

## RECENT LEGISLATION

EQUAL PROTECTION — POLITICAL RESTRUCTURING — ARKANSAS PASSES STATUTE PROHIBITING LOCAL GOVERNMENTS FROM CREATING NEW PROTECTED CLASSIFICATIONS. — Intra-state Commerce Improvement Act (Act 137), ARK. CODE ANN. §§ 14-1-401 to -403 (2015).

What happens when a law substantially burdens a minority group, but is facially neutral? In *Washington v. Davis*,<sup>1</sup> the Supreme Court held that it would not subject facially neutral state actions to heightened scrutiny unless the actions were taken with discriminatory intent.<sup>2</sup> Even before *Davis*, the Court had rarely struck down facially neutral statutes on equal protection grounds. In one such case, *United States Department of Agriculture v. Moreno*,<sup>3</sup> the Court found legislative history evidencing discriminatory intent.<sup>4</sup> In another two, *Reitman v. Mulkey*<sup>5</sup> and *Hunter v. Erickson*,<sup>6</sup> no such legislative history existed. Rather, the laws struck down in *Mulkey* and *Hunter* engaged in political restructuring — the shifting of decisionmaking power from one branch or level of government to another or from one sort of process to another within the same branch or level — in a way that disproportionately affected racial minorities.<sup>7</sup> Many scholars believe that *Moreno* remains valid today.<sup>8</sup> And the Court reaffirmed *Mulkey* and *Hunter*'s core principles post-*Davis* in *Washington v. Seattle School District No. 1*.<sup>9</sup> But the Court's other major case in the *Mulkey–Hunter* line — *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary*

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<sup>1</sup> 426 U.S. 229 (1976).

<sup>2</sup> See *id.* at 245–47; see also Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 764 (2011). Attempts have been made to distinguish legislative purpose, legislative intent, and legislative motive from each other. Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 5 (1992). Some scholars, though, have rejected such attempts. See, e.g., *id.* at 8–9 (“To a significant degree, conceptual distinctions cannot be made between legislative purpose and the terms legislative motive and intent, respectively. In practice, any worthwhile distinctions are lost mainly due to the courts’ use of the terms interchangeably.”). This comment uses the terms interchangeably.

<sup>3</sup> 413 U.S. 528 (1973).

<sup>4</sup> *Id.* at 534.

<sup>5</sup> 387 U.S. 369 (1967).

<sup>6</sup> 393 U.S. 385 (1969).

<sup>7</sup> *Id.* at 389–93; *Mulkey*, 387 U.S. at 374–77; see also Alex Reed, *Pro-Business or Anti-Gay? Disguising LGBT Animus as Economic Legislation*, 9 STAN. J. C.R. & C.L. 153, 168–70 (2013).

<sup>8</sup> See Note, *The Benefits of Unequal Protection*, 126 HARV. L. REV. 1348, 1362–63 (2013) [hereinafter *Unequal Protection*].

<sup>9</sup> 458 U.S. 457 (1982); see Stephen M. Rich, *Inferred Classifications*, 99 VA. L. REV. 1525, 1544 (2013).

(*BAMN*)<sup>10</sup> — cast uncertainty on the scope of these cases.<sup>11</sup> Thus, whether and when facially neutral political restructuring laws with disproportionate impacts violate the Fourteenth Amendment remain difficult constitutional questions.

Recently, the Arkansas legislature passed the Intrastate Commerce Improvement Act<sup>12</sup> (Act 137), a statute that prohibits “[a] county, municipality, or other political subdivision” of Arkansas from “adopt[ing] or enforc[ing] an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law.”<sup>13</sup> Act 137 does not expressly target any group, and Arkansas asserts that the Act’s purpose is to ensure that businesses are subject to uniform nondiscrimination laws throughout the state.<sup>14</sup> Nevertheless, critics of the Act claim that the law is the product of animus directed toward LGBT people.<sup>15</sup> Act 137’s opponents will probably fail if they mount an equal protection challenge. However, in questioning the Act’s constitutionality, Act 137’s opponents may have overlooked opportunities for compromise. Reform of the Act may be possible, especially if the Act’s opponents are willing to balance their search for legislative protection with the proponents’ desire for uniformity.

