9-1995

Section 2: Moot Court: Romer v. Evans

Institute of Bill of Rights Law, William & Mary Law School

COLORADO AMENDMENT TWO

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 other wise be the basis of or entitle any person or class of persons to have or claim any minority status, or claim of discrimination. This section of the Constitution shall be self-executing.

94-1039 ROMER v. EVANS

Equal protection—State ban on local ordinances conferring protected status on gays.

Ruling below (Colo SupCt, 882 P.2d 1335, 63 LW 2219):

Colorado constitutional amendment that prohibits state or local governments from conferring protected status on persons of "homosexual, lesbian or bisexual orientation" infringes fundamental right to participate equally in political process, and is not narrowly tailored to serve state's asserted compelling interests in preserving religious, familial, and personal privacy, and in preserving fiscal resources for enforcement of other civil rights laws, and therefore violates Equal Protection Clause.

Question presented: Does popularly enacted state constitutional amendment precluding special state or local legal protections for homosexuals and bisexuals violate fundamental right of independently identifiable, yet non-suspect, classes to seek such special protections?

Petition for certiorari filed 12/12/94, by Gale A. Norton, Colo. Atty. Gen., Stephen K. Erken-Brack, Ch. Dpty. Atty. Gen., Timothy M. Tymkovich, Sol. Gen., John Daniel Dailey and Paul Farley, Dpty. Attys. Gen., and Rex E. Lee and Carter G. Phillips, Spec. Asst. Attys. Gen.

Richard G. EVANS, Angela Romero, Linda Fowler, Paul Brown, Martina Navratilova, Bret Tanberg, Priscilla Inkpen, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen, Plaintiffs,

v.

Roy ROMER as Governor of the State of Colorado and Gail Norton as Attorney General of the State of Colorado, Defendants.

No. 92 CV 7223.

Colorado District Court, Denver County.

1993 WL 19678 (Colo.Dist.Ct.))

Jan. 15, 1993.

. . . BAYLESS, District Judge

* * *

The first matter of substance then that is addressed after defining the boundaries is the Bill of Rights in our Constitution. Now, I take that to mean that in Colorado, rights come first. Section 1 of Article II of the Bill of Rights sets out that all political power in Colorado is vested in and derived from people. Section 2 says the people of this state have the sole and exclusive right of governing themselves as free--as a free, sovereign, and independent state. And to alter and abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the Constitution of the United States.

What that says is the majority of citizens can alter the Constitution, it can change. And we have had 29 parts to that Constitution. There are 29 existing articles to Amendment 2 that are the Bill of Rights in Colorado. But in amending that and altering the form of government, even a majority vote of the Colorado citizens cannot violate the constitutional rights of other Colorado citizens.

Now, the issue in question here in this hearing relates to Article II Section 2 of the Colorado Constitution. And it relates to the amendment of that Constitution, the alteration of the State's Constitution by the addition of what was called Amendment 2. Amendment 2 is scheduled actually to become Section 30 of the Bill of Rights here in Colorado. The question raised by the lawsuit asked the courts of Colorado whether this amendment violates Article II Section 2 of the Bill of Rights by virtue of being repugnant to the Constitution of the United States. . .

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Now, the first part of this case is the part we have done this week. . . . This first part deals with only asking the Court to delay the effective date of the Amendment until such time as that final determination can be made. Such a request is proper, and as a matter of fact, is provided for under the Rules of Civil Procedure, specifically Rule 65 here in Colorado which allows for preliminary injunctions.

* * *

The plaintiffs are individuals and three home rule cities who have asked the Court to delay the effective date. . . . They must show the threshold of urgent necessity, and then they must show to the satisfaction of the Court these other six things. . . .

In large measure, the proof which has been offered has been focused on their position that Amendment 2 is repugnant to the United States Constitution. They argue that there's a urgent necessity because of the probability of persons having their fundamental constitutional rights violated for any time period creates an urgent necessity. They argue that the violation of these fundamental constitutional rights causes irreparable harm, and so on, through the six that I have to weigh.

The first one, and perhaps the one that most of the attention has been based on is whether--has been focused on, rather, is whether there's a reasonable probability of success on the merits. Plaintiffs are attacking the part of the Constitution of the State of Colorado which was passed by a majority vote of the voters November 3, 1992. Because it is a part of the Constitution, they must prove at the final hearing in order to prevail that this Amendment is unconstitutional beyond a reasonable doubt.

* * *

Plaintiffs argue that this Amendment deprives them of fundamental rights guaranteed by the U.S. Constitution. They do not argue that there is a fundamental right to be homosexual or bisexual or lesbian, which is found in the U.S. Constitution. Rather, they argue that the rights they are deprived of are found in the right to equal protection of the laws under the First and 14th Amendments to the United States Constitution.

Specifically, plaintiffs argue that they will be denied the right to vote and the right to petition the government for redress of grievances by the right to have access to the courts. What does the Amendment say? We have had the Amendment on the podium from time to time here. It says, "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 self-executing."

Plaintiffs produced evidence that the Amendment was only addressed to claims of discrimination by homosexuals, lesbians, and bisexuals. They did this by the testimony of witnesses who came before this Court and announced, self-declared, if you will, that they were homosexual. And then by saying that neither they or anyone that they knew who were also homosexual are seeking to establish any minority status or quota preference or protected status.

By doing this, the plaintiffs have attempted to narrow the focus to the claim of discrimination based on homosexual, bisexual, or lesbian orientation. They therefore urge that the Amendment actually and only stands for the proposition in Colorado by Constitutional Amendment is now about to say that there will be no remedy available for acts of discrimination against homosexuals, bisexuals, and lesbians because those people alone may not go to the government to ask for laws to be enacted or existing laws to be enforced which would prevent that discrimination.

* * *

In short, the plaintiffs urge that this Amendment, by denying the opportunity to obtain a remedy for discrimination based upon these orientations, has identified a specific group and said that any discrimination as to that group because of membership in that group may not be given relief or remedy by the agencies of the state of Colorado.

It has not said that the state will discriminate against homosexuals, bisexuals, or lesbians, but it has said if any private citizen does discriminate based on such orientation, that no remedy may be provided by the State. Plaintiffs argue this Amendment endorses and gives State-approval as to private discrimination.

Plaintiffs argue that such a State statement endorsing and approving private discrimination deprives them of the right to vote and the right to approach their government; specifically, their courts, for a redress of grievances.

* * *

Let's turn now to the defendants. . . . Defendants . . . well and fairly argue there are several things here that have been discussed that have been presented that they strongly urge are not part of the case. Mr. Dailey did this very well, really, at the upfront part of his argument yesterday. He said Coloradans for Family Values isn't a party here. He said the Religious Right isn't a party here, nor the Political Right, nor whether Colorado could be deemed a hate state. That's not here, Judge. That's not what you are to decide. And the defendants are correct, and the Court accepts that.

As a matter of fact, I looked at what was presented to the Court in terms of the efforts that have been made on the part of Coloradans for Family Values and the Religious Right and the Political Right. And what I saw was a group of Colorado citizens who wanted to present an initiative to the voters. They said we would like the voters of Colorado to look at this. So they acquired signatures. They presented things to the state government. They followed the political process, and they got it on the ballot. And they lobbied for or were part of a lobbying effort for the passage of the Amendment, and that involved spending money and presenting their views.

* * *

The focus of the defendant's argument was that this is not unconstitutional because all the Amendment attempts to do is to make a part of Colorado law that which is existing in the federal law in terms of the treatment of homosexuals, lesbians, bisexuals. The argument goes on that the courts should not look to the limitation placed by plaintiffs just on the discrimination but rather look to the whole Amendment. And they urge that because that demonstrates the true intent of the Amendment. If you isolate on one part, you may not be viewing the true intent and that the Courts should look to the ballot analysis as a type of legislative history, if you will, to demonstrate what that intent was.

The defendants also argue, and they cite the same way, U.S. Supreme Court cases and cases from other courts. They start with Bowers versus Hardwick, and they urge that gay, lesbian, and bisexual conduct has been held--"conduct," now, has been held to be criminal by some states. That case involved a statute outlawing sodomy. And that statute was sustained in Bowers versus Hardwick by the United States Supreme Court. And they urge that this behavior which can be criminalized defines the class of people here.

They also argue that a law-making procedure that disadvantages a particular group does not always violate constitutional rights or deny equal protection, and they cite Supreme Court case law for that. The Court agrees with that general statement of the law. They say there is no necessity for the Court to intrude on the private and moral values of citizens, and that is what is the heart of Amendment 2.

* * *

These are the positions which have been taken in summary form by the two sides here. The question is what is the Court to do. First, the Court is ruling on a motion for preliminary injunction only. I am not ruling on the constitutionality of Amendment 2. As a matter of fact, the Court may not at this time rule on the constitutionality of Amendment 2. I may only rule on what is before me, the motion for preliminary injunction.

. . . The Court's view is this: In large measure, everything revolves around the first of the six claims. That is--first of the six elements, excuse me, as to whether plaintiffs have shown evidence and made argument that leads this Court to conclude that they have a reasonable probability of proving that Amendment 2 is unconstitutional beyond a reasonable doubt at a hearing on the merits.

* * *

Keep in mind where I started. Rights come first in the Colorado Constitution. Bill of Rights is first. The question relates to whether Amendment 2

amounts to a denial of a constitutional fundamental right.

* * *

One, is that a violation which involves something--violation of a fundamental right which involves something called a suspect class or a violation which involves a suspect class, even if it's not a fundamental right, calls for strict scrutiny by the Court. It's not here. Plaintiffs haven't argued it. It's not for the Court to determine. Go on to the next.

A second involves what are described as equal protection violations of fundamental rights. What are fundamental rights? There have been a lot of cases that have discussed those. Fundamental rights have been deemed to include the right to participation in elections. The right of access to the courts. Right of privacy. And even the right of interstate travel. In terms of this issue, the laws which may burden fundamental rights of an independently identifiable group are subject to what is called strict scrutiny of the courts under this equal protection analysis.

That's where the plaintiffs urge the Court ought to come down. Those two prongs. This is a fundamental freedom. This is an independently identifiable group. And therefore, the Court must view this under the strict scrutiny standard. What does that mean? That means a law which burdens any of these fundamental rights of this independently identifiable group will require the state now to show and have a burden that this measure is necessarily related to a compelling governmental interest.

So it changes. They have had all the burden here, but if it were a strict scrutiny standard at the time of hearing on the merits, there would be two standards. One on this side of the room and one on that side of the room. And plaintiffs urge that is the standard I should apply.

The third standard which has been urged in part at least by the defense is called the rational basis test. And that involves laws which may involve not fundamental rights but may be something that's deemed non-fundamental rights in the Constitution, and they are subject only to the test of rational basis. That is to say, the Court is to defer to the legislation if there is any rational relationship between a legitimate public goal to be accomplished and the lines drawn which may accomplish that, even though those lines in the legislation may amount to some degree of discrimination.

The Court concludes with regard to the first that there is a fundamental freedom involved with Amendment 2. The parties themselves have struggled to identify the fundamental freedom. The reason they have struggled, I think, is because they have tried to cast it in the words of prior cases. Let me read you some of those words. I'm going to read you some quotes, and that's always a question as to whether anybody ought to do this, but you have to understand where the Court is coming from because of the law that has come before.

* * *

So the first part has been established, the Court concludes. There is a fundamental right here, and it's the right not to have the State endorse and give effect to private biases.

Second question, is there an identifiable class? Yes. Lot of these cases say it's real hard to find an identifiable class. Not here. The statute itself, the Amendment 2 defines the identifiable class. A lot of these cases say even though it is facially neutral; that is to say, you can sell your property to anybody you want or not sell it to anybody you don't want, this isn't facially neutral. This identifies the class right in the Amendment.

So I find that there is an identifiable class. Now, with regard to the idea that's been argued by defendants that you can't make this an identifiable class because of Bowers versus Hardwick, the Court concludes that this is principally, although, the term "conduct" appears in there, this is principally an Amendment which addresses status, not conduct. Conduct is what Bowers versus Hardwick said.

* * *

The Court finds that this is a status. Therefore, the Court finds that the burden at the hearing on the merits is going to be twofold. One, the plaintiffs must prove the unconstitutionality of this beyond a reasonable doubt. But two, the Court will look at this under the strict scrutiny standard. And therefore, the State will have to show more than a mere rational basis. They will have to show a substantial and compelling government interest in passing this.

There will be a trial on the merits. The amendment will be reviewed as though it is one involving a fundamental right as affecting an identifiable class. That requires strict scrutiny and the two burdens. This will take place in light of what Justice Warren said, "The evolving standards of decency that mark the progress of a maturing society."

Will the plaintiffs win? The Court does not know. Do the plaintiffs have a reasonable probability, given all of this, given all of the law that the Court has examined, do they have a reasonable probability of proving that Amendment 2 is unconstitutional beyond a reasonable doubt? Yes.

The burdens of Rathke have been carried and met by the plaintiffs. The motions for preliminary injunction are granted, and the defendants--the defendants, the Governor of the State of Colorado and the Attorney General of the State of Colorado are enjoined from declaring Amendment 2 in force, and are enjoined from enforcing Amendment 2 until further order of Court.

This Court is in recess.

(The proceedings were concluded.)

Richard G. EVANS, Angela Romero, Linda Fowler, Paul Brown, Jane Doe, Martina Navratilova, Bret Tanberg, Priscilla Inkpen, John Miller, the Boulder Valley School District Re-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen, Plaintiffs-Appellees,

v.

