

MINI-DOMAS AS POLITICAL PROCESS FAILURES: THE CASE FOR HEIGHTENED SCRUTINY OF STATE ANTI-GAY MARRIAGE AMENDMENTS

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INTRODUCTION

Lawsuits seeking gay and lesbian marriage equality are piling up—more than seventy separate cases in thirty-two jurisdictions as of this writing¹—and advocates are racing to the Supreme Court to see which case might settle the question for the whole nation. As these cases move up swiftly through the federal courts, it is becoming increasingly difficult to see how the Justices can avoid a final reckoning on the question of same-sex marriage during their October 2014 term.

Indeed, it does not seem an exaggeration to describe same-sex marriage advocates' apparent strategy as one of "shock and awe." Marriage equality is on a winning streak of more than a dozen cases since the Supreme Court's decision last summer in *United States v. Windsor*,² the primary authority on which lower courts have relied.³ *Windsor* invalidated the federal Defense of Marriage Act, but even more importantly, the Court spoke with warm empathy toward gay and lesbian Americans' quest for equal marriage rights. Specifically, the majority wrote that the "equal dignity of same-sex marriages" may not be undermined by laws whose "principal purpose is to impose inequality."⁴

Windsor was a breakthrough equal protection decision, but it arose within a framework of federalism: protecting the prerogatives of pro-marriage equality states against an overreaching and ill-intentioned Congress. As various commentators have suggested, *Windsor*'s thinly

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¹ The web site <http://www.freedomtomy.org/litigation> is tracking all of the cases [<http://perma.cc/5JZP-UL76>].

² 133 S. Ct. 2675 (2013) [<http://perma.cc/RRK3-P4V2>].

³ Michael C. Dorf, *Will the Lower Court Consensus on Same-Sex Marriage Influence the Supreme Court?*, VERDICT (May 28, 2014), <http://verdict.justia.com/2014/05/28/will-lower-court-consensus-sex-marriage-influence-supreme-court> (observing that "every single judge to rule on the question has relied on *Windsor* for the conclusion that [same-sex marriage] bans are unconstitutional") [<http://perma.cc/6BDZ-6LN3>].

⁴ *Windsor*, 133 S. Ct. at 2693–94.

reasoned, dignity-focused analysis seems inadequate for sweeping aside more than thirty state gay marriage bans.⁵ A decision with such monumental consequences for social policy and federalism requires more rigorous analysis and deeper roots in traditional equal protection theory. As Justice Brandeis is said to have observed, no case is ever fully decided until it is rightly decided.⁶ This principle has haunted the Court's gay rights cases—*Romer v. Evans*, *Lawrence v. Texas*, and most recently *Windsor*—all of which have suffered criticism for their ambiguous levels of scrutiny and lack of doctrinal rigor.⁷

If and when the Supreme Court eventually settles the question of gay marriage for the nation, the decision will take a place in history beside such landmarks as *Brown v. Board of Education* and *Loving v. Virginia*, as well as in the canon of major international human rights decisions. And so, it is important that the Court get this one right: not only the outcome, but also the constitutional reasoning. A decision based only on rational basis scrutiny (as some of the recent district court decisions have been)⁸ would suffer withering criticism, and a decision with an unspecified standard of review, like *Windsor*, might not be received much better. Most commentators agree that the state “mini defense of marriage acts,” or “mini-DOMAs,” cannot survive true heightened scrutiny.⁹ But first, the Court—which has declined numerous opportunities to expressly make sexual orientation a suspect or quasi-suspect classification—needs a clear and principled basis for *getting* to heightened scrutiny.

This Essay suggests that political process theory provides the most democratically legitimate justification for the Supreme Court to step in and resolve the question of same-sex marriage for the whole country, as it seems increasingly likely to do, at a time when a majority of states still outlaw the practice. As I will explain, such an approach would not be

⁵ See, e.g., Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 33 (2014) (arguing that the justices in a state marriage case should not “act merely on their own political-moral judgment” because “it seems premature to conclude that there is a national consensus on this issue”) [<http://perma.cc/N6D7-CZGN>].

⁶ Attributed to Justice Brandeis in Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 223 (1952) [<http://perma.cc/7NSL-VZJT>].

⁷ See, e.g., Mike Dorf, *A Publicity Update and Then Three Thoughts on Justice Scalia's Dissent in Windsor*, DORF ON LAW (June 28, 2013), <http://www.dorfonlaw.org/2013/06/a-publicity-update-and-then-three.html> (observing that “there is much to regret about the fact that in *Romer*, *Lawrence* and now *Windsor*, the Court has failed to specify the level of scrutiny it is applying as a matter of equal protection doctrine (in *Romer* and *Windsor*) or substantive due process doctrine (in *Lawrence*”) [<http://perma.cc/XZ43-B3A6>].