Arkansas’s Act 137 is not the first of its kind. In fact, Act 137 is modeled after a Tennessee statute: the Equal Access to Intrastate Commerce Act<sup>16</sup> (HB 600). In 2010, Belmont University, a government contractor for the city of Nashville, Tennessee, announced that the award-winning head coach of its women’s soccer program, Lisa Howe, would not return for the 2011 season.<sup>17</sup> Players on the team alleged that Howe had been fired for revealing that she was a lesbian and expecting a child with her partner.<sup>18</sup> In response to the incident the Nashville Metropolitan Council enacted an ordinance “to prohibit city contractors from discriminating on the basis of sexual orientation or gender identi-

<sup>10</sup> 134 S. Ct. 1623 (2014); see *id.* at 1631–33 (plurality opinion) (describing *Mulkey*, *Hunter*, and *Seattle School District No. 1* as the three cases of “principal relevance,” *id.* at 1632).

<sup>11</sup> See, e.g., *The Supreme Court, 2013 Term — Leading Cases*, 128 HARV. L. REV. 281, 281 (2014) [hereinafter *Schuetz* Case Comment] (characterizing the *Schuetz* plurality as “abandon[ing] the political-process doctrine, and, in its place, introduc[ing] a new test”).

<sup>12</sup> ARK. CODE ANN. §§ 14-1-401 to -403 (2015).

<sup>13</sup> *Id.* § 14-1-403(a).

<sup>14</sup> *Id.* § 14-1-402(a).

<sup>15</sup> See, e.g., *Animus on Display — Why Arkansas SB 202 Deserves a Veto*, ACLU (Feb. 21, 2015), <http://www.aclu.org/news/animus-display-why-arkansas-sb-202-deserves-veto>; *February 13, 2015*, ARK. HOUSE OF REPRESENTATIVES: ARCHIVED VIDEOS, 1:35:43–1:36:10, [http://arkansas-house.granicus.com/ViewPublisher.php?view\\_id=3](http://arkansas-house.granicus.com/ViewPublisher.php?view_id=3) [<http://perma.cc/Z5ME-5EA7>] (follow “video” hyperlink for February 13 under “House Sessions”) (statement of Rep. Tucker) [hereinafter *House Debate*].

<sup>16</sup> TENN. CODE ANN. §§ 4-21-102, 7-51-1801 to -1802 (2015); see *House Debate*, *supra* note 15, at 1:38:27–1:38:37 (statement of Rep. Hammer).

<sup>17</sup> Reed, *supra* note 7, at 154–55.

<sup>18</sup> *Id.* at 155.

ty.”<sup>19</sup> Shortly thereafter, the Tennessee legislature — spurred on by the Family Action Council of Tennessee<sup>20</sup> — passed HB 600.<sup>21</sup> HB 600 amended Tennessee law (1) to specify that the state’s definition of “sex” “refers only to the designation of an individual person as male or female as indicated on the individual’s birth certificate”<sup>22</sup> and (2) to prohibit local governments from adopting laws that deviate from the state’s antidiscrimination laws.<sup>23</sup> Howe and other plaintiffs challenged HB 600’s constitutionality, but the Tennessee Court of Appeals dismissed the suit for lack of standing.<sup>24</sup> By 2013, Montana, Nebraska, Michigan, and Oklahoma had considered adopting similar legislation.<sup>25</sup>

In 2015, Arkansas adopted a comparable restructuring law when it passed Act 137. Act 137 prohibits any Arkansas political subdivision from “creat[ing] a protected classification or prohibit[ing] discrimination on a basis not contained in state law.”<sup>26</sup> Excepted from this prohibition is any “rule or policy that pertains only to the employees of a county, municipality, or other political subdivision.”<sup>27</sup> Act 137’s stated purpose is to “ensur[e] that businesses, organizations, and employers doing business in the state are subject to uniform nondiscrimination laws and obligations.”<sup>28</sup>

Act 137 was proposed shortly after the city of Fayetteville, Arkansas, adopted an ordinance preventing discrimination on the basis of sexual orientation.<sup>29</sup> Seeming to draw an inference from this chain of events,<sup>30</sup> the Act’s opponents protested — even before the Act was passed — that the Act was designed to target LGBT people, as sexual orientation is not a protected classification under the Arkansas Civil

<sup>19</sup> *Id.* (citing Nashville, Tenn., Ordinance BL2011-838 (Apr. 8, 2011)).