Roy ROMER, as Governor of the State of Colorado, Gale A. Norton, as Attorney General of the State of Colorado, and the State of Colorado, Defendants-Appellants.

No. 93SA17

Supreme Court of Colorado, En Banc.

854 P.2d 1270

July 19, 1993.

* * *

Chief Justice ROVIRA delivered the Opinion of the Court.

Defendants, Roy Romer, Governor of the State of Colorado, Gale A. Norton, Attorney General of the State of Colorado, and the State of Colorado (referred to collectively as "defendants") appeal the trial court's entry of a preliminary injunction enjoining them from enforcing a voter-initiated amendment to the Colorado Constitution ("Amendment 2"). We affirm.

I

In May 1992, the requisite number of qualified voters submitted petitions to the secretary of state to present to the electorate a new section 30 to article II of the Colorado Constitution. The proposed constitutional amendment was put to the voters as Amendment 2 on November 3, 1992, and passed by a margin of 813,966 to 710,151 (53.4% to 46.6%).

* * *

Amendment 2 provides: No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. 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.

On November 12, 1992, Richard G. Evans, along with eight other persons ("individual plaintiffs"), and the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen ("governmental plaintiffs") (referred to collectively as "plaintiffs") filed suit in Denver District Court to enjoin the enforcement of Amendment 2 claiming that the amendment is unconstitutional. This contention was premised on several state and federal constitutional provisions.

After plaintiffs' request for an expedited hearing on the merits was rejected, they filed a motion seeking to preliminarily enjoin the enforcement of Amendment 2 which was to go into effect on or before January 15, 1993. In support of this motion, plaintiffs argued that Amendment 2 deprives them of the First Amendment right of free expression and their Fourteenth Amendment right to equal protection of the laws. The First Amendment claim was based on the contention that Amendment 2 eliminates all potential means of redress for private retaliation or discrimination against gay men, lesbians, and bisexuals. Accordingly, the First Amendment requires the government to demonstrate a compelling justification for exposing those who engage in expressive conduct to increased risk. This burden, plaintiffs maintained, could not be met by the state. The trial court neither addressed nor relied on this argument in rendering its decision.

Plaintiffs presented two separate arguments under the Equal Protection Clause. First, that Amendment 2 violates their right to equal protection of the laws insofar as it denies gay men, lesbians, and bisexuals the opportunity to participate equally in the political process. Second, that Amendment 2 lacks a rational

basis for the burdens it imposes on gay men, lesbians, and bisexuals.

The trial court conducted an evidentiary hearing to consider the motion. Following its conclusion, the court issued a temporary restraining order. The next day, the trial court held that plaintiffs had met their burden under the six-part test of Rathke v. MacFarlane, which sets forth the applicable standard for the issuance of a preliminary injunction and accordingly, granted plaintiffs' motion barring the enforcement of Amendment 2 pending the outcome of a trial on the merits.

More specifically (and of central importance to this appeal) the trial court concluded that plaintiffs had met the threshold requirement of Rathke by demonstrating that enjoining the enforcement of Amendment 2 was necessary to protect their right to equal protection of the laws under the United States Constitution. The court reached this conclusion by reasoning that Amendment 2 "may burden fundamental rights of an identifiable group." The fundamental right, the court went on, was "the right not to have the State endorse and give effect to private biases."

The trial court then determined that because Amendment 2 may burden a fundamental constitutional right, its constitutionality must be assessed by reference to the "strict scrutiny" standard of review. The court concluded that under this standard, plaintiffs had shown to a reasonable probability that Amendment 2 would be demonstrated to be unconstitutional beyond a reasonable doubt at a trial on the merits.

. . .The basis of defendants' challenge to the preliminary injunction pertains only to the trial court's determination that the threshold requirement of Rathke v. MacFarlane had been met (i.e., that injunctive relief is necessary to protect existing fundamental constitutional rights). Accordingly, the gravamen of defendants' allegation of error is their contention that the trial court "did not base its decision on any direct precedent," but rather "extrapolated from several federal court decisions" the right identified and allegedly infringed by Amendment 2. Moreover, defendants argue, there is no applicable legal precedent or established right under the Equal Protection Clause of the United States Constitution which Amendment 2 can be shown to infringe upon. Defendants conclude, therefore, that "the lower court's order was fundamentally flawed, and cannot be sustained."

Plaintiffs have presented to this court the same equal protection arguments that were made to, but not relied on by, the trial court. They do not urge that we base our decision on the precise right identified and relied on by the trial court in rendering its decision. To the contrary, they have argued to this court that the right identified by the trial court, when "read in light of the arguments actually presented to [it] . . . is best construed to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation. . . ." In short, plaintiffs urge us to rely only on the equal protection arguments which they have relied on, and that the trial court's ruling should be construed to have done the same.

Before turning to the merits, we first set forth the applicable standard of review which governs our decision.

* * *

III

It is important to stress at the outset that the Equal Protection Clause of the United States Constitution applies to all citizens, and not simply those who are members of traditionally "suspect" classes such as racial or ethnic minorities. That gay men, lesbians, and bisexuals have not been found to constitute a suspect class, and that plaintiffs do not claim that they constitute such a class do not render the Equal Protection Clause inapplicable to them.

* * *

Strict scrutiny review--the most exacting standard of review under the Equal Protection Clause--is reserved for statutes or state constitutional amendments that discriminate against members of traditionally suspect classes or infringe on any fundamental constitutional. Laws that are subject to strict scrutiny review will be sustained only if they are supported by a compelling state interest and narrowly drawn to achieve that interest in the least restrictive manner possible.

Intermediate review, which requires a showing that the law in question is substantially related to a sufficiently important governmental interest has been applied in the context of laws which draw distinctions based on gender and, but not to those laws which create differential treatment based on age.

Thus, in reviewing the trial court's determination that the plaintiffs carried their burden of establishing the threshold requirement. . ., we first must determine which standard applies and second, whether Amendment 2 can be shown, under that standard, and to a reasonable degree of probability, to violate the guarantee of equal protection of the laws.

* * *

The Equal Protection Clause guarantees the fundamental right to participate equally in the political process and thus, any attempt to infringe on that right must be subject to strict scrutiny and can be held constitutionally valid only if supported by a compelling state interest. This principle is what unifies the cases, in spite of the different factual and legal circumstances presented in each of them. Thus, while all three categories of cases are distinguishable from the present controversy, the common thread which unites them with one another, and with the case before us, is the principle that laws may not create unequal burdens on identifiable groups with respect to

the right to participate in the political process absent a compelling state interest.

This principle has received its most explicit, and nuanced, articulation in yet another category of cases where the legislation at issue bore a much closer resemblance to the question presented by Amendment 2. This category of cases involves legislation which prevented the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters. In each case, the legislation was held to be violative of equal protection.

* * *

B

We conclude that the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by "fencing out" an independently identifiable class of persons must be subject to strict judicial scrutiny.

We reject defendants' contention that Amendment 2 cannot be understood to infringe on any recognized right protected under the Equal Protection Clause. We do so for a number of reasons. First, defendants urge that the authority relied on in reaching our conclusion, when "properly analyzed," recognizes a cognizable equal protection claim "only when the political process has been restructured to place unusual burdens upon racial groups, or, in the most expansive sense, [upon politically powerless groups]." This contention belies the fact that much of the authority relied on in reaching our conclusion did not involve racial groups.

* * *

Finally, if the cases referred to above were decided solely on the basis of the "suspect" nature of the classes involved, there would have been no need for the Court to consistently express the paramount importance of political participation or to subject legislation which infringed on the right to participate equally in the political process to strict judicial scrutiny. To the contrary, were these simply "race cases," the Supreme Court would have been required to do nothing more than note that the legislation at issue drew a classification that was inherently suspect (i.e., that discriminated on the basis of race), and apply strict scrutiny to resolve those cases--irrespective of the right, entitlement, or opportunity that was being restricted.

* * *

We therefore conclude that defendants' argument that the right to participate equally in the political process applies only to traditionally suspect classes is without merit. Similarly, we reject their argument that the above cited authorities are properly understood only as "suspect class" cases, and not "fundamental rights" cases. We turn, therefore, to the question of whether Amendment 2 has been shown, to a reasonable degree of probability, to infringe on the fundamental right to participate equally in the political process beyond a reasonable doubt.

IV

In reviewing Amendment 2, we do so in light of its immediate objective, its ultimate effect, its historical context, and the conditions existing prior to its enactment.

The immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation.

* * *

The "ultimate effect" of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures. In the absence of such a constitutional amendment, any governmental entity would be acting contrary to the state constitution by "adopting, enacting, or enforcing" any such measure.

Thus, the right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment. Rather than attempting to withdraw antidiscrimination issues as a whole from state and local control, Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political processes.

Amendment 2 expressly fences out an independently identifiable group. Like the laws that were invalidated in Hunter, which singled out the class of persons "who would benefit from laws barring racial, religious, or ancestral discriminations," Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden--no other group's ability to participate in the political process is restricted and encumbered in a like manner. Such a structuring of the political process undoubtedly is contrary to the notion that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."

In short, gay men, lesbians, and bisexuals are left out of the political process through the denial of having an "effective voice in the governmental affairs

which substantially affect their lives." Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them. By constitutionalizing the prescription that no branch or department, nor any agency or political subdivision of the state "shall enact, adopt, or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation . . . shall constitute or otherwise be the basis of . . . [a] claim of discrimination," Amendment 2 singles out and prohibits this class of persons from seeking governmental action favorable to it and thus, from participating equally in the political process.

Prior to the passage of this amendment, gay men, lesbians, and bisexuals were, of course, free to appeal to state and local government for protection against discrimination based on their sexual orientation. Thus, like any other members of the electorate, the political process was open to them to seek legislation or other enactments deemed beneficial in the same way it was open to all others. Were Amendment 2 in force, however, the sole political avenue by which this class could seek such protection would be through the constitutional amendment process. In short, Amendment 2, to a reasonable probability, infringes on a fundamental right protected by the Equal Protection Clause of the United States Constitution. Amendment 2 must be subject to strict judicial scrutiny in order to determine whether it is constitutionally valid under the Equal Protection Clause.

Because the defendants and their amici have not proffered any compelling state interest to justify the enactment of Amendment 2 at this stage of the proceedings as required under the strict scrutiny standard of review.

V

That Amendment 2 was passed by a majority of voters through the initiative process as an expression of popular will mandates great deference. However, the facts remain that "[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections," and that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."

We reject defendants' argument that the trial court erred in granting a preliminary injunction enjoining defendants from enforcing Amendment 2 pending a trial on the merits of plaintiffs' constitutional challenge.

Order affirmed.

Justice ERICKSON dissenting:

* * *

In my view, the district court's underlying legal premise that the Supreme Court has recognized a fundamental right not to have the State endorse and give effect to private biases is erroneous. Similarly, the majority's underlying legal premise that the Supreme Court has recognized a fundamental right to participate equally in the political process is erroneous. Because Supreme Court precedent does not support the evaluation of Amendment 2 under the strict scrutiny standard of review, I would reverse and discharge the entry of the preliminary injunction, and remand for trial on the permanent injunction.

Richard G. EVANS, Angela Romero, Linda Fowler, Paul Brown, Jane Doe, Marina Navratilova, Bret Tanberg, Priscilla Inkpen, John Miller, the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen, Plaintiffs,

v.

Roy ROMER as Governor of the State of Colorado, Gale Norton as Attorney General of the State of Colorado, and the State of Colorado, Defendants.

Civ. A. No. 92 CV 7223.

Colorado District Court, City and County of Denver.

1993 WL 518586 (Colo.Dist.Ct.)

Dec. 14, 1993.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

H. JEFFREY BAYLESS, Judge.

INTRODUCTION

On November 3, 1993, by a vote of 53.4% to 46.6%, the voters of the State of Colorado passed an initiated amendment to the Colorado Constitution referred to as Amendment 2. That amendment provides: No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. 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.

Nine days after the amendment was passed, plaintiffs, individuals, three home rule cities, and a school district, filed the instant action seeking to have Amendment 2 declared unconstitutional. Plaintiffs also sought and obtained a preliminary injunction prohibiting the amendment from becoming effective prior to court review. That injunction was upheld by the Colorado Supreme Court July 19, 1993 in Evans v. Romer).

In its ruling, the Colorado Supreme Court did more than merely affirm the granting of the preliminary injunction. By the terms of its ruling that court set the guidelines this court must apply in making its present decision. Certain parts of the Supreme Court opinion must be noted for they form the basis for the present ruling.

* * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING OFFERED COMPELLING STATE INTERESTS

By virtue of the Supreme Court ruling, the burden at trial was upon defendants to show at least one compelling state interest and to show that Amendment 2 was narrowly drawn to support that interest. This is an unusual placement of the burden of proof. Defendants presented six alleged "compelling state interests": 1) deterring factionalism; 2) preserving the integrity of the state's political functions; 3) preserving the ability of the State to remedy discrimination against suspect classes; 4) preventing the government from interfering with personal, familial and religious privacy; 5) preventing government from subsidizing the political objectives of a special interest group; and 6) promoting the physical and psychological well-being of our children. The court will address each claimed compelling interest separately.