⁸ See, e.g., *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1207 (D. Utah 2013) [<http://perma.cc/8WFH-SK37>].

⁹ See, e.g., Conkle, *supra* note 5, at 42 (“By every indication, the strongest, most candid, and most judicious rationale [for invalidating state anti-gay marriage laws] would rest on equal protection, with the Court concluding that classifications based on sexual orientation are quasi-suspect, triggering heightened scrutiny that marriage prohibitions cannot survive.”).

inconsistent with the Court's recent decision in *Schuette v. Coalition to Defend Affirmative Action*, in which political process theory also played some role.¹⁰ In focusing on same-sex couples' right to marry (which, notably, is often presented as a premise that assumes its conclusion) courts and commentators have largely overlooked the history of how and why the mini-DOMAs were enacted. The history and circumstances surrounding the twenty-eight mini-DOMAs that are embedded in state constitutions¹¹ deserve a more prominent examination in federal marriage litigation.

Collectively, these laws represent a troubling failure of the political process. By strong-arming marriage discrimination into state constitutions—which typically are far more difficult to change than ordinary statutes—during a relatively brief period from 1998 to 2012, mini-DOMA proponents intended to freeze marriage discrimination in place and put it beyond the reach of ordinary democratic deliberation, future legislative reconsideration, and state judicial review. And so the remaining mini-DOMAs should receive searching, skeptical judicial review of their *substance* because they are the products of a constitutionally suspect lawmaking *process*.

This Essay proceeds in four parts. In Part I, I review the recent emergence of state constitutional mini-DOMAs. In Part II, I provide background on the political process branch of equal protection doctrine. In Part III, I explain why, under political process theory, the mini-DOMAs should receive heightened scrutiny. Finally, I discuss why the Court's recent decision in *Schuette* does not prevent the use of political process theory that I suggest.

I. STATE CONSTITUTIONAL MINI-DOMAS: HISTORY AND CONSEQUENCES

Although legal same-sex marriage was not possible in the United States up until a decade ago, affirmative and categorical prohibitions on the celebration or interstate recognition of same-sex marriages are largely the products of only the past twenty years. The first state constitutional mini-DOMAs were not passed until 1998, when Alaskan and Hawaiian voters approved amendments in response to state court rulings favorable to same-sex marriage.¹²

The push for state marriage amendments gained much more momentum after the Massachusetts Supreme Judicial Court decided *Goodridge v. Department of Public Health* in 2003, for the first time

¹⁰ *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014) [<http://perma.cc/7SEF-9697>].

¹¹ See *Where State Laws Stand*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/where-state-laws-stand> (last updated June 10, 2014) [<http://perma.cc/S5TL-H6FL>].

¹² AMY L. STONE, GAY RIGHTS AT THE BALLOT BOX 33 (2012).

making legal same-sex marriage a reality in America.¹³ *Goodridge* “brought gay marriage to the forefront of political debate in 2004.”¹⁴ Social conservatives like Republican Senator Wayne Allard of Colorado warned: “There is a master plan out there from those who want to destroy the institution of marriage.”¹⁵

Marriage equality activists were indeed mapping litigation and legislative strategies to slowly win marriage equality state-by-state. But the real “master plan”—along with the money, communication abilities, and political muscle to implement it—belonged to social conservatives and their political allies, mostly in the Republican Party. Before *Goodridge*, only three states had adopted constitutional mini-DOMAs. But by 2008, a mere five years later, more than twenty-five additional states had done so.¹⁶

Until very recently, direct democracy was a disaster for gay rights, a fact that goes a long way toward explaining why social conservatives made constitutional amendments, which typically must be approved in voter referenda, their weapon of choice in the fight against gay marriage. Of the thirty-three times that states voted on gay marriage ballot measures between 1998 and the spring of 2012, opponents of gay marriage won thirty-two times.¹⁷ In her study of earlier civil rights ballot initiatives, political scientist Barbara Gamble found that gays and lesbians had “seen their civil rights put to a popular vote more often than any other group.”¹⁸ Of forty-three gay/lesbian rights initiatives that reached the ballot between 1959 and 1993, eighty-eight percent sought to repeal existing gay rights laws or forbid legislatures from passing new ones, and voters approved seventy-nine percent of these restrictive measures.¹⁹

Today, as the courts confront same-sex marriage, they also confront something of a political and legal anomaly. Thirty-one states ban same-sex marriage, twenty-eight of these by constitutional amendment.²⁰ Yet a majority of the people in those states—fifty-three percent—actually *support* marriage equality.²¹ Nationwide, support stands at fifty-nine percent, with

¹³ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) [<http://perma.cc/XFV2-5PLD>].