<sup>20</sup> *See id.* at 188–92. The mission of the Family Action Council of Tennessee is “[t]o equip Tennesseans and their public officials to effectively promote and defend a culture that values God’s design for the family, for the sake of the common good.” FAM. ACTION COUNCIL TENN., <http://www.factn.org> [<http://perma.cc/FGF4-KTF2>].

<sup>21</sup> Reed, *supra* note 7, at 157.

<sup>22</sup> TENN. CODE ANN. § 4-21-102 (2015).

<sup>23</sup> *Id.* § 7-51-1802; *see also* Reed, *supra* note 7, at 155.

<sup>24</sup> *Howe v. Haslam*, No. M2013-01790-COA-R3-CV, 2014 WL 5698877, at \*22 (Tenn. Ct. App. Nov. 4, 2014).

<sup>25</sup> *See* Reed, *supra* note 7, at 171–77.

<sup>26</sup> ARK. CODE ANN. § 14-1-403(a).

<sup>27</sup> *Id.* § 14-1-403(b).

<sup>28</sup> *Id.* § 14-1-402(a).

<sup>29</sup> Michael R. Wickline, *Big Batch of Latest State Laws in Force*, NW. ARK. DEMOCRAT-GAZETTE (July 22, 2015, 1:28 AM), <http://www.arkansasonline.com/news/2015/jul/22/big-batch-latest-state-laws-force>. Fayetteville voters repealed their ordinance after Act 137 was introduced but before it was enacted. *Id.* Eureka Springs, Arkansas, passed a similar ordinance after Fayetteville’s was repealed but before Act 137 was enacted. *Id.*

<sup>30</sup> Act 137’s sponsor in the Arkansas House of Representatives has implied that the Act was proposed in response to Fayetteville’s decision to adopt its later-repealed ordinance. House Debate, *supra* note 15, at 1:54:40–1:56:12 (statement of Rep. Ballinger).

Rights Act of 1993.<sup>31</sup> While debating the Act in the Arkansas House of Representatives,<sup>32</sup> the Act's proponents emphasized (1) that the Tennessee Court of Appeals had already determined that the statute was constitutional,<sup>33</sup> (2) that local government ordinances might infringe business owners' religious liberties,<sup>34</sup> and (3) that the debate about the merits of legislation that prevents discrimination on the basis of sexual orientation should occur at the state level.<sup>35</sup>

Since its adoption, Act 137 has continued to prove contentious. Act 137 did not go into effect until July 22;<sup>36</sup> but by that time, seven Arkansas cities and counties — Little Rock, North Little Rock, Pulaski County, Conway, Marvell, Eureka Springs, and Hot Springs — had adopted ordinances that seem to conflict with the Act by prohibiting discrimination on the basis of sexual orientation.<sup>37</sup> In defense of their ordinances, the cities and counties asserted that Act 137's definition of "state law" is broad and encompasses two instances where discrimination on the basis of sexual orientation is prohibited — an anti-school bullying law and a law that applies to domestic abuse shelters.<sup>38</sup> On July 1, Arkansas Attorney General Leslie Rutledge issued an advisory opinion indicating that Act 137 repeals ordinances that conflict with the Act even if they were passed before the Act became law, but that opinion didn't address whether any of the existing ordinances actually

<sup>31</sup> ARK. CODE ANN. § 16-123-107 (listing "race, religion, national origin, gender, [and] . . . disability" as protected classifications); see, e.g., House Debate, *supra* note 15, at 1:35:43-1:36:10 (statement of Rep. Tucker). Note that although the Fayetteville ordinance was not transgender inclusive, Act 137's opponents have asserted that the animus they believe motivated Act 137's enactment includes animus toward transgender persons. See, e.g., *Animus on Display*, *supra* note 15.

<sup>32</sup> The Arkansas legislature "publishes no committee reports, committee prints, or floor debate." Kathryn C. Fitzhugh, *Arkansas Legislative History Research*, WILLIAM H. BOWEN SCH. L. LIBR., U. ARK. LITTLE ROCK (Mar. 24, 2006), [http://ualr.edu/law/files/2011/03/Arkansas\\_Legislative\\_Research.pdf](http://ualr.edu/law/files/2011/03/Arkansas_Legislative_Research.pdf) [<http://perma.cc/BF7F-HW4A>]. The Arkansas House of Representatives, though, provides video recordings of its sessions. See House Debate, *supra* note 15.