The first claimed compelling state interest is that Amendment 2 deters factionalism. In their trial brief Defendants describe what they mean by factionalism as follows: Amendment 2 does not purport to serve any interests outside of Colorado's borders; rather, it simply seeks to ensure that the deeply divisive issue of homosexuality does not serve to fragment Colorado's body politic. Amendment 2 eliminates city-by-city and county-by-county battles over the political issue of homosexuality and bisexuality. As a matter of law, therefore, Amendment 2 serves a compelling state interest by ending political fragmentation and promoting statewide uniformity on this issue.

As defined by defendants, "factionalism" means "political fragmentation" over a controversial political issue. Defendants therefore define a difference of opinion on a controversial political question as factionalism.

* * *

Defendants' own authorities encourage the "competition of ideas" with "uninhibited, robust and wide-open" political debate. Defendants seek to deter those very things as being "factionalism". The history and policy of this country has been to encourage that which defendants seek to deter.

Defendants first claimed compelling state interest is not a compelling state interest. The opposite of defendants' first claimed compelling interest is most probably compelling.

Defendants' second suggested compelling state interest is the preservation of the State's political functions. Witnesses were offered who testified about the "homosexual agenda" and the homosexual push for "protected status" and urged that this Amendment protected Colorado's political functions from being overrun by such groups.

* * *

The evidence presented does not satisfy this court that there is militant gay aggression in this state which endangers the state's political functions. Similarly the evidence does not persuade the court that absent Amendment 2, homosexuals and bisexuals are going to be found to be a suspect or quasi- suspect class and afforded protections based on those classifications. Finally, Defendants' legal argument is not supported by federal or state case law, nor is it supported by the Colorado Constitution. Defendants' argument seems little more than a begging of the ultimate question to be answered. The second alleged compelling interest is not a compelling state interest.

The third interest claimed to be compelling is the preservation of the ability of the state to remedy discrimination against groups which have been held to be suspect classes. This claim is basically that there are insufficient fiscal resources available to the state to add another group to the rolls of those protected by existing civil rights laws or ordinances. Although not totally clear from defendants' presentation, this claim may relate in some way to Amendment 1 passed in the same election.

* * *

The facts don't support defendants' position. Defendants' evidence was principally in the form of opinion and theory as to what would occur if a Denver type ordinance were adopted as a state statute. There is no such statute, nor is one proposed. Plaintiffs' evidence was based on what has happened over the course of eleven years in Wisconsin, and during the time in which the Denver ordinance has included a sexual orientation provision. Those actual experiences show that the presence of a sexual orientation provision has not increased costs or impaired the enforcement of other civil rights statutes or ordinances.

Additionally, the Court has a very real question as to whether fiscal concerns may rise to the level of a compelling interest. At least three U.S. Supreme Court cases have suggested that fiscal concerns do not reach such a level when weighed against fundamental or even less than fundamental rights. .

The Colorado Supreme Court has found the right invaded in this case to be fundamental, and this court now finds defendants' offered evidence of lack of fiscal ability unpersuasive in all respects.

Defendants' fourth alleged compelling interest is the prevention of governmental interference with personal, familial and religious privacy.

* * *

In the present case, the religious belief urged by defendants is that homosexuals are condemned by scripture and therefore discrimination based on that religious teaching is protected within freedom of religion. The competing interest in the present case is the right to participate in the political process as outlined by the Colorado Supreme Court. On balance, this court concludes that the two rights, the religious right to discriminate and the homosexuals' right to participate in political process can coexist.

When the court finds that the defendants have presented a compelling state interest, the court is then charged with determining whether Amendment 2 is "narrowly drawn to achieve that interest in the least restrictive manner possible." In this case it is obvious that the amendment is not narrowly drawn to protect religious freedom. The narrowly focused way of addressing the Boulder ordinance is to add to it a religious exemption such as is found in the Denver and Aspen ordinances, not to deny gays and bisexuals their fundamental right of participation in the political process. The court specifically finds that Amendment 2 is not narrowly drawn to accomplish the purpose of protecting religious freedom.

* * *

Most importantly, however, how does Amendment 2, which impacts on fundamental rights of an identifiable group, narrowly promote the goal of promoting family values? Seemingly, if one wished to promote family values, action would be taken that is pro-family rather than anti some other group. The tie-in between the interest of protecting the family and denying gays and bisexuals the right to political participation was not made by defendants' presentation.

Defendants failed to meet their burden as to the second prong of their claimed fourth compelling interest, showing that this Amendment is narrowly drawn to achieve its purpose of protecting religious freedom or family privacy.

The general issue of whether personal privacy is a compelling state interest was not adequately established. The court can only speculate as to what defendants mean by personal privacy and how Amendment 2 protects such a right. Defendants have

not carried their burden as to this alleged "compelling state interest."

Defendants' fifth compelling interest is the prevention of government from subsidizing the political objectives of a special interest group. Their strongest argument on this claim was: For example, if a landlord is forced to rent an apartment to a homosexual couple, the landlord is being forced to accept, at least implicitly, a particular ideology.

No authority is offered for this fairly remarkable conclusion, and none has been found. Further, the logic of the argument is unclear. This claimed compelling interest was not supported by any credible evidence or any cogent argument, and the court concludes that it is not a compelling state interest.

The final interest urged is the promotion of the physical and psychological well-being of children. The defendants argue: The state has a compelling interest in supporting the traditional family because without it, our children are condemned to a higher incidence of social maladies such as substance abuse, poverty, violence, criminality, greater burdens upon government, and perpetuation of the underclass.

* * *

The defendants have presented evidence of only two compelling state interests that Amendment 2 serves, the promotion of religious freedom and the promotion of family privacy. As to those two interests the Amendment is not "narrowly drawn to achieve that purpose in the least restrictive manner possible." Defendants have failed to carry the burden assigned to them by the Colorado Supreme Court and therefore this Court concludes that Amendment 2 is unconstitutional as being violative of the fundamental right of an identifiable group to participate in the political process without being supported by a compelling state interest.

Plaintiffs' Claim of Suspect or Quasi-Suspect Class

The above ruling, however, is not the end of the matter. In one of their trial briefs plaintiffs admit that "if the defendants do not meet their burden of showing that Amendment 2 serves a compelling interest by the least restrictive means, then Amendment 2 must be held unconstitutional. . . ." Notwithstanding the fact that the court has now ruled as plaintiffs suggest, they nonetheless seek to have the court rule on three additional matters. First they claim that homosexuals and bisexuals ought to be found to be a suspect class and entitled to strict scrutiny review for that reason. Second they claim that homosexuals and bisexuals ought to be found to be a quasi-suspect class and be entitled to heightened scrutiny review. Finally they claim that Amendment 2, even if subject to the least stringent standard of review, the rational basis review, ought to be found unconstitutional.

Plaintiffs' presentation seeking suspect class status may be new or a change of plaintiffs' initial position. The Supreme Court was unaware that plaintiffs were seeking suspect class status. That court noted, "That gay men, lesbians, and bisexuals have not been found to constitute a suspect class, (citations omitted) and that plaintiffs do not claim that they constitute such a class do not render the Equal Protection Clause inapplicable to them."

* * *

Plaintiffs urge that this Court should find that the elements associated with a suspect class are present in the homosexual and bisexual community. Plaintiffs argue that those elements are: (1) common traits; (2) a history of discrimination; (3) especially vulnerable in society, and that; (4) the common trait is irrelevant to individual merit. This set of elements is a re-definition or amalgamation of elements from other cases. No case cited contains these four elements. In order to persuade the court, plaintiffs filled the witness stand with doctors, psychiatrists, genetic explorers, historians, philosophers, and political scientists. Having chosen to present these types of witnesses, defendants felt obliged to respond in kind.

* * *

In applying these standards to homosexuals and bisexuals, no appellate court has yet found them to be either a "suspect" or quasi-suspect" class. It also bears noting that to date the Supreme Court has only recognized three classifications as suspect and two as quasi- suspect. However, the Supreme court has recognized only three classifications as suspect: race, alienage, and national origin; and two others as quasi-suspect: gender, and illegitimacy.

* * *

One of the hot debates among witnesses addressed the question of whether homosexuality is inborn, a product of "nature", or a choice based on life experiences, a product of "nurture". Plaintiffs strongly argue that homosexuality is inborn. All the suspect and quasi-suspect classes, race, alienage, national origin, gender and illegitimacy, are inborn. Defendants argue that homosexuality or bisexuality is either a choice, or its origin has multiple aspects or its origin is unknown. The preponderance of credible evidence suggests that there is a biologic or genetic "component" of sexual orientation, but even Dr. Hamer, the witness who testified that he is 99.5% sure there is some genetic influence in forming sexual orientation, admits that sexual orientation is not completely genetic. The ultimate decision on "nature" vs "nurture" is a decision for another forum, not this court, and the court makes no determination on this issue.

The federal court in High Tech Gays v. Defense Industrial Security Clearance Office, supra, concluded that there is a history of discrimination against gays. That same court concluded that gays were not a suspect class, however, because they failed to establish two other required elements. This court concludes as did the court in High Tech Gays that there is a history of discrimination against homosexuals.

The court cannot conclude, however, that homosexuals and bisexuals remain vulnerable or politically powerless and in need of "extraordinary protection from the majoritarian political process" in today's society. Failure to prevail on an issue in an election, such as Amendment 2 is not a demonstration of political powerlessness. Indeed, in the case of the vote on Amendment 2, the evidence supports a finding of the political power of gays and bisexuals. According to the figures presented to the court, more than 46% of Coloradans voting voted against Amendment 2. Testimony placed the percentage of homosexuals in our society at not more than 4%. If 4% of the population gathers the support of an additional 42% of the population, that is a demonstration of power, not powerlessness. The President of the United States has taken an active and leading role in support of gays, and an increasing number of states and localities have adopted gay rights protective statutes and ordinances such as the three city ordinances in the present case. Because the gay position has been defeated in certain elections, such as Amendment 2, does not mean gays are particularly politically vulnerable or powerless. It merely shows that they lost that election. No adequate showing has been made of the political vulnerability or powerlessness of gays.

The evidence at trial was that there is no identifiable majority in American politics. Numerical majorities of whites, heterosexuals and women were identified, but each numerical majority is so internally divided that it does not form an effective political majority. Therefore, the evidence showed political majorities are formed through the process of coalition building on an issue by issue, or election by election, basis. Those coalitions come together or do not come together to the level of a majority. What was established to the satisfaction of this court is that gays and bisexuals though small in number are skilled at building coalitions which is a key to political power. They are not therefore politically vulnerable or powerless. Homosexuals fail to meet the element of political powerlessness and therefore fail to meet the elements to be found a suspect class.

Case law has not clearly differentiated between the elements of a "suspect" class and a "quasi-suspect" class. Plaintiffs similarly have not established to the satisfaction of this court what those elements are, how they are distinguished from a suspect class, and how they apply to homosexuals and bisexuals. There are two recognized "quasi-suspect" classes, gender and illegitimacy. Neither of the existing quasi-suspect classes encompass homosexuals and bisexuals. No real effort was put forth to establish that homosexuals and bisexuals fit the existing definitions. Plaintiffs have failed to carry their burden to establish that homosexuals are a quasi-suspect class.

* * *

JUDGMENT

Amendment 2 is found to be unconstitutional and the court orders that the preliminary injunction be made permanent.

So ordered.

Richard G. EVANS, Angela Romero, Linda Fowler, Paul Brown, Priscilla Inkpen, John Miller, The Boulder Valley School District Re-2, The City and County of Denver, The City of Boulder, The City of Aspen, and The City Council of Aspen, Plaintiffs-Appellees,

v.

Roy ROMER, as Governor of the State of Colorado, and the State of Colorado, Defendants-Appellants

Nos. 94SA48, 94SA128.

Supreme Court of Colorado, En Banc.

882 P.2d 1335

Oct. 11, 1994.

Chief Justice ROVIRA delivered the Opinion of the Court.

Defendants, Roy Romer, Governor of the State of Colorado, Gale A. Norton, Attorney General of the State of Colorado, and the State of Colorado (defendants) appeal the trial court's entry of a permanent injunction enjoining them from enforcing a voter-initiated amendment to the Colorado Constitution ("Amendment 2"). We affirm.

I

In May 1992, petitions which would amend the Colorado Constitution by adding a new section 30b to article II were filed with the secretary of state. The proposed amendment was put to the voters as Amendment 2 on November 3, 1992, and passed by a vote of 813,966 to 710,151 (53.4% to 46.6%). The secretary of state certified the results on December 16, 1992, as required by article V, section 1, of the state constitution.

Amendment 2 provides: No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. 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.

On November 12, 1992, Richard G. Evans, along with eight other persons, the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen (plaintiffs) filed suit in Denver District Court to enjoin the enforcement of Amendment 2 claiming that the amendment was unconstitutional.

The trial court conducted an evidentiary hearing to consider plaintiffs' motion for a preliminary injunction. Subsequently, the court granted the motion and prohibited the defendants from enforcing Amendment 2 pending the outcome of a trial on the merits.

The defendants appealed pursuant to C.A.R. 1(a)(3), and we granted review. See Evans v. Romer, 854 P.2d 1270 (Colo.1993) (Evans I). In Evans I, we first addressed the question of the legal standard to be applied in reviewing the trial court's entry of the preliminary injunction. Following the precedent of the United States Supreme Court, we held that "the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process," and "that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny." Id. at 1282.