¹⁴ MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 97 (2013).

¹⁵ *Id.* at 105.

¹⁶ *Id.*

¹⁷ Charles Mahtesian, *The Map of Gay Marriage*, POLITICO (May 4, 2012, 10:54 PM), <http://www.politico.com/blogs/charlie-mahtesian/2012/05/the-map-of-gay-marriage-122535.html> [<http://perma.cc/J2UT-PLNR>].

¹⁸ Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 257 (1997) [<http://perma.cc/YU9Z-EA2F>].

¹⁹ *Id.* at 258.

²⁰ See *Where State Laws Stand*, *supra* note 11.

²¹ Peyton M. Craighill and Scott Clement, *Support for Same-Sex Marriage Hits New High; Half Say Constitution Guarantees Right*, WASH. POST (Mar. 4, 2014), <http://www.washingtonpost.com/politics/support-for-same-sex-marriage-hits-new-high-half-say-constitution-guarantees->

half of America believing gay marriage is a constitutional right.²² Of course, variation remains from state to state. But even in deeply conservative states like Kentucky, where voters ratified a mini-DOMA in 2004, attitudes have moved decidedly toward greater acceptance. In 2004, seventy-two percent of Kentuckians said they supported a ban on gay marriage.²³ Ten years later, the number opposed to marriage equality had dropped almost twenty points, to fifty-five percent.²⁴

A bedrock premise of representative democracy is that such attitudinal change should portend changes in laws and policies. In this case, greater acceptance of marriage equality should be making it easier to repeal existing bans state-by-state. But that assumes a political process that is responsive to evolving public attitudes and where simple legislative majorities can prevail under ordinary lawmaking. But for same-sex marriage in twenty-eight of the fifty states, that is not the regime we have.

II. POLITICAL PROCESS THEORY AND EQUAL PROTECTION

Broadly stated, the political process approach to an equal protection inquiry holds that, when considering how government allocates benefits and burdens among groups of citizens, the characteristics of the political decision making process that produced an allocation can help to determine whether the allocation is constitutionally suspect. Relevant factors include whether the process was customary or extraordinary; whether it was infected with animus or invidious purposes; whether it inherently advantaged one group over another; and whether it remains democratically responsive to social and political change. The theory assumes that the first line of defense against oppressive, unjust, or ill-conceived laws is a fair, open, and responsive lawmaking process. Political process theory is usually considered a conservative constitutional methodology because its “animating purpose . . . is circumvention of the countermajoritarian difficulty inherent in judicial review.”²⁵

The basic principle that the nature of the process through which a law is made can be relevant to equal protection analysis has its origins in *United States v. Carolene Products Co.* The case’s famous footnote four suggested

right/2014/03/04/f737e87e-a3e5-11e3-a5fa-55f0c77bf39c_story.html [<http://perma.cc/5KTP-92CX>].

²² *Id.*

²³ Tom O’Neill, *Gay Marriage: Kentucky Still Opposed, but Acceptance Growing*, *Bluegrass Poll Says*, COURIER-J. (Feb. 8, 2014), <http://archive.courier-journal.com/article/20140207/NEWS01/302070077/Gay-marriage-Kentucky-still-opposed-acceptance-growing-Bluegrass-Poll-says> [<http://perma.cc/5YKC-PRXH>].

²⁴ *Id.*

²⁵ Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 768 (1991); see also Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1370–72 (2011) (discussing the origins of political process theory) [<http://perma.cc/6PH4-R8JM>].

that “more exacting judicial scrutiny” may be required for “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.”²⁶ Political process theory’s most famous exposition came in John Hart Ely’s classic *Democracy and Distrust*, which argued that, under equal protection, the legitimacy of how government allocates benefits and burdens should not “be determined simply by looking to see who ended up with what,” but instead “by attending to the process that brought about the distribution in question”²⁷

Although the Supreme Court has not expressly embraced political process theory, “[t]he ideas spawned by footnote four and Ely are embedded in [its] equal protection doctrine.”²⁸ In particular, the Court has acknowledged that subjecting ordinary legislative questions to public referenda can place special burdens on minorities.²⁹ The Court has also said that, in the search for unconstitutional discriminatory purpose, relevant factors can include the “historical background” and “sequence of events” that produced the challenged law, especially departures from normal processes.³⁰ Nearly twenty years ago in *Romer*, the Court warned that “[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.”³¹ And *Windsor* teaches that “[i]n determining whether a law is motivated by an improper animus or purpose, ‘[d]iscriminations of an unusual character’ especially require careful consideration.”³²

III. GETTING TO HEIGHTENED SCRUTINY

This Essay is not concerned with the constitutionality of individual state laws forbidding gay marriage, but rather with how the Supreme Court should think about the phenomenon of state mini-DOMAs collectively. Even if marriage discrimination is not in itself “unusual,” the process that was used to enact it in the United States over the past two decades—swiftly, and with the intent that the discrimination be permanent and irreversible—surely was. At oral argument in *Perry v. Hollingsworth* (where the Court ultimately would duck deciding the constitutionality of a state mini-DOMA by dismissing the appeal on standing grounds), Justice Scalia famously

²⁶ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) [<http://perma.cc/M5P-N6Z6>].