<sup>33</sup> See House Debate, *supra* note 15, at 1:38:27-1:38:52 (statement of Rep. Hammer). This assertion assumes that HB 600 and Act 137 are exactly the same, when in fact they contain some differences. Even if those differences are not constitutionally significant, Act 137's opponents mischaracterized *Howe*'s holding. Because the Tennessee Court of Appeals decision turned on plaintiffs' lack of standing, no court has yet ruled on the actual merits of a constitutional challenge to this type of legislation.

<sup>34</sup> *Id.* at 1:43:36-1:43:56 (statement of Rep. Copeland); *id.* at 1:52:05-1:52:25 (statement of Rep. Bentley).

<sup>35</sup> *Id.* at 1:56:42-1:57:06 (statement of Rep. Ballinger).

<sup>36</sup> Wickline, *supra* note 29.

<sup>37</sup> John Lyon, *New Law Seeks to Bar Anti-Discrimination Ordinances, but Interpretations Vary*, ARK. NEWS (July 22, 2015, 5:19 PM), <http://arkansasnews.com/news/arkansas/new-law-seeks-bar-anti-discrimination-ordinances-interpretations-vary> [<http://perma.cc/BM3L-KYMU>]. Although Eureka Springs's ordinance was passed before the Arkansas legislature enacted Act 137, others — such as Little Rock's, Pulaski County's, and Hot Springs's ordinances — were adopted after Act 137 was enacted. See Wickline, *supra* note 29. Moreover, after Act 137 was enacted, Eureka Springs voters affirmed their city council's decision to adopt their ordinance. *Id.*

<sup>38</sup> Lyon, *supra* note 37.

conflicted with the Act.<sup>39</sup> By early September, Fayetteville voters had begun voting on a proposal to enact another city ordinance that would prevent discrimination on the basis of sexual orientation.<sup>40</sup> In response, Project Fayetteville, an advocacy group, filed a lawsuit seeking to enjoin the vote, and Arkansas Attorney General Rutledge issued a second opinion, this time affirmatively stating that Act 137 preempts and repeals the existing ordinances.<sup>41</sup> Nevertheless, on September 8 Fayetteville voters approved their new ordinance.<sup>42</sup>

If Act 137's opponents decide to challenge the Act, they can advance two theories as to why it is unconstitutional. First, invoking "rational basis with bite" review, they can argue that Act 137 was passed solely out of animus toward LGBT people.<sup>43</sup> Second, they can look to the political process doctrine and assert that Act 137 contains the same defects that spoiled the political restructuring laws invalidated in *Mulkey* and *Hunter*.<sup>44</sup> Regardless of the theory that the Act's opponents invoke, an equal protection challenge is likely to fail. But there might be opportunity for compromise. Although less swift than a judicial victory, legislative reform could be possible in light of recent developments in Arkansas. To achieve such reform, Act 137's opponents should seek to balance their search for protection with the proponents' desire for uniformity.

*Washington v. Davis* and *United States v. Carolene Products Co.*<sup>45</sup> are two of the Supreme Court's foundational equal protection cases. In *Davis*, the Court held that "facially neutral state action would draw only ordinary rational basis review so long as it was not enacted with discriminatory intent."<sup>46</sup> In *Carolene Products*, Justice Stone penned his famous footnote four, wherein he indicated 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, and which may call for a correspondingly more searching judicial inquiry."<sup>47</sup> These cases gave birth to two fundamental questions in equal protection law, both tied to the countermajoritarian problems posed by the Equal Protection Clause: First, when and how should the Court go about searching for discrim-

<sup>39</sup> See *id.*

<sup>40</sup> Joel Walsh, *Arkansas Attorney General: Fayetteville Anti-Discrimination Law Unenforceable*, NW. ARK. DEMOCRAT-GAZETTE (Sept. 2, 2015, 1:00 AM), <http://www.nwaonline.com/news/2015/sep/01/arkansas-attorney-general-fayetteville-anti-discri>.

<sup>41</sup> *Id.*

<sup>42</sup> Caleb Yarbrough, *Fayetteville Voters Approve LGBT Anti-Discrimination Law*, ARK. BAPTIST NEWS (Sept. 9, 2015), <http://bpnews.net/45455> [http://perma.cc/3HKW-QQSR].