After recognizing that "[t]he immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation" and that the " 'ultimate effect' of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures," we held: [T]he right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment. Rather than attempting to withdraw antidiscrimination issues as a whole from state and

local control, Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political processes. Id. at 1285. We concluded that the trial court did not err in granting the preliminary injunction enjoining defendants from enforcing Amendment 2.

After our decision in Evans I, the case was remanded to the trial court to determine whether Amendment 2 was supported by a compelling state interest and narrowly tailored to serve that interest. Id. at 1286. At trial the defendants offered six "compelling" state interests: (1) deterring factionalism; (2) preserving the integrity of the state's political functions; (3) preserving the ability of the state to remedy discrimination against suspect classes; (4) preventing the government from interfering with personal, familial, and religious privacy; (5) preventing government from subsidizing the political objectives of a special interest group; and (6) promoting the physical and psychological well-being of Colorado children.

The trial court concluded that the interest in deterring "factionalism" was in truth, nothing more than an attempt to impede the expression of "a difference of opinion on a controversial political question. . . ." It concluded that the first governmental interest was not a compelling state interest but rather, that "the opposite of defendants' claimed compelling interest is most probably compelling," i.e., encouraging the competition of ideas with uninhibited, robust, and wide-open political debate.

The trial court found that the interest of preserving the State's political functions, premised on the Tenth Amendment right of the states to amend state constitutions, was not a compelling interest since "[d]efendants' legal argument is not supported by federal or state case law, nor is it supported by the Colorado Constitution."

With respect to the interest in preserving the ability of the state to remedy discrimination against groups which have been held to be suspect classes, the trial court stated its doubt as to whether fiscal concerns of the state rise to the level of a compelling state interest. The court held that Amendment 2 could not be understood to further this interest because, [d]efendants' evidence was principally in the form of opinion and theory as to what would occur if a Denver type ordinance were adopted as a state statute. There is no such statute, nor is one proposed. Plaintiffs' evidence was based on what has happened over the course of eleven years in Wisconsin, and during the time in which the Denver ordinance has included a sexual orientation provision. Those actual experiences show that the presence of a sexual orientation provision has not increased costs or impaired the enforcement of other civil rights statutes or ordinances. Thus, the trial court concluded that "defendants' offered evidence of lack of fiscal ability [is] unpersuasive in all respects."

The trial court held that preventing the government from interfering with personal, familial, and religious privacy was, in part, a compelling state interest. Although the court acknowledged promotion of family privacy is a compelling state interest, it held that defendants never established what they meant by the term "family." Moreover, defendants failed to "tie-in . . . the interest of protecting the family and denying gays and bisexuals the right to political participation. . . ."

The trial court also found that preserving religious liberty was a compelling state interest. However, it held that Amendment 2 was not narrowly tailored to serve this interest. "The narrowly focused way of addressing [antidiscrimination protections for gay men, lesbians, and bisexuals] is to add to it a religious exemption such as is found in the Denver and Aspen ordinances, not to deny gays and bisexuals their fundamental right of participation in the political process."

The trial court rejected the personal privacy component of the argument on the grounds that "[t]he general issue of whether personal privacy is a compelling state interest was not adequately established. The court can only speculate as to what defendants mean by personal privacy and how Amendment 2 protects such a right."

The interest in preventing government from subsidizing the political objectives of a special interest group was rejected on the grounds that "[t]his claimed compelling interest was not supported by any credible evidence or any cogent argument, and the court concludes that it is not a compelling state interest."

Similarly, the trial court rejected the argument that the protection of children is a compelling state interest served by Amendment 2 because "[d]efendants have failed to present sufficient evidence to support this claimed compelling interest."

Accordingly, because the trial court concluded that Amendment 2 was not necessary to support any compelling state interest and narrowly tailored to meet that interest, it permanently enjoined the enforcement of Amendment 2.

On appeal the defendants argue that: (1) the legal standard set forth by this Court in Evans I for assessing the constitutionality of Amendment 2 should be reconsidered; (2) Amendment 2 is supported by several compelling state interests and is narrowly tailored to meet those interests; (3) that the unconstitutional provisions of Amendment 2 are severable from the remainder; and (4) Amendment 2 is a valid exercise of state power under the Tenth Amendment to the United States Constitution.

II

Defendants first ask that we reconsider the constitutional principles articulated in Evans I, but they offer no arguments that were not then considered and rejected by this court. We see no reason to revisit that decision. We reaffirm our holding that the

constitutionality of Amendment 2 must be determined with reference to the strict scrutiny standard of review.

III

A legislative enactment which infringes on a fundamental right or which burdens a suspect class is constitutionally permissible only if it is "necessary to promote a compelling state interest," and does so in the least restrictive manner possible The question of what constitutes a compelling state interest is one of law and thus, we review the trial court's ruling de novo. Defendants argue that Amendment 2 is supported by a number of compelling state interests and is narrowly tailored to serve those interests.

A

Defendants' first asserted governmental interest is in protecting the sanctity of religious, familial, and personal privacy. Freedom of religion is expressly guaranteed by both the First Amendment to the United States Constitution and article II, section 4 of the Colorado Constitution and stands at the core of our Nation's history and tradition. It is among the highest values of our society. There can be little doubt that ensuring religious freedom is a compelling governmental interest.

Defendants argue that Amendment 2 is necessary to serve this interest because "[u]nder the ordinances preempted by Amendment 2, individual landlords or employers who have deep-seated and profound religious objections to homosexuality would nonetheless be compelled to compromise those convictions, under threat of government sanctions." In support of this proposition, defendants rely on Smith v. Commission of Fair Employment & Hous., 25 Cal.App.4th 251, 30 Cal.Rptr.2d 395 (3 Dist.1994), pet. for review granted and opinion superseded by Smith v. Fair Employment & Hous. Comm'n, 33 Cal.Rptr.2d 567, 880 P.2d 111 (Cal.1994). (See Cal.Ct.Rules 976(d) opinion withdrawn from publication pending review).

In Smith, the plaintiff challenged the ruling of the California Commission of Fair Employment and Housing which found that she had impermissibly discriminated, based on their marital status, against a couple who sought to rent housing. The couple was unmarried and the plaintiff refused to rent to them on the grounds that doing so would violate her deeply-held religious beliefs. Plaintiff was ordered to cease and desist marital discrimination; post a notice announcing her violation of California law for ninety days; permanently post a notice to rental applicants of their rights and remedies under California antidiscrimination laws; and sign both notices and provide copies to each person who subsequently expressed an interest in renting her property. Id. 30 Cal.Rptr.2d at 397-98.

The California court of appeals concluded that the commission's order substantially burdened plaintiff's free exercise rights because she "cannot remain faithful to her religious convictions and beliefs and yet rent to unmarried couples." Id. 30 Cal.Rptr.2d at 399.

Assuming arguendo that ordinances such as that in effect in Boulder, which prohibit discrimination against gay men, lesbians, and bisexuals in housing and employment but which contain no exception for religiously-based objections, substantially burden the religious liberty of those who object to renting or employing gay men, lesbians, or bisexuals on religious grounds, the enactment of Amendment 2 clearly is not narrowly tailored to serve the interest of ensuring religious liberty. To the contrary, an equally effective, and substantially less onerous way of accomplishing that purpose simply would be to require that antidiscrimination laws which include provisions for sexual orientation also include exceptions for religiously-based objections. This is precisely what the Denver antidiscrimination laws provide. Denver, Colo., Rev.Mun.Code art. IV, §§ 8-92, 28-93, 28-95 to 28-97 (1992 Supp.). Similar exemptions for religious organizations are found in federal antidiscrimination statutes. Defendants do not, and we doubt that they could, argue that the Denver ordinance impairs religious freedom. Indeed, Joseph Broadus, who testified as an expert witness on behalf of the defendants, testified that imposing a religiously-based exemption on antidiscrimination laws intended to protect gay men, lesbians, and bisexuals would be less restrictive than Amendment 2 and would adequately address any concerns about religious liberty.

It is clear that Amendment 2, which affects the fundamental right of gay men, lesbians, and bisexuals to participate equally in the political process, is not the least restrictive means of ensuring religious liberty, and is not narrowly tailored to serve the compelling governmental interest in ensuring the free exercise of religion.

Defendants also argue that Amendment 2 serves the compelling interest of preserving "familial privacy." Family privacy is characterized by defendants as the right "of some parents to teach traditional moral values" to their children. As support, defendants cite authority recognizing the sanctity of the family and the central role the family plays in society.

Defendants contend that the "right of familial privacy" is "severely undermine[d]" by the enactment of antidiscrimination laws protecting gay men, lesbians, and bisexuals because "[i]f a child hears one thing from his parents and the exact opposite message from the government, parental authority will inevitably be undermined." This argument fails because it rests on the assumption that the right of familial privacy engenders an interest in having government endorse certain values as moral or immoral. While it is true that parents have a constitutionally protected interest in inculcating their children with their own values, defendants point to no authority, and we are aware of none, holding that

parents have the corresponding right of insuring that government endorse those values.

The United States Supreme Court has repeatedly held that the individual's right to profess or practice certain moral or religious beliefs does not entail a right to have government itself reinforce or follow those beliefs or practices. Furthermore, it is clear that the government does not burden an individual's constitutional rights merely because it endorses views with which that individual may disagree.

Consequently, fully recognizing that parents have a "privacy" right to instruct their children that homosexuality is immoral, we find that nothing in the laws or policies which Amendment 2 is intended to prohibit interferes with that right. With or without Amendment 2, parents retain full authority to express their views about homosexuality to their children. We believe that Amendment 2 is neither necessary nor narrowly tailored to preserve familial privacy because that right is not implicated by the laws and policies which Amendment 2 proscribes.

Defendants also argue that Amendment 2 serves the compelling state interest in preserving "personal privacy." While it is not entirely clear what is meant by the phrase, it appears that the defendants are referring to the right of "associational privacy" which will be impaired in the absence of Amendment 2 because individuals may be forced to associate with gay men, lesbians, and bisexuals in the rental of housing.

As the Supreme Court has explained, the right of associational privacy protects associations involving, deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. . . . [T]hey are distinguished by such attributes as relative smallness, a high degree of selectivity in the decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

While preserving associational privacy may rise to the level of a compelling state interest, Amendment 2 is not narrowly tailored to serve that interest. Amendment 2 would forbid governmental entities from prohibiting discrimination against gay men, lesbians, and bisexuals (because they are gay, lesbian, or bisexual) in all aspects of commercial and public life, no matter how impersonal. Amendment 2 affects a vast array of affiliations which in no way implicate associational privacy. None of the criteria needed to precipitate associational privacy rights exists: there is no "special community" distinguished by "selectivity," "relative smallness," or any concern with "distinctively personal aspects of one's life." Id. [A]n association lacking these qualities--such as a large business enterprise--seems remote from the concerns giving rise to this constitutional protection. Accordingly, the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.

To the extent that antidiscrimination laws protecting gay men, lesbians, and bisexuals have the potential to implicate associational privacy rights, a narrower way of avoiding this conflict would be to exempt the sort of intimate associations identified in Roberts from the scope of such laws. For instance, landlords could be allowed to discriminate against homosexuals in the rental of owner-occupied housing--the so-called "Mrs. Murphy's Boarding House" exception. Similar exemptions already exist under Colorado law. For instance, Denver's antidiscrimination ordinance exempts from its housing and public accommodation provisions multiple unit dwellings of not more than two units where one of the units is owner occupied. Denver, Colo., Rev.Mun.Code art. IV, §§28-95(b)(2) & 28-96(b)(2) (1991). Similarly, the Colorado Civil Rights statute exempts from the definition of "housing" any room offered for rent or lease in a single- family dwelling occupied in part by the owner. §24-34-501(2), 10A C.R.S. (1988).

Amendment 2, however, does no such thing. Rather, it prohibits governmental entities from enacting laws barring discrimination against gay men, lesbians, and bisexuals in all contexts, regardless of the nature of the relationship involved and the extent of intimacy inherent in those relationships. Amendment 2 sweeps more broadly than necessary and is not narrowly tailored to serve the governmental interest in preserving associational privacy.

B

Defendants next assert that because "laws and policies designed to benefit homosexuals and bisexuals have an adverse effect on the ability of state and local governments to combat discrimination against suspect classes. . . . Amendment 2 is an appropriate means whereby the people sought to focus government's limited resources upon those circumstances most warranting attention." In short, defendants take the position that Amendment 2 serves the compelling governmental interest in seeing that limited resources are dedicated to the enforcement of civil rights laws intended to protect suspect classes rather than having a portion of those resources diverted to the enforcement of laws intended to protect gay men, lesbians, and bisexuals.

It is well-settled that the preservation of fiscal resources, administrative convenience, and the reduction of the workload of governmental bodies are not compelling state interests.

Consequently, we conclude that defendants' asserted interest in preserving the fiscal resources of state and local governments for the exclusive use of

enforcing civil rights laws intended to protect suspect classes does not constitute a compelling state interest.

Assuming that the state has some legitimate interest in preserving fiscal resources for the enforcement of civil rights laws intended to protect suspect classes, and recognizing that combating discrimination against racial minorities and women may constitute a compelling governmental interest, the evidence presented indicates that Amendment 2 is not necessary to achieve these goals. The chief enforcement officer for Denver's antidiscrimination ordinance testified that Denver's protection of gay men, lesbians, and bisexuals has not prevented Denver from protecting other groups or had any significant fiscal impact on Denver. The chief of Wisconsin's Civil Rights Bureau testified, based on twelve years experience with Wisconsin's enforcement of its antidiscrimination laws, that protection of gay, lesbian, and bisexual persons has not limited enforcement of other parts of the Wisconsin statutes. The trial court found that protecting gay men, lesbians, and bisexuals from discrimination "has not increased costs or impaired the enforcement of other civil rights statutes or ordinances." This finding is supported by the record and substantiates the conclusion that Amendment 2 is not necessary to serve the governmental interest asserted.