²⁷ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 136 (1980).

²⁸ Schacter, *supra* note 25, at 1372.

²⁹ *See* *Hunter v. Erickson*, 393 U.S. 385, 391 (1969) [<http://perma.cc/5GD4-3WZH>].

³⁰ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) [<http://perma.cc/MA2H-A6GF>].

³¹ *Romer v. Evans*, 517 U.S. 620, 633 (1996) [<http://perma.cc/C89Y-8U76>].

³² *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (alteration in original) (quoting *Romer*, 517 U.S. at 633).

asked: “[W]hen did it become unconstitutional to exclude homosexual couples from marriage?”³³ Framing the issue this way, of course, is intended to trap marriage equality plaintiffs in a quagmire of difficult arguments about a “living Constitution” or evolving understandings of equal protection. But Justice Scalia’s question is the wrong one. To get to heightened scrutiny—and thus shift the burden to states to justify their laws—the inquiry should focus on the process that gave us, in a relative historical blink of the eye, a new normal of deeply entrenched marriage discrimination against gays and lesbians in a majority of states. I would suggest that the appropriate question, although perhaps not as punchy as Justice Scalia’s, goes something like this: “When did states start erecting affirmative and categorical barriers to same-sex marriage, and why do most of those barriers exist in the form of constitutional amendments that are very difficult to revisit even after public attitudes become more favorable?” To put the matter in terms of a more general principle, heightened judicial scrutiny is justified where, due to the majority’s deliberate rigging or corruption of the process, a minority group “keeps finding itself on the wrong end of the [law’s] classifications, for reasons that in some sense are discreditable.”³⁴

For sake of argument, let us assume the Constitution does not provide a fundamental right to same-sex marriage, and that gays and lesbians are not a suspect class. Let us instead accept the counsel of conservatives like Justice Scalia, who urge gays to “promot[e] their agenda through normal democratic means” rather than running to the courts because “[s]ocial perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best.”³⁵ The crucial questions then become: could same-sex marriage compete in a fair fight? Did the political process, as it actually played out in a majority of states between 1998 and 2012, merely enact a traditional definition of marriage, or was it also intended to rig the game for many decades into the future? Did it preserve a lawmaking process that is accessible and responsive to reasoned debate, where legislators can be held electorally accountable if they refuse to remain in step with the evolving views of their constituents? Did it reflect “the Constitution[’s] presum[ption] that even improvident decisions will”—or at least *can*, in time—“be rectified by the democratic processes[?]”³⁶ The answer to the latter two questions must be no.

³³ Transcript of Oral Argument at 38, *Perry v. Hollingsworth*, 133 S. Ct. 2652 (2013) (No. 12-144) [<http://perma.cc/L5XS-FBWT>].

³⁴ ELY, *supra* note 27, at 152.

³⁵ *Lawrence v. Texas*, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting) [<http://perma.cc/V6PX-658D>].

³⁶ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) [<http://perma.cc/8GUW-RKJ2>].

Support for marriage equality has climbed by twenty-two points in eleven years.³⁷ Even while marriage equality opponents were still enjoying success at the voting booth, attitudes were evolving: between 1998 and 2009, the average vote against mini-DOMAs in statewide referenda increased from thirty-one percent to forty-six percent.³⁸ Given the shift in public attitudes toward gay marriage that underlay these numbers, it seems reasonable to assume that, in a world where marriage discrimination was merely statutory, gays and their allies could be slowly but steadily winning marriage equality state by state. In that scenario, it would be difficult to justify the Supreme Court stepping into the matter this soon. The problem is that, even as public acceptance of gay marriage has continued to grow, in a majority of states the process for translating social change into legal and policy change cannot work the way it is intended to. Thus, marriage equality proponents are left with only two choices: mount difficult and expensive campaigns to begin *un-amending* twenty-eight state constitutions (in reality, doing so in more than perhaps one or two states remains a practical impossibility right now)³⁹ or look to the federal courts and federal Constitution.