<sup>43</sup> See sources cited *supra* note 15.

<sup>44</sup> Cf. *Howe v. Haslam*, No. M2013-01790-COA-R3-CV, 2014 WL 5698877, at \*11 (Tenn. Ct. App. Nov. 4, 2014) (challenging Tennessee's HB 600).

<sup>45</sup> 304 U.S. 144 (1938).

<sup>46</sup> *Yoshino*, *supra* note 2, at 764 (citing *Washington v. Davis*, 426 U.S. 229, 245-47 (1976)).

<sup>47</sup> 304 U.S. at 153 n.4.

inatory intent? Second, when has the political process failed in such a way as to require judicial intervention?<sup>48</sup>

The Court has usually sought to resolve these difficult questions using tiers of scrutiny. Under conventional equal protection analysis, a challenged law is subject to one of three types of scrutiny: strict scrutiny, intermediate scrutiny, or rational basis review.<sup>49</sup> Strict and intermediate scrutiny are triggered only when a law targets a suspect classification.<sup>50</sup> Concerns about legislative intent and the dangers of the political process underlie this doctrinal approach. Whether a classification triggers heightened scrutiny is determined in part by whether the relevant group is politically powerless,<sup>51</sup> and tiers of scrutiny in turn help courts “smoke out” illegitimate intent.<sup>52</sup>

The Court, though, has deviated from this analytical approach in two ways. First, many scholars have argued that the Court has used rational basis with bite to search for illegitimate discriminatory intent.<sup>53</sup> Beginning with *Moreno*, continuing in *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>54</sup> and culminating in *Romer v. Evans*,<sup>55</sup> the Court invalidated state actions while purporting merely to employ rational basis review<sup>56</sup> — review that is supposed to be “exceedingly deferential . . . [and under which] legislative classifications are presumptively constitutional.”<sup>57</sup> In light of the perceived distance between these cases’ purported standard of review and their results, they appear to support more searching judicial inquiry in appropriate cases.

Second, the Court developed the political process doctrine for those situations where a facially neutral law allocates governmental power

<sup>48</sup> See generally Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363 (2011); Stephen M. Rich, Note, *Ruling by Numbers: Political Restructuring and the Reconsideration of Democratic Commitments After Romer v. Evans*, 109 YALE L.J. 587 (1999).

<sup>49</sup> See *Unequal Protection*, *supra* note 8, at 1359.

<sup>50</sup> See *id.* (noting that it’s unclear whether sexual orientation is a suspect classification).

<sup>51</sup> See Schacter, *supra* note 48, at 1372–77.

<sup>52</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“[T]he purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race . . . . The test . . . ensures . . . that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”).

<sup>53</sup> See, e.g., *Unequal Protection*, *supra* note 8, at 1362–63. A majority of the Court has never expressly acknowledged that rational basis with bite exists. Reed, *supra* note 7, at 161 & n.44. Justice O’Connor, though, has admitted that the Court sometimes “applie[s] a more searching form of rational basis review.” *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring in the judgment).

<sup>54</sup> 473 U.S. 432 (1985).

<sup>55</sup> 517 U.S. 620 (1996).

<sup>56</sup> See Reed, *supra* note 7, at 162–67; Yoshino, *supra* note 2, at 760. Other cases often grouped in this category include *Lawrence and Plyler v. Doe*, 457 U.S. 202 (1982), see *Unequal Protection*, *supra* note 8, at 1363, as well as *United States v. Windsor*, 133 S. Ct. 2675 (2013), see Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155, 166–67 (2014).

<sup>57</sup> Reed, *supra* note 7, at 161.

in a way that nonneutrally disadvantages a specific group.<sup>58</sup> In *Mulkey* and *Hunter*, the Court struck down laws that fit into this mold.<sup>59</sup> In *Seattle School District No. 1*, the Court reaffirmed these cases.<sup>60</sup> But more recently, in *Schuette*, Justice Kennedy wrote a plurality opinion that cabined *Seattle School District No. 1*.<sup>61</sup> Given (1) this cabining, (2) the minimal amount of political process case law, and (3) the absence of a majority in *Schuette*, the current scope of the political process doctrine is unclear.