Even if protecting gay men, lesbians, and bisexuals from discrimination has some fiscal impact on the state, Amendment 2 is not narrowly tailored to serve that interest. Ensuring that certain racial, gender, or ethnic groups receive undiminished funds for civil rights enforcement could easily be accomplished by ear-marking funds to cover the costs of such enforcement. Under such an arrangement, any protection for gay men, lesbians, and bisexuals would have to be funded from sources other than funds reserved for the protection of the specified suspect classes. The governmental interest in insuring adequate resources for the enforcement of civil rights laws designed to protect suspect classes from discrimination need not be accomplished by denying the right of gay men, lesbians, and bisexuals from participating equally in the political process. Rather, this interest can be served in such way that no persons' fundamental rights need be denied.

The defendants' second asserted governmental interest in support of Amendment 2 is neither necessary nor narrowly tailored to serve that interest.

C

Defendants next argue that Amendment 2 "promotes the compelling governmental interest of allowing the people themselves to establish public social and moral norms." In support of this proposition, defendants define two related norms which are promoted by Amendment 2: Amendment 2 preserves heterosexual families and heterosexual marriage and, more generally, it sends the societal message condemning gay men, lesbians, and bisexuals as immoral.

The only authority relied on to support the view that the protection of morality constitutes a compelling governmental interest is Barnes v. Glen Theater, Inc., 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Defendants cite the plurality opinion in Barnes for the proposition that "the State's interest in protecting order and morality is compelling; substantial; subordinating; paramount; cogent; strong." Barnes does not support defendants' contention that protecting public morality constitutes a compelling governmental interest.

In Barnes, four Justices held that "the public indecency statute . . . furthers a substantial government interest in protecting order and morality." Barnes, 501 U.S. at 567, 111 S.Ct. at 2461 (emphasis added). Justice Souter provided the fifth vote in Barnes, however he did not rely "on the possible sufficiency of society's moral views to justify the limitations at issue." Id. at 582, 111 S.Ct. at 2468 (Souter, J., concurring). Rather, he was of the opinion that the Indiana law at issue (which prohibited completely nude dancing) was permissible due to the "State's substantial interest in combating the secondary effects of adult entertainment establishments." Id. None of the justices in Barnes concluded that furthering public morality constitutes a compelling state interest.

Consequently, defendants have cited no authority to support the proposition that the promotion of public morality constitutes a compelling governmental interest, and we are aware of none. At the most, this interest is substantial. However, a substantial governmental interest is not sufficient to render constitutional a law which infringes on a fundamental right--the interest must be compelling.

Furthermore, even recognizing the legitimacy of promoting public morals as a governmental interest, it is clear to us that Amendment 2 is not necessary to preserve heterosexual families, marriage, or to express disapproval of gay men, lesbians, and bisexuals. First, we reject defendants' suggestion that laws prohibiting discrimination against gay men, lesbians, and bisexuals will undermine marriages and heterosexual families because married heterosexuals will "choose" to "become homosexual" if discrimination against homosexuals is prohibited. This assertion flies in the face of the empirical evidence presented at trial on marriage and divorce rates. For example, Wisconsin, the state with the oldest "gay rights" law in the nation, enacted in 1982, reports that the divorce rate in Wisconsin declined after the enactment of its antidiscrimination statute.

Defendants also argue that the "endorsement" of homosexuality undermines marriage and heterosexual families because antidiscrimination laws implicitly endorse that conduct which is deemed an improper basis for discrimination. We are of the opinion, however, that antidiscrimination laws make no assumptions about the morality of protected classes--they simply recognize that certain characteristics, be they moral or immoral--have no

relevance in enumerated commercial contexts. For instance, it is difficult to imagine how a law which prohibits employers from discriminating against anyone engaged in off-duty, legal conduct such as smoking tobacco, see §24-34-402.5, 10A C.R.S. (1994 Supp.), constitutes an endorsement of smoking.

In short, prohibitions on discrimination against gay men, lesbians, and bisexuals do not imply an endorsement of any particular sexual orientation or practices. To the contrary, prohibitions on discrimination imply at most that termination of employment, eviction or denial of rental opportunities, denial of insurance coverage, and other sanctions in commercial contexts based on sexual orientation are not appropriate ways of advancing even valid moral beliefs.

Accordingly, we reject defendants' third asserted interest as a basis for finding that Amendment 2 is constitutionally valid.

D

Defendants contend that Amendment 2 "prevents government from supporting the political objectives of a special interest group." The only argument offered to substantiate the contention that this is a compelling state interest is the following observation from Lyng v. International Union, 485 U.S. 360, 369, 108 S.Ct. 1184, 1191, 99 L.Ed.2d 380 (1988): "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."

Defendants do not claim that the laws which Amendment 2 is intended to prohibit constitute an infringement on the First Amendment liberties identified in Lyng. Similarly, they do not take the position that those laws amount to a "coerc[ion] by the State" to believe anything. Rather, they assert that the laws which Amendment 2 is intended to prohibit constitute an implicit endorsement of homosexuality and that this somehow vitiates the right of individuals "to make their own judgments on this question. . . ." As explained above, however, we do not believe that antidiscrimination laws constitute an endorsement of the characteristics that are deemed an unlawful basis upon which to discriminate against individuals.

More significantly, defendants offer no authority to support the rather remarkable proposition that the government has a compelling interest in seeing that the state does not support the political objectives of a "special interest group." The state exists for the very purpose of implementing the political objectives of the governed so long as that can be done consistently with the constitution. The fact that some political objectives are promoted by "special interest groups" is utterly inconsequential. Indeed, virtually any law could be regarded as a benefit to a "special interest group." If defendants' argument had any merit at all, the compelling state interest defined would justify striking down almost any legislative enactment imaginable. This is clearly not the law. No citation of authority is needed to make the point.

We reject defendants' assertion that Amendment 2 is justified by the compelling governmental interest in not having the state endorse the political objectives of a special interest group.

E

Defendants claim that Amendment 2 "serves to deter factionalism through ensuring that decisions regarding special protections for homosexuals and bisexuals are made at the highest level of government." More specifically, they argue that "Amendment 2 is intended, not to restrain the competition of ideas," but "seeks to ensure that the deeply divisive issue of homosexuality's place in our society does not serve to fragment Colorado's body politic." Amendment 2 accomplishes this end by eliminating "city-by-city and county-by-county battles over this issue."

We reject the argument that the interest in deterring factionalism, as defined by defendants, is compelling. Political debate, even if characterized as "factionalism," is not an evil which the state has a legitimate interest in deterring but rather, constitutes the foundation of democracy. "[T]here is no significant state or public interest in curtailing debate or discussion of a ballot measure." We fail to see how the state, which is charged with serving the will of the people, can have any legitimate interest in preventing one side of a controversial debate from pressing its case before governmental bodies simply because it would prefer to avoid political controversy or "factionalism."

In support of the asserted compelling interest in deterring factionalism, defendants rely on Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). Storer involved a state requirement that proponents of any viewpoint resign from political parties and not run in those parties' primaries if the proponents intend to run as independent candidates. The purpose of this neutral election procedure was to insure that independent candidates were more than merely sore losers who, having lost one primary, ran as "independents" to satisfy "short-range political goals, pique, or personal quarrel."

Neither Storer, nor any other case we are aware of supports the proposition that there is a compelling governmental interest in preventing divisive issues from being debated at all levels of government by prohibiting one side of the debate from seeking desirable legislation in those fora. We conclude that the interest in deterring "factionalism" is not a compelling state interest.

F

Defendants argue that each of the governmental interests, while individually adequate to validate Amendment 2, "are especially so when considered in the aggregate." None of the interests identified by the state is a necessary, compelling governmental interest

which Amendment 2 is narrowly tailored to advance. Lumping them together as one grandiose (and rather ill- defined) interest makes them no more necessary, compelling, or narrowly tailored. In this context, the whole is equal, and is as equally deficient as the sum of its parts.

IV

Defendants next argue that the provisions of Amendment 2 are severable and that only those provisions pertaining to "sexual orientation" should be stricken as unconstitutional: "Plaintiffs have only challenged . . . the question of sexual orientation. They have not claimed or made any suggestion that Amendment 2's restrictions concerning homosexual or bisexual conduct, practices, and relationships are in any way constitutionally suspect."

In so arguing, defendants not only mischaracterize plaintiffs' position, but fundamentally misconstrue the intent of Amendment 2. In Evans I, we held that Amendment 2 had been shown to a reasonable probability to be unconstitutional on the grounds that it affected "the fundamental right to participate equally in the political process . . . by 'fencing out' an independently identifiable class of persons. . . ." Id. at 1282. The constitutional infirmity of Amendment 2 recognized in Evans I was not limited to sexual orientation as opposed to restrictions concerning homosexual or bisexual conduct, practices, and relationships. To the contrary, it was based on the fact that Amendment 2 sought to deny an independently identifiable group's right to participate equally in the political process.

* * *

We hold that the portions of Amendment 2 that would remain if only the provision concerning sexual orientation were stricken are not autonomous and thus, not severable. In addition to denying the right of equal participation in the political process to a group based on sexual orientation, Amendment 2 also is intended to deny that same right to persons based on "homosexual, lesbian or bisexual . . conduct, practices or relationships. . . ."

Amendment 2 targets this class of persons based on four characteristics: sexual orientation; conduct; practices, and relationships. Each characteristic provides a potentially different way of identifying that class of persons who are gay, lesbian, or bisexual. These four characteristics are not truly severable from one another because each provides nothing more than a different way of identifying the same class of persons.

The fact that there is no constitutionally recognized right to engage in homosexual sodomy, is irrelevant. Amendment 2 by no stretch of the imagination seeks to criminalize homosexual sodomy. While it is true that such a law could be passed and found constitutional under the United States' constitution, it does not follow from that fact that denying the right of an identifiable group (who may or may not engage in homosexual sodomy) to participate equally in the political process is also constitutionally permissible. The government's ability to criminalize certain conduct does not justify a corresponding abatement of an independent fundamental right.

V

Last, defendants argue that even if Amendment 2 is in conflict with the Fourteenth Amendment to the United States Constitution, it is nevertheless a constitutionally valid exercise of the people's reserved powers under the Tenth Amendment. In short, the argument is that the power to amend the state constitution is reserved to Colorado's voters under the Tenth Amendment, and even if the voters amend the state constitution in such a way as to violate the federal constitution, such an amendment is per se valid.

In support of this argument, defendants rely on Gregory v. Ashcroft, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). In Gregory, the Supreme Court held that the Age Discrimination in Employment Act does not apply to state court judges. In reaching this conclusion, the Court noted that decisions concerning the necessary qualification of state court judges "is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government and the character of those who exercise government authority, a state defines itself as a sovereign." Id. at 460, 111 S.Ct. at 2400. The court concluded that "Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers."

Gregory applies only to cases involving federal interference with the qualification of constitutional officers.

States have no compelling interest in amending their constitution in ways that violate fundamental federal rights.

We reject defendants' argument that Amendment 2 is a constitutionally valid exercise of state power under the Tenth Amendment.

VI

The state has failed to establish that Amendment 2 is necessary to serve any compelling governmental interest in a narrowly tailored way. Amendment 2 is not severable and not a valid exercise of state power under the Tenth Amendment. Accordingly, we affirm the trial court's entry of a permanent injunction barring its enforcement.

Justice SCOTT concurring:

I agree with the majority and join in its opinion and judgment. Amendment 2 is unconstitutional because it offends the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. I write separately, nevertheless, to

suggest that Amendment 2 impermissibly burdens the right "peaceably to assemble and petition the government for redress of grievances," a right guaranteed to every citizen. Hence, the district court's permanent injunction should be upheld under the Privileges or Immunities Clause of the Fourteenth Amendment.

I

Citizenship, not the good graces of the electorate, is the currency of our republican form of government. Over 130 years ago, this nation was engaged in a great Civil War which tested our constitutional form of government as has no other time in our history. That great battle, joined to address issues of slavery and race, actually resolved much more. History teaches us that, in fact, our nation addressed a question of paramount importance: whether any state may, by legislative enactment or popular referendum, deny or refute the Union of the several states and render asunder the bonds of our constitutional form of government. Although answered at Appomatox, today we are called upon to answer, if not resolve, that question once more.

The federal Constitution, as submitted to the various states, created certain rights which the states cannot diminish. By joining the Union, Colorado "cannot be viewed as a single, unconnected, sovereign power, on [which] . . . no other restrictions are imposed than may be found in its own Constitution." Fletcher v. Peck, 10 U.S. (6 Cranch) 85, 135, 3 L.Ed. 162 (1810). Writing for the court in Fletcher, Chief Justice Marshall opined that each state "is a part of a large empire, . . . is a member of the American Union; and that Union has a constitution, the supremacy of which all acknowledge, and which imposes limits to . the several states, which none claim a right to pass." Id. Thus, within the limits of state sovereignty, most important questions are decided by the electorate. However, those matters in which the result intrudes upon a protected liberty or fundamental right cannot be determined in the voting booth.