Collectively, the state constitutional mini-DOMAs were not merely benign initiatives to assert majoritarian democratic control over the definition of marriage. The central political process problem of the mini-DOMAs is that they were not intended simply to *enact* marriage discrimination, but rather to *freeze it in place indefinitely*; to permanently disadvantage the group seeking to marry; to effectively shut down the legislative and legal debate over marriage equality just as it was getting off the ground; and to insulate the question from future legislative reconsideration or state judicial review.

Consider that not one of the thirteen states that enacted constitutional gay marriage bans in 2004 had previously permitted same-sex marriage, meaning “the referenda deprived nobody of marriage rights that already existed.”⁴⁰ What these amendments *did* do was to “make it harder for those states to adopt gay marriage in the future, as legislatures would be powerless to act by statute.”⁴¹ As of now, in a majority of states, the ordinary legislative process through which family law (and almost all other social regulations) is made has been disabled when it comes to same-sex marriage. A key purpose of the constitutional mini-DOMAs was to make it impossible for legislators to assess and respond to social and political

³⁷ Craighill and Clement, *supra* note 21.

³⁸ STONE, *supra* note 12, at 132.

³⁹ See Trip Gabriel and Sheryl Gay Stolberg, *Ohio Gay-Marriage Push Divides Some Advocates*, N.Y. TIMES (Feb. 23, 2014), <http://www.nytimes.com/2014/02/24/us/politics/ohio-gay-marriage-push-divides-some-advocates.html> [<http://perma.cc/CP9N-VPZ8>].

⁴⁰ KLARMAN, *supra* note 14, at 108.

⁴¹ *Id.*

change and the shifting preferences of their constituents.

The spirit of these efforts was captured by a Georgia Republican politician who urged his state to adopt its mini-DOMA because it would “set in stone that marriage in this country is a union between one man and one woman. The laws of man did not create marriage; the laws of man should not alter marriage.”⁴² A Georgia newspaper editorial said the measure would “put the institution [of marriage] back where it belongs, above both the courts and the Legislature.”⁴³ In Arizona, the speaker of the state’s House of Representatives said the measure would “put current state law in the [Arizona] Constitution so that it withstands any future legal or legislative challenges.”⁴⁴ The effect of these mini-DOMAs, as a North Carolina news account observed, was to “[make] it extremely difficult for same-sex marriage to ever become legal.”⁴⁵

Mini-DOMA proponents seized the moment to cement discrimination into their states’ fundamental law just before the sea change in public attitudes began. Even as the tides have now shifted against marriage discrimination, the remarks of one mini-DOMA proponent are telling. After Indiana’s legislature recently delayed a mini-DOMA from going to the voters during 2014, one frustrated Republican state senator complained that “[t]he can keeps getting kicked down the road while the culture changes and opponents [of the amendment] grow.”⁴⁶ In other words, we must put marriage discrimination permanently into place before too many people change their minds and we lose the opportunity to do so! But this is not a valid argument for amending a document that is supposed to be about timeless and fundamental principles.

Indeed, a critical reason why mini-DOMAs raise red flags from a political process standpoint is that state regulation of the family, including the qualifications and prerequisites for marriage, is typically accomplished by statute, not constitutional amendments. Constitutions are about fundamental law—things like the organization and powers of government, and the retained rights and immunities of individuals. Using constitutional amendments to impose disadvantages against one group in an area traditionally governed by statutory law is, at the least, a “[d]iscrimination[]

⁴² Phil Gingrey, Editorial, *Marriage Established by God*, ATLANTA JOURNAL-CONSTITUTION, Feb. 26, 2004, at 15A.

⁴³ Dan Wolfe, Editorial, *Gay Marriage Amendment: Put Sacred Institution Beyond Courts’ Reach*, ATLANTA JOURNAL-CONSTITUTION, Nov. 1, 2004, at 13A.

⁴⁴ Amanda J. Crawford, *Legislators Push Ban on Gay Marriage*, ARIZ. REPUBLIC (Feb. 12, 2008, 12:00 AM), <http://archive.azcentral.com/specials/special12/articles/0212gay-marriage0212.html> [<http://perma.cc/L99-NCLS>].

⁴⁵ Mike Kernels, *Black Clergy Fight Amendment in Greensboro*, WINSTON-SALEM JOURNAL (May 7, 2012, 9:41 AM), http://www.journalnow.com/news/elections/local/article_c855a2c8-e03b-58bc-97d8-b45b08c92709.html [<http://perma.cc/S4P5-48PD>].