If Act 137's opponents challenge the Act's constitutionality, they might rely upon both of these less conventional approaches to equal protection. They have already emphasized similarities between Act 137 and the Colorado constitutional amendment — Amendment 2 — that the Supreme Court struck down in *Romer* using (probably) rational basis with bite.<sup>62</sup> And these laws do in fact share many traits. Both reallocate decisionmaking authority to a higher governmental level. Both focus on antidiscrimination law. Both were enacted after at least one local government in each state had passed legislation preventing discrimination on the basis of sexual orientation.<sup>63</sup> And a perceived need for statewide uniformity provides justification at least in part for both.<sup>64</sup>

Despite these similarities, Act 137 will almost certainly survive rational basis with bite review because it is facially neutral. To prevail using rational basis with bite, Act 137's opponents must demonstrate

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<sup>58</sup> See Kerrel Murray, Note, *Good Will Hunting: How the Supreme Court's Hunter Doctrine Can Still Shield Minorities from Political-Process Discrimination*, 66 STAN. L. REV. 443, 446 (2014). Specifically, the political process cases have involved situations where a racial group was disadvantaged. See *id.* For the sake of simplicity, this comment assumes that the political process doctrine is not limited to protecting racial minorities, as this comment argues that a political process challenge to Act 137 would fail regardless.

<sup>59</sup> See *Hunter v. Erickson*, 393 U.S. 385, 390–91 (1969); *Reitman v. Mulkey*, 387 U.S. 369, 376–77 (1967).

<sup>60</sup> See 458 U.S. 457, 469–70 (1982).

<sup>61</sup> See *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1634 (2014) (plurality opinion). Concurring, Justices Scalia and Thomas desired a complete overruling of *Hunter* and its kin. See *id.* at 1640 (Scalia, J., concurring in the judgment).

<sup>62</sup> See *Animus on Display*, *supra* note 15. Amendment 2 “prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons or gays and lesbians,” and “repeal[ed] or rescind[ed]” any such protections already enacted. *Romer v. Evans*, 517 U.S. 620, 624 (1996).

<sup>63</sup> See *Romer*, 517 U.S. at 623.

<sup>64</sup> See Brief for Petitioners at 47–48, *Romer*, 517 U.S. 620 (No. 94-1039), 1995 WL 17008429, at \*20–21. There are also significant differences between Amendment 2 and Act 137. Though Act 137 revokes local government authority, it leaves the state legislature's and the state judiciary's powers intact. Further, Act 137 exempts from reallocation those laws that “pertain[] only to [government] employees.” ARK. CODE ANN. § 14-1-403(b). Finally, Amendment 2 expressly targeted gays and lesbians, while Act 137's express distinction is between those groups who have already secured antidiscrimination protection at the state level and those who have not.

that the law was motivated by animus.<sup>65</sup> Yet the Supreme Court has never found animus where there was no evidence in the statute or in the legislative record that the law was designed to target a specific group.<sup>66</sup> No one disputes that the text of Act 137 provides no such evidence. And although the Act's proponents did indicate during the Arkansas House debate that concerns about the scope of LGBT rights were on their mind,<sup>67</sup> they also expressed willingness to consider LGBT-protective legislation — just at the state level.<sup>68</sup> Thus, rational basis with bite — an already rarely (if ever) invoked doctrine — is unlikely to bear fruit for Act 137's opponents.

At first glance, the political process doctrine seems like a better fit for a challenge to Act 137. After all, the key obstacle to a rational basis with bite challenge is the Act's facial neutrality, and in both *Mulkey* and *Hunter*, the statutes were facially neutral with no smoking-gun legislative history. Moreover, Act 137 engages in political restructuring, just as the laws in *Mulkey* and *Hunter* did. Yet unlike the law in *Mulkey* (section 26), Act 137 does not foreclose new antidiscrimination legislation at the state level.<sup>69</sup> And unlike the law in *Hunter* (section 137), Act 137 has blanket applicability.<sup>70</sup> Thus, it would be difficult to argue that Act 137 embeds a "right to discriminate into state law" or imposes a "special burden" similar to the one in *Hunter* on any particular minority group attempting to use the political process. Add other obstacles, such as the cloud that *Schuette* cast over the doctrine<sup>71</sup> and the fact that the Court has not actually struck down a law using the political process doctrine for over forty-five years, and using the

<sup>65</sup> See Reed, *supra* note 7, at 181; Yoshino, *supra* note 2, at 763.