The framers originally recognized this potential for harm and understood that not every issue can be resolved by the vote of a majority. In The Federalist Papers, James Madison identified the covenant of "a well constructed Union" as its promise to protect and preserve inviolate certain rights of all citizens. The Federalist No. 10, at 42 (J. Madison) (Wills 1982). Madison noted that under other forms of government, "measures are too often decided, not according to the rules of justice, and the rights of the minor party; but by the superior force of an interested and over-bearing majority." Id. at 43. Madison further stated: The interest of the man must be connected with the constitutional rights of the place. . . . If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. . . It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. Id., No. 51, at 262 & 264. Appropriately, Madison suggested, the "cure" rests in a republican form of government -- a Union in which there is a "tendency to break and control the violence of faction." Id., No. 10 at 42. The obligation to "guard one part of the society against the injustice of the other part" exists whether the oppressive act is the result of referendum or other state action. Hence, every individual is promised full citizenship under a written Constitution which, as Justice Harlan opined, "neither knows nor tolerates classes among citizens."

* * *

II

A

Section 1 of the Fourteenth Amendment of the United States Constitution declares: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." U.S. Const. amend XIV, section 1. The Fourteenth Amendment, in section 1, made state citizenship derivative of national citizenship and transferred to the federal government a portion of each state's control over civil and political rights.

By the force of an unfortunate history and a refusal to rely upon the plain text of the constitution, our Fourteenth Amendment jurisprudence has resulted in a Privileges or Immunities Clause that has been eclipsed by the Equal Protection and Due Process Clauses. As a consequence, no important line of decision rests solely on the Privileges or Immunities Clause. Early on, in fact, the original understanding was virtually written out of the Constitution by the United States Supreme Court in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873).

In the Slaughter-House Cases, decided in 1873, a majority of the Court acknowledged the Privileges or Immunities Clause of the Fourteenth Amendment, but limited its effects to those rights earlier existing under Article IV, without recognizing the creation of a new national citizenship. In his opinion for the Court in Slaughter-House Cases, Justice Miller declared that the rights conferred by national citizenship were those "which owe their existence to the Federal government, its National character, its Constitution, or its laws." 83 U.S. (16 Wall.) at 79, 21 L.Ed. 394. A review of the legislative history, however, will not permit such an ambivalent view. The statements of the framers of the Fourteenth Amendment, Senator Howard and Representative Bingham, confirm that the Privileges or Immunities Clause was originally intended to confer and make inviolate certain minimal rights embodied in national citizenship.

* * *

III

The United States Supreme Court has repeatedly held that the right to vote is fundamental to the rights of citizenship and to a free and democratic society. By "participate equally," although not assuring any political result, we did contemplate the right of the people peaceably to assemble and petition the government for a redress of grievances. This right to participate, an attribute of the new national citizenship, was meant by the framers of the Fourteenth Amendment to be a personal right guaranteed and secured by the Privileges or Immunities Clause.

It should be axiomatic that the right peaceably to assemble and petition government implies the ability of the duly elected representatives to respond, if so persuaded or predisposed. Yet, if enforced, Amendment 2 provides that the state, acting "through any of its branches or departments, or any of its agencies, political subdivisions, municipalities or school districts," shall not "enact, adopt or enforce any statute, regulation, ordinance or policy" granting to citizens a "claim of discrimination" based on homosexual or lesbian status or sexual orientation. Because it would prevent the General Assembly or other legislative bodies from enacting or adopting certain new laws and bar the executive department and its agencies from enforcing existing laws, Amendment 2 effectively denies the right to petition or participate in the political process by voiding, ab initio, redress from discrimination. Like the right to vote which assumes the right to have one's vote counted, the right peaceably to assemble and petition is meaningless if by law government is powerless to act.

IV

Courts have been reluctant to develop a working constitutional analysis under the Privileges or Immunities Clause since the Slaughter-House Cases, and, unfortunately, have instead built upon the Equal Protection Clause and Due Process Clause. The Equal Protection Clause, burdened by a history and analysis beyond this context, is not the most appropriate of the Fourteenth Amendment provisions for securing the right to participate equally in the political process and yet it is the primary mode of analysis relied upon by the majority in this case.

Certainly all must now agree that the Fourteenth Amendment sought to protect citizens from oppression by state government. The Equal Protection Clause of that amendment mandates that rights afforded to some are granted equally to all. From time to time the acts of government intervene in the lives of its citizens. Under the Equal Protection Doctrine, such government intervention is subjected to review, applying at least one of three standards: strict scrutiny, intermediate review, or rational basis analysis. The applicable standard of review to be applied depends upon the characteristics or attributes of the citizens involved. Under the Equal Protection Doctrine, when such governmental intervention occurs, such as with the enactment of Amendment 2 in this case, regardless of the standard applied, it is contemplated that certain abridgements of even fundamental rights are acceptable. For example, under the strict scrutiny test, the most exacting standard and that applied by the majority, state action is "constitutionally permissible . . . if it is 'necessary to promote a compelling state interest,' and [the state] does so in the least restrictive manner possible."

Unlike the Equal Protection Clause, the Privileges or Immunities Clause guarantees citizens that certain fundamental rights of national citizenship are inviolate, absent due process.

The syntax of the Fourteenth Amendment Clause seems inescapably that of substantive entitlement. According to Ely, "the slightest attention to language will indicate that it is the Equal Protection Clause that follows the command of equality strategy, while the Privileges or Immunities Clause proceeds by purporting to extend to everyone a set of entitlements." Ely at 24. The importance of the Privileges or Immunities Clause is that it does not require varying standards of review and that its protections are extended to every citizen.

V

Under Amendment 2, the rights of citizens "peaceably to assemble and petition the government for a redress of grievances" so as to participate freely and equally in the political process are compromised in a manner prohibited by the Fourteenth Amendment. Because these political rights are fundamental and inherent in national citizenship they are protected by the Privileges or Immunities Clause. Accordingly, I concur.

Justice ERICKSON dissenting:

I respectfully dissent. In Evans v. Romer, 854 P.2d 1270 (Colo.) (Evans I), cert. denied, --- U.S. ----, 114 S.Ct. 419, 126 L.Ed.2d 365 (1993), the majority crafted a new fundamental right that had never been recognized by the United States Supreme Court or by any court other than a federal district court in Ohio that relied on Evans I. Ironically, judicial review of Amendment 2 has accomplished exactly what the voters who passed Amendment 2 sought to prevent--the majority has effectively created a heightened protection for homosexuals, lesbians, and bisexuals.

In establishing what is essentially a new substantive due process right disguised as a previously unrecognized "fundamental right," the majority disregarded the warnings of Chief Justice Burger, who stated in his dissent to Plyler v. Doe, 457 U.S. 202, 244, 102 S.Ct. 2382, 2409, 72 L.Ed.2d 786 (1982): "If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example." Chief Justice Burger stated: Were it our

business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children--including illegal aliens--of an elementary education. . . . However, the Constitution does not constitute us as "Platonic Guardians" nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, "wisdom," or "common sense." We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking role as the Court does today.

The majority opinion has overlooked a crucial aspect of the case before us: we are not evaluating an act of the legislature or pronouncement of the executive--we are reviewing a constitutional amendment adopted by the people of the State of Colorado. While there are certainly some initiated constitutional amendments that a majority of the electorate may attempt to visit on a minority that will not pass constitutional scrutiny, we must not ignore the fact that we are reviewing the expressed will of the citizens of this state.

In Evans I, we remanded the case to the district court to determine whether the preliminary injunction sustained by a majority of this court should be made permanent. The district court, following Evans I with great precision, made extensive findings and made the preliminary injunction permanent. Nevertheless, people of homosexual, lesbian, or bisexual orientation have never been adjudicated to be a protected class and the right to participate equally in the political process has never been determined, apart from Evans I, to be a fundamental right. Accordingly, I would employ a rational relation standard to Amendment 2 and vacate the permanent injunction. For the reasons set forth in my dissent to Evans I, and for the reasons set forth below, I respectfully dissent.

I

The majority relies on Evans I and applies the strict scrutiny standard of review to Amendment 2 because it holds that the Equal Protection Clause of the United States Constitution guarantees the fundamental right to participate equally in the political process. Maj. op. at 1339; Evans I, 854 P.2d at 1276. Evans I established this standard of review by assembling several United States Supreme Court decisions and interpreting their collective teachings as implying a new fundamental right. In my view, no fundamental right or suspect class is implicated by Amendment 2, and therefore the standard of judicial scrutiny applied by the majority is erroneous.

A

The majority in Evans I extensively reviewed many United States Supreme Court decisions to reach its conclusion, and emphasized a line of cases relating to citizen participation in the political process. The majority in Evans I interpreted these cases to create the fundamental right to participate equally in the political process. Properly understood, however, these cases involve suspect classifications and not the alleged fundamental right to participate equally in the political process.

In Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), the United States Supreme Court addressed a violation of the Equal Protection Clause of the federal constitution. Hunter involved a city charter amendment that repealed a racial anti-discrimination ordinance and required voter action before such an ordinance could be enacted. Id. at 387, 89 S.Ct. at 558. Although Hunter involved the political process, the Court invalidated the amendment because it created an unjustified distinction based on race. The Court held: Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are "constitutionally suspect," and subject to the "most rigid scrutiny." They "bear a far heavier burden of justification" than other classifications. . .

In Washington v. Seattle School District No. 1, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982), the Court applied Hunter and struck down a state-wide initiative to terminate the use of busing to achieve racial integration in the public schools. In finding that the initiative violated the Equal Protection Clause, the Supreme Court held: [T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places special burdens on racial minorities within the governmental process," thereby "making it more difficult for certain racial and religious minorities than for other members of the community to achieve legislation that is in their interest." Id. at 470, 102 S.Ct. at 3195 (emphasis in original) (citations omitted). The Court thus did not approve of "distinctions based on race" and struck down the initiative because it would have created additional burdens for a class of citizens who have had historical difficulty in changing the political process.

A similar issue was addressed in Crawford v. Board of Education, 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982), which was announced on the same day as Washington. In Crawford, the Court upheld a state constitutional amendment that prohibited state courts from ordering mandatory student assignment or transportation. The Court stated that if the constitutional amendment employed a racial classification such as the classification in Hunter, the Court would apply the strict scrutiny standard of review, but found Hunter inapplicable because the amendment at issue did not "embody a racial classification."

The fact that the fundamental right created by the majority in Evans I has never been recognized by the Supreme Court is evident in two cases, James v.

Valtierra, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971), and Gordon v. Lance, 403 U.S. 1, 91 S.Ct. 1889, 29 L.Ed.2d 273 (1971). In James and Gordon, the Court could have used the fundamental right found in Evans I and applied strict scrutiny review to strike down constitutional measures. Instead, in both cases, the Court upheld the provisions and refused to apply the strict scrutiny standard enunciated in Hunter.

In James, the Supreme Court upheld the validity of a California constitutional measure that prohibited state public bodies from developing, constructing, or acquiring low-income housing projects until voters approved of the project in a referendum. Thus, the citizens singled out in James were low-income people who would qualify for low-rent housing and therefore the Court did not apply strict scrutiny. The Supreme Court said: Unlike the case before us, Hunter rested on the conclusion that Akron's referendum law denied equal protection by placing "special burdens on racial minorities within the governmental process." . . Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race." . . . The present case could be affirmed only by extending Hunter, and this we decline to do.

Similarly, in Gordon, the plaintiffs challenged West Virginia's constitutional provision that required a sixty-percent approval for any bonded indebtedness incurred by the political subdivisions of the state. As in James, the Supreme Court did not apply the strict scrutiny standard of review because: Unlike the restrictions in our previous cases, the West Virginia Constitution singles out no "discrete and insular minority" for special treatment. . . . We are not, therefore, presented with a case like Hunter, in which fair housing legislation alone was subject to an automatic referendum requirement. The class singled out in Hunter was clear--"those who would benefit from laws barring racial, religious, or ancestral discriminations." James and Gordon demonstrate that strict scrutiny should not be applied to review a restriction on the political process unless the restriction singles out a discrete and insular minority. The Supreme Court of the United States has never held, however, that the right to participate equally in the political process is a fundamental right.

B

The development of fundamental rights in our jurisprudence has never been a matter for ad hoc determination. Fundamental rights must be explicitly or implicitly guaranteed by the United States Constitution. Among the fundamental rights delineated by the Supreme Court are the right to vote, the right to interstate travel, the right to privacy, and the guarantees contained in the First Amendment.

The Court has been reluctant to recognize new rights as fundamental. The Court has refused to declare education, housing, the right to refuse medical treatment, welfare payments, or governmental employment to be fundamental rights worthy of heightened constitutional protection. Never before has any court recognized the right to participate equally in the political process as a fundamental right, the curtailing of which warrants strict judicial scrutiny. "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."

It is crucial to note, however, that even though equal participation in the political process does not merit strict scrutiny analysis, the United States Constitution offers protection for those who may be adversely affected by legislation. When individuals or groups are singled out, as they have been here, they may still be protected by the Due Process Clauses or the Equal Protection Clause. In this case, the class of citizens is protected by the Equal Protection Clause. Accordingly, Amendment 2 must be struck down only if its challengers can demonstrate that the legislation is not rationally related to a legitimate state interest.