⁴⁶ Michael Auslen, *HJR 3 Debate over for Now*, IND. DAILY STUDENT (Feb. 18, 2014, 12:39 AM), <http://idsnews.com/news/story.aspx?id=96690> [<http://perma.cc/3729-DR4P>].

of an unusual character” that “suggest[s] careful consideration”⁴⁷ in the form of heightened scrutiny. The mere fact that a transient political majority may feel strongly about a volatile policy question does not suffice to make the issue a fundamental one of constitutional importance.⁴⁸

For these reasons, Judge J. Harvie Wilkinson of the Fourth Circuit Court of Appeals, a prominent judicial conservative, has condemned constitutional mini-DOMAs as “traged[ies]” that offend the “American constitutional tradition” and “risk trivializing” constitutions.⁴⁹ Following the wave of mini-DOMAs approved in 2004, he wrote:

[I]t is legislative bodies that broker compromises among opposing beliefs and zealous factions, and it is legislatures that adapt to changing public preferences and circumstances. It is impossible to predict what views electoral majorities may entertain five, ten, twenty, or fifty years hence on same-sex relations. It is the job of legislatures, not constitutions, to reflect evolving standards and to register change from whatever direction it may arrive.⁵⁰

Of course, another reason that mini-DOMA proponents pushed for discrimination in the form of constitutional amendments was that mere statutory laws were vulnerable to being overturned by “activist judges”—that is, state judiciaries applying their own state constitutions.⁵¹ But here, too, there is a political process problem. Because most state judges are subject to election or retention, and are thus held democratically accountable, judges can be regarded as integral parts of their state political systems.⁵² Accordingly, state judicial review typically does not present counter-majoritarian concerns in the same way as federal judicial review. An intention to disable state judicial review of same-sex marriage, like an intention to disable future legislative reconsideration, should thus also amount to an improper purpose by the lights of political process theory, because it singles out one issue and changes the ordinary rules of the game in a way that is intended to consistently disadvantage one group and perpetuate discrimination.

⁴⁷ *Romer v. Evans*, 517 U.S. 620, 633 (1996) (alteration in the original) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37–38 (1928)).

⁴⁸ At the very least, the fact that voters thought an issue to be so profound that it deserved a place in their state constitution suggests that, when reviewed for compliance with the *federal* constitution, the question deserves something more than rational basis scrutiny.

⁴⁹ J. Harvie Wilkinson III, *Gay Rights and American Constitutionalism: What's a Constitution For?*, 56 DUKE L.J. 545, 545, 574 (2006) [<http://perma.cc/6TAP-2PZL>].

⁵⁰ *Id.* at 574.

⁵¹ See, e.g., Klarman, *supra* note 14, at 98.

⁵² See, e.g., Melinda Gann Hall, *On the Cataclysm of Judicial Elections and Other Popular Antidemocratic Myths*, in *WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE* 240 (Charles Gardner Geyh ed., 2011) (arguing that the American tradition of subjecting state jurists to election or retention votes “give[s] citizens a voice in the exercise of judicial power,” reinforcing a “carefully engineered nexus between state governments and citizen preferences at the local level, and the stringent guarantees of civil rights and liberties at the national level”).

Mini-DOMAs are even more disreputable from a political process perspective because they were often a tool to mobilize anti-gay fear and animus in the service of partisan politics. For example, President George W. Bush's 2004 re-election campaign worked closely with the proponents of state constitutional amendments, knowing that "[g]ay marriage referenda would inspire religious conservatives to vote, make gay marriage more salient in voter choices between political candidates, and put Democrat politicians on the defensive."⁵³

Indeed, the mini-DOMA campaigns were frequently marked by virulent anti-gay animus—a reality that has gone largely unremarked upon in current federal marriage litigation. Prominent religious conservative leaders with powerful media capabilities and large national followings like James Dobson, founder of the group Focus on the Family, called the fight against gay marriage "our D-Day, or Gettysburg or Stalingrad."⁵⁴ One legislator remarked in 2004 that supporters of his state's mini-DOMA had shown "an unparalleled level of zeal, intolerance and hatred" toward gays.⁵⁵ And the district court in *Perry* found that California's Proposition 8 campaign presented voters with a "multitude of television, radio and [I]nternet-based advertisements and messages" intended to "convey[] to voters that same-sex relationships are inferior to opposite-sex relationships and dangerous to children."⁵⁶

Moreover, the suggestion that the only purpose of the constitutional mini-DOMAs was a benign and democratically legitimate one—to protect a traditional definition of marriage—is belied by the fact that most of these amendments reach beyond marriage to also prohibit civil unions and other forms of legal recognition for gay relationships. And as Justice Scalia has aptly observed, "'preserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples."⁵⁷

IV. DISTINGUISHING *SCHUETTE*

The political process branch of equal protection doctrine received recent attention from the Court in *Schuette v. Coalition to Defend Affirmative Action*.⁵⁸ The question in *Schuette* was whether the Equal Protection Clause was violated by a Michigan constitutional amendment,

⁵³ KLARMAN, *supra* note 14, at 106.