<sup>66</sup> See Reed, *supra* note 7, at 181; see also, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (noting that section 3 of the Defense of Marriage Act "use[d] th[e] state-defined class . . . to impose restrictions and disabilities").

<sup>67</sup> House Debate, *supra* note 15, at 1:54:40–1:56:00 (statement of Rep. Ballinger) (implying that the statute was passed in response to Fayetteville's attempt to prevent discrimination on the basis of sexual orientation); see also *id.* at 1:43:36–1:43:56 (statement of Rep. Copeland) (discussing concerns that cities will infringe the rights of business owners whose religions teach that homosexuality is sinful); *id.* at 1:52:05–1:52:25 (statement of Rep. Bentley) (same).

<sup>68</sup> See *id.* at 1:56:42–1:57:06 (statement of Rep. Ballinger).

<sup>69</sup> The *Mulkey* Court distinguished section 26 from a law that "mere[ly] repeal[s] . . . existing statutes." 387 U.S. 369, 376 (1967). Because the law affirmatively banned the state from interfering with a property owner's decision to sell, lease, or rent his property "as he, in his absolute discretion, chooses," *id.* at 371 (quoting CAL. CONST. art. 1, § 26 (1964)), a "right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter," *id.* at 377.

<sup>70</sup> *Hunter*'s section 137 expressly stated that "race, color, religion, [and] national origin or ancestry" were grounds upon which the city could never pass housing discrimination legislation without approval via referendum. 393 U.S. 385, 390 (1969) (quoting AKRON, OHIO, CITY CHARTER § 137 (1964)). From this and the social context, the *Hunter* Court inferred "an explicitly racial classification." *Id.* at 389; see also *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 485 (1982) ("*Hunter* dealt in explicitly racial terms . . . , not [with] legislation designed to benefit some larger group of underprivileged citizens . . .").

<sup>71</sup> See *Schuette* Case Comment, *supra* note 11, at 281.



political process doctrine becomes not merely a hard fight for Act 137's opponents, but probably a losing one.<sup>72</sup>

Despite legal obstacles, Act 137's opponents are not without options — options that have some upsides.<sup>73</sup> In questioning Act 137's constitutionality, the Act's opponents may have overlooked opportunities for compromise.<sup>74</sup> After all, the fact that the Court's jurisprudence has pushed the Arkansas legislature<sup>75</sup> to craft Act 137 in a broad manner means that many groups may desire legislative reform. In just the housing context, for instance, those who may want local protection could include “political [minorities], . . . those with children or dogs, . . . tenants seeking more heat or better maintenance from landlords, [and] those seeking rent control, urban renewal, public housing, or new building codes.”<sup>76</sup> Nor are veterans protected under the Arkansas Civil Rights Act of 1993.<sup>77</sup> Of course, that coalition building is theoretically possible does not mean it will be easy,<sup>78</sup> but even the proponents of Act 137 might not be completely satisfied with the statute in light of recent events. In particular, the number of local governments in Arkansas that have enacted antidiscrimination legislation since the Act was passed has increased, indicating that Act 137 might actually be promoting *dis*uniformity.<sup>79</sup>

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<sup>72</sup> Cf. *Howe v. Haslam*, No. M2013-01790-COA-R3-CV, 2014 WL 5698877, at \*15 (Tenn. Ct. App. Nov. 4, 2014) (“Although [Tennessee’s] HB600 curtails the authority of local governments to vary from the generally applicable State anti-discrimination laws, it does not impose a structural barrier to Appellants’ ability to advocate for political change.”).

<sup>73</sup> The dissents in the Court’s landmark same-sex marriage decision, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), may ring somewhat hollow to Act 137’s opponents, but there is truth to the claim that “[c]losing debate tends to close minds.” *Id.* at 2625 (Roberts, C.J., dissenting).

<sup>74</sup> See Jeff Guo, *That Anti-Gay Bill in Arkansas Actually Became Law Today. Why Couldn’t Activists Stop It?*, WASH. POST: GOVBEAT (Feb. 23, 2015), <http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/23/that-anti-gay-bill-in-arkansas-actually-became-law-today-why-couldnt-activists-stop-it> [<http://perma.cc/9SLB-9HEN>] (listing the options that Act 137’s opponents have considered as “a popular referendum” and “challeng[ing] the law in court”).