II

During oral argument before this court, counsel for the plaintiffs- appellees asserted that even if strict scrutiny review were inappropriate, we should analyze Amendment 2 under a rational basis standard of review. Counsel noted that in Heller v. Doe by Doe, --- U.S. ----, ----, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993), the Supreme Court did not engage in strict scrutiny review because it was not properly preserved at the lower levels and therefore urged this court not to preclude rational basis review by ruling merely under strict scrutiny standards. I find counsel's contention persuasive and therefore address Amendment 2 under a rational relation standard.

A

In reviewing an act of the legislature or a voter-mandated constitutional amendment that creates a classification involving neither a fundamental right nor suspect classes, a court will review the classification under the "rational basis" standard of review. Under the rational basis standard of review, the classification will be "upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

The inquiry into whether there is a rational basis for the classification, however, does not authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." Instead, a classification that involves neither suspect classes nor fundamental rights is accorded a strong presumption of validity.

Because of the strong presumption of validity, the purpose or rationale behind the legislation need not be articulated at any time. Additionally, the party challenging the classification bears the burden of "negat[ing] every conceivable basis which might support it" whether or not it is supported by the record.

In an effort to ensure that rational basis review does not become a "license for courts to judge the wisdom, fairness, or logic of legislative choices," the reasons articulated are given great deference. This is so because: The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational. Although the purposes and rationale of a voter initiative are even more difficult to assess than legislative pronouncements, initiatives passed by the citizens of the state which contain classifications not related to fundamental rights or suspect classes are also given deference.

It is the prerogative of the people of the State of Colorado, and not this or any other court, to weigh the evidence and determine the wisdom and utility of the purposes behind a measure adopted through the initiative process. Thus, whether in fact Amendment 2 will meet its objectives is not the relevant question: the Equal Protection Clause is satisfied if the people of Colorado could have rationally decided that prohibiting homosexuals, lesbians, and bisexuals from enacting certain legislation might further a legitimate interest.

Amendment 2 was put to a plebiscite by initiative petitions and eventually won voter approval by 813,966 votes to 710,151 votes. Because Amendment 2 was a product of a vote of the citizens of Colorado, no purpose or rationale for Amendment 2 was explicitly set forth. However, the state has articulated several rationale in this court and in the district court to establish that the interest behind Amendment 2 is not only a rational interest but also a compelling state interest.

III

Although only one legitimate state interest rationally related to the state's goals for a constitutional amendment is necessary, the state has set forth several. The district court found that two rationale--the promotion of religious freedom and the promotion of family privacy--demonstrated compelling state interests, although it found that the means for achieving the interests were not narrowly tailored to achieve the objectives. In my view, there are at least three interests that satisfy the constitutional standard and those asserting the invalidity of Amendment 2 have not met their burden of demonstrating that there is no rational basis for the constitutional amendment.

A

The state asserts that the rational basis of Amendment 2 is that it prevents the government from interfering with religious privacy. The root of the state's contention is that under ordinances preempted by Amendment 2, individual landlords or employers, including churches, who have profound religious objections to homosexuality, would nonetheless be compelled to compromise those convictions under threat of government sanctions. Thus, Amendment 2 prevents any political body from enacting legislation that would hinder the right of individuals to choose who to rent to or who to employ on religious grounds. The district court found that "[p]reserving religious freedom is a compelling state interest" but that Amendment 2 was "not narrowly drawn to achieve that purpose in the least restrictive manner possible."

Freedom of individuals to practice and hold particular religious beliefs is among the highest values in our society. It is not within the discretion of this or any court to determine which beliefs are valid because "courts are not the arbiters of scriptural interpretation." In fact, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit [free exercise] protection." Not only is it impermissible for courts to determine the validity of religious practices and beliefs, but no government official or body may delineate what is a "proper" form of faith and require citizens to act in accordance with government- mandated religious standards.

Nevertheless, not all burdens on religion are unconstitutional. Even the highest values, including religious freedom, must sometimes give way to the greater public good. Thus, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest.

In this case, the state asserts that Amendment 2 is an attempt to protect religious freedom by precluding legislation that would threaten sanctions against those who would refuse to employ or rent to homosexuals, lesbians, and bisexuals. The state indicates several examples of instances in which individuals or groups were forced to set aside their religious beliefs based on legislative enactments protecting homosexuals. In Aspen, for example, section 13-98 of the sexual orientation ordinance required churches to open their facilities to homosexual organizations if the facilities were opened to any community organization. Churches apparently could not refuse to hire employees, including pastors or priests, on the basis of their sexual orientation. Similarly, Title 12 of the Boulder Municipal Code did not allow a church or religious organization with deeply held moral and religious views on the subject of homosexuality to refuse to hire someone based on his or her sexual orientation.

In my view, the state has a legitimate interest in protecting religious freedoms and Amendment 2 bears a rational relationship to that interest.

B

Although the district court found that the state did not have a compelling interest in deterring "factionalism," or "political fragmentation," the state

does have a legitimate interest in promoting state-wide uniformity and Amendment 2 is rationally related to that interest.

Prohibiting local action on matters affecting the entire state is advantageous inasmuch as the state has an interest in uniformity of regulation: The central inquiry implicit in the concept of pre-emption is whether there should be statewide uniformity in the regulation of specific conduct. If there is no need for statewide uniformity, there is no need for state law to preempt local power to regulate . . . This is the core of the preemption question--to consider, on the one hand, the need for statewide uniformity of regulation of a specific type of conduct, and, on the other hand, the need of local governments to be able to respond to local, as distinguished from statewide problems.

* * *

In this case, the state has a legitimate interest in promoting Amendment 2 because it is a matter of statewide concern. Amendment 2 involves a matter of statewide concern because the public is deeply divided over the issue of homosexuality. In fact, civil rights has never been the type of concern reserved exclusively for local governments. By adopting Amendment 2, the people of the state have sought to ensure that the government will act on a uniform basis. Several local governments, such as Denver, Aspen, and Boulder enacted sexual orientation laws, while others did not. By voting to approve Amendment 2, the voters of Colorado indicated that they wanted a statewide resolution of the issue that had formerly only been locally regulated and subject to great debate. The citizens of the state have a right to the initiative process which resolves conflicts between municipal and local governments when the issue is a matter of statewide concern and the process is not repugnant to the constitution. The Supreme Court has noted that "referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."

In my view, the state has a legitimate interest in promoting statewide uniformity in matters of statewide concern and Amendment 2 bears a rational relationship to that interest.

C

The state also contends that it has a legitimate interest in allocating its resources. Specifically, the state suggests that laws prohibited by Amendment 2 would drain the state's financial and labor resources set aside and budgeted for the protection of traditionally suspect classes and diminish respect for traditional civil rights categories.

In this case, the testimony reflected that, although there was no current statute that required the state to enforce civil rights legislation on behalf of homosexuals, lesbians, and bisexuals, any such statute would decrease the funding available to enforce existing laws protecting traditionally suspect classes. For example, the investigative arm of the Civil Rights Commission has experienced steadily increasing demands upon a shrinking budget. Two out of the last three years, the Division has been unable to fulfill its part of a federally funded work-share agreement. The Division received complaints from the black community that claims were not being thoroughly investigated and prosecuted. The state, therefore, reasonably postulates that a law requiring the protection of an additional group would further stretch scarce resources, and Amendment 2 protects the civil rights enforcement for traditionally suspect groups. Thus, the decision of the people of the State of Colorado to allocate government resources in a particular manner is a legitimate state interest in this case.

Additionally, the state has a legitimate interest in ensuring that the traditionally suspect classes remain respected. Professor Joseph Broadus testified that the addition of homosexuals to civil rights statutes or ordinances would lessen the public's respect for historic civil rights categories. Testimony also indicated that, unlike the traditionally suspect classes, homosexuals, lesbians, and bisexuals are a relatively politically powerful and privileged special interest group. Indeed, former Civil Rights Commission Chairman Ignacio Rodriguez testified that the inclusion of homosexuals as a suspect class would represent a "drastic departure" from the historical aims of the civil rights laws.

The State of Colorado, through entities such as the Colorado Civil Rights Division, has attempted to further the interest in remedying specific instances of sexual and racial discrimination through existing civil rights laws and enforcement programs. However, owing to the fiscal constraints which are inevitably a part of public administration, unlimited funds are not available for this purpose. Therefore, it is incumbent upon the state to set priorities for its enforcement efforts. In this case, the setting of priorities is a legitimate state interest and Amendment 2 is rationally related to that interest.

IV

In my view, the correct standard of judicial review of Amendment 2 is a rational basis standard of review. Additionally, the plaintiffs have not shown that Amendment 2 is not rationally related to the state's legitimate interest in protecting religious freedom, encouraging statewide uniformity in the law, and allocating resources. Accordingly, I would reverse the decision of the district court and vacate the injunction. Therefore, I dissent.

Note EVANS v. ROMER:COLORADO AMENDMENT 2 AND THE SEARCH FOR A FUNDAMENTAL RIGHT FOR GROUPS TO PARTICIPATE EQUALLY IN THE POLITICAL PROCESS

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Robert J. Wagner

[A] State 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.

I. INTRODUCTION

On November 3, 1992, a majority of Colorado voters approved an amendment to the Colorado Constitution, commonly known as "Amendment 2." This measure sought to repeal existing statutes, regulations, ordinances and policies of state and local entities that bar discrimination based on sexual orientation. More significantly, it aimed to ban any future laws that would recognize claims of discrimination by gay men, lesbians and bisexuals.

Following Amendment 2's passage, a group of individual and government plaintiffs filed suit in state court against the State of Colorado challenging the constitutionality of Amendment 2. After the plaintiffs' request for an expedited hearing on the merits was rejected, they filed a motion to preliminarily enjoin the enforcement of Amendment 2. To grant the injunction, the court had to determine, inter alia, that the plaintiffs were likely to win the case in a full hearing on the merits. The trial court held that Amendment 2 burdened the fundamental constitutional right of an "identifiable class" (namely gay men, lesbians and bisexuals) "not to have the State endorse and give effect to private biases" under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, and announced that it would apply strict scrutiny to Amendment 2 in the full hearing on the merits. Using this level of scrutiny, the court would most likely hold Amendment 2 unconstitutional. Accordingly, the trial court granted the plaintiffs' motion to preliminarily enjoin execution of Amendment 2.

On appeal, the Colorado Supreme Court in Evans v. Romer affirmed the issuance of the preliminary injunction by a vote of six to one. However, the court disregarded the particulars of the trial court's fundamental rights analysis and independently reviewed the question of whether Amendment 2 violated an existing constitutional right. Noting that Amendment 2 aimed to single out and prohibit gay men, lesbians and bisexuals from seeking governmental action favorable to them, the Evans majority held that Amendment 2 infringed upon the fundamental constitutional right of an "independently identifiable class of persons . . . to participate equally in the political process" under the Equal Protection Clause of the Fourteenth Amendment. Because Amendment 2 would thus be required to withstand strict scrutiny in a full hearing on the merits, the court concluded that the measure would most likely be held unconstitutional.

In response to this holding, one supreme court justice issued a spirited dissent criticizing the majority's "erroneous" recognition of the group right to participate equally in the political process. Justice Erickson stated that "at no point has the Supreme Court explicitly identified the fundamental right that the majority extrapolates from the Supreme Court decisions on which it relies." Citing one case in particular where the Supreme Court seemed to explicitly refuse to recognize such a right, Justice Erickson admonished the majority, stating that "a state court cannot impose a restriction as a matter of federal constitutional law that the Supreme Court has specifically refrained from adopting."

This Note considers whether the Evans majority correctly held that the Supreme Court has effectively recognized the group right to equal participation in the political process under the Equal Protection Clause of the Fourteenth Amendment. After analyzing the opinions of the trial judge, the Evans majority and Justice Erickson, the Note argues that the Supreme Court has effectively recognized such a right, and that the Evans majority was correct to rule that Amendment 2 must withstand strict scrutiny in order to be upheld. In closing, the Note argues that the consequent constitutional demise of Colorado Amendment 2 should serve to stifle similar legislative efforts in other states that seek to exclude gays, lesbians, bisexuals and other identifiable groups from the political process.

II. EVANS V. ROMER

When the plaintiffs filed suit in the Colorado District Court in Denver County, they based their challenge on a variety of state and federal grounds. The individual plaintiffs claimed that Amendment 2 violated their Fourteenth Amendment right to equal protection because it failed to rationally advance a legitimate governmental purpose, and because it placed unique burdens on the ability of gays, lesbians and bisexuals to participate equally in the political process. They also challenged Amendment 2 on First Amendment grounds, claiming it violated their right to petition the government for a redress of grievances, their right to free expression and association, the prohibition

against the establishment of religion, and finally, that Amendment 2 was unconstitutionally vague. The individual plaintiffs also asserted that the voter initiative process, by which Amendment 2 was adopted, violated the Guarantee Clause of Article IV, Section 4 of the U.S. Constitution. Finally, they alleged that the amendment prohibited state courts from enforcing laws addressing discrimination based on sexual orientation and, as a result, the measure violated the Supremacy and Due Process Clauses of the federal Constitution, and Article II, Section 6 of the Colorado Constitution.

Two of the governmental plaintiffs urged that Amendment 2 violated their home rule powers. Another asserted that Amendment 2 violated local control over educational policies protected by the Colorado Constitution. All of the governmental plaintiffs claimed that the measure would subject them to potential liability under the Supremacy Clause of the U.S. Constitution.