⁵⁴ *Id.* at 98.

⁵⁵ Al Cross, *Senate OKs Putting Proposal to Ban Gay Marriage on Ballot*, COURIER-J. (Louisville, Ky.), Apr. 14, 2004, at A1.

⁵⁶ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 930 (N.D. Cal. 2010) [<http://perma.cc/ERY5-7D7P>].

⁵⁷ *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting).

⁵⁸ *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014).

enacted through a voter referendum that prohibited state universities from using the limited form of racial affirmative action that the Court had allowed in *Grutter v. Bollinger*. The Court overturned an *en banc* decision from the Sixth Circuit that had relied on two of the Court's earlier cases about the harmful effects of direct democracy on the interests of racial minorities: *Hunter v. Erickson*⁵⁹ and *Washington v. Seattle School District No. 1*.⁶⁰

In *Hunter*, the Court held that the Equal Protection Clause was violated by a voter referendum that overturned an Akron, Ohio, fair-housing ordinance and stripped the city council of authority to enact any future such ordinance dealing with discrimination on the basis of race, color, religion, national origin, or ancestry.⁶¹ In *Seattle School District No. 1*, the Court applied *Hunter* to strike down a state statute, also enacted via a referendum, that prohibited racially integrative busing and took the matter out of the hands of local school boards.⁶² Together, *Hunter* and *Seattle* have come to stand for the principle that an electoral majority may not “restructure[] the political process” so that “the majority has not only won, but has rigged the game to reproduce its success indefinitely.”⁶³

Although there was no majority opinion in *Schuetz*, the critical flaw in the Sixth Circuit's decision, as at least five of the justices saw it, was that it essentially used attitudes toward affirmative action as a proxy for race, equating a referendum against affirmative action with constitutionally forbidden race discrimination.⁶⁴ For anyone familiar with the Roberts Court's race jurisprudence, it could not have come as a surprise that the Court's conservative members would rebel against this idea. “It cannot be entertained as a serious proposition,” wrote Justice Kennedy for a plurality of himself, the Chief Justice, and Justice Alito, “that all individuals of the same race think alike” on matters of public policy like affirmative action.⁶⁵ In short, the Sixth Circuit's applications of *Hunter* and *Seattle* foundered as a matter of equal protection doctrine because at least five justices thought the Michigan amendment did not inflict “specific injuries on account of race”⁶⁶ or demonstrate “discriminatory intent”⁶⁷ in the way that was done by

⁵⁹ 393 U.S. 385 (1969) [<http://perma.cc/9X4Z-3W5R>].

⁶⁰ 458 U.S. 457 (1982) [<http://perma.cc/ZGR7-9UDT>].

⁶¹ *Hunter*, 393 U.S. at 391.

⁶² *Seattle Sch. Dist. No. 1*, 458 U.S. at 474.

⁶³ Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by Any Means Necessary (BAMN) v. Regents of the Univ. of Mich., 701 F.3d 466, 475, 489 (6th Cir. 2012) (*en banc*), *rev'd*, 134 S. Ct. 1623 (2014) [<http://perma.cc/URT8-N9QV>].

⁶⁴ See *Schuetz*, 134 S. Ct. 1623, 1633–34 (2014) (plurality opinion); *id.* at 1639–40 (Scalia, J., concurring in the judgment).

⁶⁵ *Id.* at 1634 (plurality opinion).

⁶⁶ *Id.* at 1633.

⁶⁷ *Id.* at 1647 (Scalia, J., concurring in the judgment) (quoting *Hernandez v. New York*, 500 U.S. 352, 372–373 (1991) (O'Connor, J., concurring in the judgment)).

the laws at issue in *Hunter* and *Seattle*. Although several Justices in *Schuette* discussed the implications of political process restructuring, the Court as a whole provided no guidance on that point.

In the end, my argument here is unaffected by the outcome in *Schuette*. Unlike a ballot initiative on affirmative action, mini-DOMAs undeniably create a discriminatory classification and an intentional injury for equal protection purposes: they categorically deny marriage to a specific group of people based on their sexual orientation. Moreover, the classification involves access to the right of marriage, something the Court has repeatedly called “one of the basic civil rights of man.”⁶⁸ The key task, then, is to determine whether this deprivation deserves more than mere baseline rational basis scrutiny. I have assumed for purposes of argument that sexual orientation, as such, does not create a suspect or quasi-suspect classification for all purposes. Under my application of political process theory, the justification for heightened scrutiny arises not from the characteristics of the group of people affected, but from the extraordinary circumstances through which state constitutional mini-DOMAs came into being between 1998 and 2012 in more than half the states. Rather than relying on suspect or quasi-suspect status under equal protection for particular *persons*, I suggest that the mini-DOMAs are tainted by a disreputable history which points toward giving them suspect status as an *issue*.

