, or MPCP), permitting parents to use public funds to pay their children's tuition at private schools, including religious schools. The Wisconsin Supreme Court has held that the MPCP does not violate the Establishment Clause, and the United States Supreme Court has declined to hear the case on appeal. *See* Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998). In the 1995-1996 school year, religious institutions constituted 89 of the 122 private schools eligible to participate in the program. *See Jackson*, 578 N.W.2d at 619 n.17. It is conceivable that opponents of the MPCP may decide that the state court was premature in approving the program's constitutionality. These opponents may view the Christian Right in particular as a religious minority with disproportionate power in both national and local politics. They might, therefore, sponsor a state constitutional amendment repealing the authority of municipalities to provide vouchers transferable to religious schools or to private schools in general except under special circumstances (such as those relating to a student's disability). Certainly either amendment would restructure the political process in such a way as to burden the interests of religious groups. While the first permutation (barring religious schools from participation in

Second, a single act of political restructuring may repeal policies benefiting several distinct social minorities that, when considered collectively, in fact constitute a voting majority within the relevant jurisdiction. Ultimately, the Ninth Circuit accepted the district court's findings that Proposition 209 impaired the interests of insular minorities within the state of California. However, the court of appeals considered in dicta that racial minorities in the aggregate may constitute a numerical majority, thus appearing to frustrate the restructuring precedent.[174] In *Hunter*, for example, the Supreme Court stated that "[t]he majority needs no protection against discrimination."[175] The *Hunter* and *Seattle School District* Courts had considered the effects of political restructuring against a single minority group that constituted a clear numerical minority within the jurisdiction. These cases most likely did not anticipate that minorty-disadvantaging restructuring could be effectively deployed in a multi-racial jurisdiction. Therefore, future courts will likely be compelled to decide whether the prohibition against burdening minority interests is triggered only when the affected minority constitutes a numerical minority within the jurisdiction (thereby virtually ensuring that women as a group will never receive *Hunter* protection); or whether the protection of minority interests attaches to the interests themselves rather than to the numerical status of the minority group.

In other words, it may be the case that certain interests held by minorities are so socially stigmatized and therefore so vulnerable to political disapprobation that they can scarcely be defended by a numerically strong minority, even one with coalition opportunities that could bring its interests to majoritarian status. If, as in the case of affirmative action, these are the kinds of interests that spoil coalitions, then even coalition groups of similarly interested minorities may reject the pursuit of such interests in order to achieve other political goals.[176] The question then for the

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voucher programs) would undeniably be open to challenge under the Free Exercise Clause, it should also be open to equal protection challenge. Arguably, the first permutation invokes a partial categorization opening the amendment to challenge under the per se rule. This seems to be the case because, even though the amendment does not name a specific religious group for disadvantage, it does target religious groups as opposed to non-religious groups. The second permutation, like the anti-busing amendment in *Seattle School District*, uses an impartial classification which nevertheless possesses the practical effect of disadvantaging a minority group. We may debate whether the consequence of this political attack is sufficiently diffuse as to impact a variety of religious and non-religious groups and, therefore, withhold the application of heightened scrutiny. Nevertheless, the primary significance of this example is to demonstrate that groups other than homosexuals and racial minorities may require additional protection against political restructuring in order to ensure that they are not branded with special political disabilities, as majorities grow tempted to access strategically those political mechanisms through which they can most effectively concentrate their political power.

174. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 704-05 (9th Cir. 1997).

175. Hunter v. Erickson, 393 U.S. 385, 391 (1969).

176. *See* FRYMER, *supra* note 14, at 31-32 (explaining that the coalition-of-minorities model works poorly when organized around racial issues).

reconstructed doctrine is whether political structuring should be permitted to be the mechanism that forces this kind of conflict *within* minority groups, with no special judicial protection emanating from the fact that the restructuring has occurred precisely in order to ban the disfavored interest.

VI. CONCLUSION

This Note has attempted to reconcile *Romer v. Evans* with prior doctrine developed in the course of constitutional challenges to acts of political restructuring that adversely impacted African Americans. Gays and lesbians have been injured by a pervasive resistance to acknowledging the structural parallels between their political experiences and those of traditionally protected minorities. This Note has attempted to overcome this resistance by erasing the artificial barrier erected between *Romer* and the *Hunter* doctrine by the *Romer* Court's omission of relevant precedent. The structural considerations of this Note were intended to distill from this reconciliation a core democratic commitment, enforceable under the Equal Protection Clause, to preclude social minorities from being burdened with special political disabilities.

Although it has not been the purpose of this Note definitively to answer whether suspect classification should be enlarged to include sexual orientation or whether homosexuals constitute a suspect class under equal protection, the Note has argued three points that should influence the reconstruction of the *Romer* and *Hunter* doctrine at a second stage: that those acts should be held constitutionally suspect that place minority groups in a condition of special disability; that a group so impacted will deserve heightened judicial protection; and that the *Romer* Court appeared to believe that homosexual persons are capable of representing this kind of group. For some readers, the structural considerations of this Note may have accomplished little more than the framing of persisting questions. I have considered this, however, to be a worthwhile task.