<sup>75</sup> During the House debate, Act 137’s House Sponsor — appearing to confuse the overruled case *Bowers v. Hardwick*, 478 U.S. 186 (1986), and *Romer* — indicated that “the law in *Bowers* is what shapes this.” House Debate, *supra* note 15, at 1:54:20–1:54:25 (statement of Rep. Ballinger).

<sup>76</sup> *Hunter v. Erickson*, 393 U.S. 385, 391 (1969).

<sup>77</sup> See ARK. CODE ANN. § 16-123-107.

<sup>78</sup> See Rich, *supra* note 48, at 625–26 (“[I]t 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 . . . 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.”).

<sup>79</sup> This suggestion is arguably naïve: if the Act’s proponents were motivated solely by animus they feel toward LGBT people, they will not care if the law fails to advance uniformity, as that goal was merely a pretext. But this retort might oversimplify the matter. In the context of racial discrimination, psychologists have theorized that some individuals are “aversive racists” who “hav[e] egalitarian conscious . . . attitudes but negative unconscious . . . racial attitudes.” Adam R. Pearson et al., *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 3 SOC.

Act 137's opponents are of course not limited to seeking reform of the Act itself. They have already considered a popular referendum.<sup>80</sup> The Act's opponents might also propose a bill directly addressing discrimination on the basis of sexual orientation.<sup>81</sup> They could seek to persuade businesses to voluntarily adopt policies prohibiting discrimination on the basis of sexual orientation.<sup>82</sup> And they themselves could even take advantage of political restructuring — by seeking reform at the federal level.<sup>83</sup> Yet as a starting point, Act 137's opponents should propose a reformed Act that allows local governments in each region of Arkansas to cooperate to establish regional antidiscrimination laws.<sup>84</sup> Such an approach would achieve a form of balance between the two sides' goals, and might even be preferred by those Act 137 proponents who are conflicted about the Act's diminishment of local authority.<sup>85</sup> This reform would not end discrimination, but it would be a step forward.

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& PERS. PSYCHOL. COMPASS 314, 317 (2009) (noting that “similar processes have been observed within members of dominant groups in other nations . . . in which overt forms of prejudice are similarly recognized as inappropriate,” *id.* at 315). Perhaps, then, at least some of the Act's proponents are indeed motivated by animus, but only subconsciously. The Act's failure to advance its stated goal could force such proponents into a state of cognitive dissonance, compelling them to either change their beliefs or change their Act. *See generally* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

<sup>80</sup> *See* Guo, *supra* note 74.

<sup>81</sup> *See* House Debate, *supra* note 15, at 1:53:40–1:53:57 (statement of Rep. Ballinger) (inviting Act 137's opponents to propose such a bill).

<sup>82</sup> *See id.* at 1:33:45–1:33:57 (statement of Rep. Tucker) (noting that 484 of the Fortune 500 companies have adopted LGBT-protective policies). This approach is, admittedly, piecemeal.

<sup>83</sup> *Cf.* Complainant v. Foxx, No. 0120133080, 2015 WL 4397641, at \*5 (E.E.O.C. July 15, 2015) (holding that claims of discrimination on the basis of sexual orientation are cognizable under Title VII's proscription against sex discrimination).

<sup>84</sup> Proposals of this sort are not new. *See, e.g.*, David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field from the Field*, 21 J.L. & POL. 261, 288 (2005) (“[O]ne thing that states could do to promote greater regionalism at the local level would be to link increases in local legal power to local agreements to cooperate regionally.”).

<sup>85</sup> *See* House Debate, *supra* note 15, at 1:29:34–1:29:36 (statement of Rep. Ballinger) (“I’m a person who is all about home rule.”); *see also* Wickline, *supra* note 29 (“Gov. Asa Hutchinson allowed the measure to become law without signing it, saying he had concerns that it usurped the role of local governments.”). Moreover, some scholars have posited that this approach actually produces greater uniformity than does state assertion of authority. *See* Barron & Frug, *supra* note 84, at 261–62 (“The form of local power most cities and towns possess grants them only limited authority. . . . This condition encourages an insular and defensive mindset . . . . [P]arochialism . . . , therefore, is as much a consequence of the constraints that cities and towns confront as of the powers they possess.”).