In summary, I am arguing that the specific purposes and circumstances of the mini-DOMAs—imposing discrimination against a minority group on a volatile and dynamic question of social policy, employing the vehicle of constitutional amendments to insure against the group’s ability to redress the problem through the ordinary legislative/political process, accomplishing this across more than half the states in little more than a decade, all in an atmosphere that was often polluted by evident animus and ill will—now require that their substance be reviewed with skepticism under a heightened burden of justification. I am not arguing that direct democracy on controversial questions like gay marriage is always incompatible with the Constitution. But if “[a] law declaring that . . . 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 in the most literal sense,”⁶⁹ then a *process* that is deliberately designed to achieve that same result—to “restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation”⁷⁰—should at least raise judicial eyebrows and force states to provide important, persuasive, and substantive justifications. This is especially so when the issue at hand is not an isolated matter in one jurisdiction, but a question of national scale

⁶⁸ *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)) [<http://perma.cc/N9KN-VMSC>].

⁶⁹ *Romer v. Evans*, 517 U.S. 620, 633 (1996).

⁷⁰ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

involving more than half the states.⁷¹

CONCLUSION

The “right to marry” for gays and lesbians is a difficult issue for courts because “[i]t is fundamentally a disagreement about final ends whose value cannot be demonstrated by argument. It is as intractable as (and, as it happens, largely coextensive with) religious disagreement.”⁷² I have argued that the circumstances under which the state constitutional mini-DOMAs were enacted render them collectively a failure of the political process and thus provide a sound justification for heightened, skeptical judicial review of their substance. I have advanced no view about the substantive merits of the mini-DOMAs, other than that they seem unlikely to survive the application of “exacting judicial scrutiny”⁷³ that insists on justifications that are “genuine, not hypothesized or invented *post hoc* in response to litigation.”⁷⁴ My objective has been simply to provide a clear analytical path the Supreme Court could use for *getting* to such heightened scrutiny, something that has been missing in all of its other gay rights decisions.

To be sure, the Court already has given a form of heightened scrutiny that is sometimes called “rational basis with bite” to a sweeping anti-gay ballot initiative in Colorado (*Romer*), a sodomy law in Texas (*Lawrence*), and the federal Defense of Marriage Act (*Windsor*). But all those cases lacked a clear justification for getting to heightened scrutiny, and none involved something as monumental as invalidating marriage laws in more than half the states. If the Court is going to take that step—and have its authority and credibility survive—it needs to apply heightened scrutiny by name, not merely by implication, and it needs to explain why it is subjecting states to a heavy burden of justification.

Ironically, the campaign to lock up permanent marriage discrimination in as many states as possible, as quickly as possible, planted the seeds of its own demise. Had same-sex marriage opponents maintained faith in the process of democratic dialogue as translated through the normal legislative process, progress toward state-by-state marriage equality may have

⁷¹ Although three states—Indiana, Wisconsin, and Wyoming—ban same-sex marriage by statute and not constitutional amendment, I would subject those laws to the same analysis and burden of justification as the constitutional mini-DOMAs. As discussed earlier in this Essay, I propose heightened scrutiny for the *issue* of same-sex marriage based on the history of political process problems in the overwhelming number of jurisdictions that have enacted gay marriage bans. Just as *all* forms of race discrimination now automatically get strict scrutiny, because our nation’s history teaches that race discrimination is inherently suspect and very rarely serves constitutionally permissible ends, so I believe our nation’s experience with outlawing same-sex marriage has tainted all of the mini-DOMAs, even the small number that remain merely statutory.

⁷² Andrew Koppelman, *Why Scalia Should Have Voted to Overturn DOMA*, 108 NW. U.L. REV. COLLOQUY 131, 153 (2013) [<http://perma.cc/B7GV-296K>].

⁷³ *Carolene Prods.*, 304 U.S. at 152 n.4 (1938).

⁷⁴ *United States v. Virginia*, 518 U.S. 515, 533 (1996) [<http://perma.cc/K2Y6-8YHX>].

unfolded at a slower, more natural pace. By now, we would have come a shorter distance down the road toward the point where it was appropriate for the Supreme Court to step in and play its customary role of dragging straggler states into line with a national consensus as it did, for example, with interracial marriage and sodomy laws. Instead, the very rationales for the constitutional mini-DOMAs, and the manner in which they distorted the ordinary process of legislative and political change, now give the Supreme Court a principled reason to step in and subject them to skeptical and rigorous scrutiny.