A. The Colorado District Court: A Question of Prejudice

After the trial court rejected the plaintiffs' request for an expedited hearing on the merits, they moved for a preliminary injunction against the execution of Amendment 2. The plaintiffs argued that Amendment 2 deprived them of their First Amendment right of free expression and their Fourteenth Amendment right to equal protection of the laws, insofar as it denied gay men, lesbians and bisexuals the opportunity to participate equally in the political process.

In ruling upon this motion, the trial court was bound by the six-part test of Rathke v. MacFarlane. Under that test, a preliminary injunction may only be granted if the moving party can establish that injunctive relief is necessary to protect existing fundamental constitutional rights or existing legitimate property rights. The trial court found that Amendment 2 burdened the fundamental constitutional right of an "independently identifiable group . . . not to have the State endorse and give effect to private biases" under the Equal Protection Clause of the Fourteenth Amendment. Because the trial court would thereby apply strict scrutiny to Amendment 2 in a full hearing on the merits, and because the court would thereby most likely hold Amendment 2 unconstitutional, the court granted the plaintiffs' motion to preliminarily enjoin the enforcement of Amendment 2.

In identifying this particular fundamental right under the Equal Protection Clause, the trial court primarily relied upon two U.S. Supreme Court cases, Reitman v. Mulkey and Palmore v. Sidoti, and one Ninth Circuit case, Pruitt v. Cheney.

In Reitman v. Mulkey, the Supreme Court considered whether a voterinitiated amendment to the California Constitution, commonly known as "Proposition 14," denied the plaintiffs' Fourteenth Amendment equal protection rights. Proposition 14 repealed prior state laws prohibiting residential property owners from discriminating against prospective buyers and renters on the basis of race. When the plaintiffs filed suit claiming that a landlord had refused to rent to them on the basis of their race, the defendant moved for summary judgment, claiming that Proposition 14 precluded the plaintiffs' claim. In holding for the plaintiffs, the Reitman Court accepted the analysis of the California Supreme Court that the intent of Proposition 14 was to authorize private racial discrimination in the housing market, and that it effectively created a constitutional right to discriminate on racial grounds in the sale and leasing of property. Because under Proposition 14, the right to discriminate would have become "one of the basic policies of the State," the Supreme Court concluded that Proposition 14 was invalid under the Equal Protection Clause of the Fourteenth Amendment. Drawing upon this conclusion, the Evans trial court characterized the Reitman decision as the Supreme Court's first articulation of a fundamental right not to have the state endorse and give effect to private biases.

In Palmore v. Sidoti, the petitioner and respondent, both white, had obtained a divorce decree awarding the petitioner custody of the couple's three year old daughter. Later, the respondent sought custody of the child by filing a petition to modify the prior judgment because of changed conditions; namely, that the petitioner now cohabited with a black man. The respondent argued that his daughter would likely be victimized by others because of her having to live in a racially-mixed household. In reviewing the state court's decision to grant the respondent's petition, the Supreme Court considered "whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother." The Court held that such considerations were not permissible under the Equal Protection Clause, and overruled the state court's decision to grant the respondent's petition. In a unanimous opinion, the Palmore Court declared: "The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." The Evans trial court considered this rule a restatement of the same fundamental constitutional right it found articulated by the Supreme Court in Reitman.

Finally, the Evans trial court cited Pruitt v. Cheney, a Ninth Circuit case invoking the Palmore Rule outside the context of racial discrimination. Here, a former Army Reserve officer brought a First Amendment action against the Army challenging regulations compelling her discharge because of her acknowledged homosexuality. Although the Pruitt court affirmed the dismissal of the plaintiff's First Amendment claim, it allowed her complaint to go forward on equal protection grounds. In remanding

the case to the trial court with instructions to apply an "active" rationality review to the Army regulations challenged under the Equal Protection Clause, the Ninth Circuit noted that the Supreme Court in Cleburne v. Cleburne Living Center had extended the Palmore rule beyond the context of racial discrimination.

From this, the Evans trial court concluded that the fundamental right established under Reitman and Palmore provided a cognizable basis for the plaintiffs' claim against Amendment 2, even though the measure was not racially discriminatory. Accordingly, the court granted the plaintiffs' motion to preliminarily enjoin Amendment 2, holding that the measure infringed upon a fundamental constitutional right, and that as a result, the court would most likely hold Amendment 2 unconstitutional under strict scrutiny in a full hearing on the merits.

It is important to note, however, that neither Reitman, Palmore nor Cleburne expressly recognized the fundamental right identified and relied on by the Evans trial court. As a result, the court's decision to grant the plaintiffs' motion to preliminarily enjoin enforcement of Amendment 2 was, arguably, without support. Nonetheless, the trial court's analysis is not without merit, at least in regard to the question of Amendment 2's ultimate constitutionality. Specifically, by invoking, through Pruitt, the Supreme Court's concern about "irrational" prejudice in Cleburne, and by implying the existence of private biases and prejudices behind the passage of Amendment 2, the Evans trial court furnished an approach whereby Amendment 2 could be invalidated under the Equal Protection Clause, even if the measure cannot be shown to have infringed on a fundamental constitutional right.

In Cleburne, the Supreme Court invalidated the legislation that discriminated against mentally retarded individuals, not because a fundamental right was at stake, but because the ordinance failed to withstand the Court's "active" rationality review. The Court struck the measure because it employed an impermissible basis for its legislative classification; specifically, it gave effect to an "irrational" prejudice against mentally retarded people.

In the same way, if the court ultimately determines that Amendment 2 rested on an irrational prejudice against gay men, lesbians and bisexuals, the court may invalidate Amendment 2 by applying the Cleburne "active" rationality review test, and holding that the measure employed an impermissible basis for its legislative classification under the Equal Protection Clause of the Fourteenth Amendment. While this approach is probably not sufficient to satisfy the requirements of Rathke v. MacFarlane and support the issuance of a preliminary injunction against Amendment 2, it does provide a strong argument that the measure is ultimately unconstitutional.

B. The Colorado Supreme Court Majority: A Question of Process

On appeal, the plaintiffs presented the same equal protection arguments to the Colorado Supreme Court that they made to the trial court. While the plaintiffs conceded the infirmity of the fundamental right identified and relied upon by the trial court, they urged the supreme court to construe the lower court's analysis "in light of the arguments actually presented to [it,] that Amendment 2 violates the plaintiffs' fundamental right of political participation." The supreme court refused to follow this route, however, and independently reviewed the question of whether Amendment 2 infringed upon an existing constitutional right under the Equal Protection Clause.

The Evans majority anchored its de novo review upon two primary assertions: first, that "the Equal Protection Clause . . . applies to all citizens, and not simply those who are members of traditionally 'suspect' classes such as racial or ethnic minorities," and second, that "the right of citizens to participate in the process of government is a core democratic value which has been recognized from the very inception of [the] Republic up to the present time." With these two assertions affixed in place, the majority set out in search of a fundamental constitutional right for groups to participate equally in the political process.

The search primarily consisted of invocations of U.S. Supreme Court cases expressing the value the Court places on the ability of individuals to participate in the political process. The majority organized these cases under two categories for analysis. In the first category, the court primarily looked to Kramer v. Union Free School District No. 15, Reynolds v. Sims, and Williams v. Rhodes, all cases dealing with voting rights. While the Evans majority did not consider these cases dispositive of Amendment 2, it argued that they demonstrated that "[t]he Equal Protection Clause guarantees the fundamental right to participate equally in the political process and thus, any attempt to infringe on that right must be subject to strict scrutiny and can be held constitutionally valid only if supported by a compelling state interest."

The second and more important group of cases for analysis consisted of Hunter v. Erickson, Washington v. Seattle School District No. 1 and Gordon v. Lance. Each of these equal protection cases considered legislation that sought to prevent or limit the normal political processes from enacting legislation desired by an identifiable group of voters. In Hunter v. Erickson, the Supreme Court invalidated a city charter amendment enacted by the voters of Akron, Ohio that required any fair housing legislation passed by the city council to be ratified by a public referendum, whereas other ordinances could be enacted directly by the city council. The Court held that the charter amendment violated the Equal Protection Clause because it selectively imposed

heavier electoral burdens on laws favored by groups opposing racial, ethnic and religious discrimination in housing. In effect, the law placed a "special burden" on racial minorities within the governmental process. According to the Court, "[t]his is no more permissible than denying them the vote, on an equal basis with others."

Of fundamental importance to the Evans majority, the Hunter Court proffered a sweeping declaration: "[T]he State 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." Significantly, the Court supported this proposition by citing two cases having nothing to do with racial discrimination or any other traditionally suspect class of persons. Therefore, according to Evans, Hunter established that the Equal Protection Clause affords any particular group, be it racial or otherwise, the fundamental constitutional right to participate equally in the political process.

To bolster its interpretation of Hunter, the Evans majority invoked Washington v. Seattle School District No. 1. In that case, the Supreme Court considered the constitutionality of a voter initiative which attempted to prohibit local school districts from utilizing mandatory busing as a means of achieving desegregation. Relying on Hunter, the Washington Court held that the voters, in passing the initiative, had impermissibly interfered with the political process and unlawfully burdened the efforts of minority groups to secure public benefits.

Of significance to Evans, the Washington Court embraced the "neutral principles" formulation articulated by Justice Harlan in Hunter, and referred to it as the "simple but central principle" underlying the Hunter opinion. The Washington Court thereby struck the voter initiative because it did "not attemp[t] to allocate governmental power on the basis of any general principle." Accordingly, the Evans court interpreted Washington to stand for the rule that laws seeking to allocate governmental power on the basis of something other than a "general principle" are to be considered constitutionally suspect. For the Evans majority, Washington both affirmed the Hunter Doctrine, and helped demonstrate that it applied outside the context of racial discrimination.

The Evans majority sought to further validate its interpretation of Hunter by considering the Supreme Court's rationale in Gordon v. Lance. In Gordon, the Court upheld a West Virginia statute that required approval of any proposed increase in bonded indebtedness or state tax rates by a sixty percent majority of voters. The plaintiffs, a group of individuals who had voted in favor of two proposals covered by the sixty percent requirement, sought a declaratory judgment that the requirement was unconstitutional under the Equal Protection Clause.

The U.S. Supreme Court, in reversing the West Virginia Supreme Court, turned its attention to the applicability of Hunter. Unlike the Hunter Court's review of the legislation therein, the Gordon Court was unable to discern any "independently identifiable group or category that favors bonded indebtedness over other forms of financing." As a result, the Gordon Court upheld the statute, observing that "no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote." "[S]o long as such provisions do not discriminate against any identifiable class," the Court reasoned, "they do not violate the Equal Protection Clause."

The Evans majority considered Gordon's discussion of Hunter significant for two reasons. First, Gordon invoked Hunter even though the case had nothing to do with racial minorities or any other traditionally suspect class. The Evans majority believed this "strongly suggests that the holding of Hunter cannot be limited in application only to the review of legislation which discriminates on the basis of race." Second, according to the Evans majority, Gordon placed no significance on the fact that the class discriminated against in Hunter was a racial minority. Rather, Gordon distinguished Hunter because it found no "independently identifiable" group or category affected by the West Virginia statute. For the Evans majority, "these facts clearly support the conclusion that Hunter applies to a broad spectrum of discriminatory legislation." Accordingly, the majority declared:

> We conclude that the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by "fencing out" an independently identifiable class of persons must be subject to strict judicial scrutiny.

Next, the court reviewed Amendment 2 in light of this fundamental constitutional right.

Briefly noting that Amendment 2 aimed to repeal existing statutes, regulations, ordinances and policies of state and local entities that bar discrimination based on sexual orientation, the Evans majority was most troubled by Amendment 2's "ultimate" effect: to prohibit any governmental entity from adopting similar statutes, regulations, ordinances or policies in the future unless the state constitution was first amended to permit such measures. The court thereby held that Amendment 2 infringed on the plaintiffs' fundamental right to participate equally in the political process, because it "expressly fences out an independently identifiable group," and because it "prohibits this class of persons from seeking governmental action favorable to it." "In short, gay men, lesbians, and bisexuals are left out of the political process through the denial of having an 'effective voice in the governmental affairs which substantially affect their lives.'" As a

result, the Evans court ruled that Amendment 2 would be tested under strict scrutiny in a full hearing on the merits, and it thereby affirmed the trial court's issuance of the preliminary injunction.

C. The Colorado Supreme Court Minority: A Question of Legislative Classification

Justice Erickson, the sole dissenter in Evans, modeled his critique of the majority's opinion after the Supreme Court's approach in Bowers v. Hardwick. He rejected the majority's holding that Amendment 2 infringed upon a fundamental constitutional right, placing heavy reliance on the Bowers philosophy of judicial restraint: "There should be . . . great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category or rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." Having adopted this approach, Justice Erickson proceeded to analyze Hunter, James v. Valtierra, Gordon and Washington and argued that, in the end, Hunter only compels the application of strict scrutiny in cases involving racially discriminatory legislation. Accordingly, Justice Erickson would have reversed the trial court's issuance of the preliminary injunction against the enforcement of Amendment 2.

Justice Erickson began his analysis by asserting that the Hunter Court invalidated the Akron charter amendment specifically because it placed special burdens on racial minorities within the governmental process. Therefore, due to the racially discriminatory nature of the charter amendment, and because subsequent federal cases invoking Hunter characterized the opinion as one involving an unconstitutional racial classification, Justice Erickson concluded that Hunter was merely a "race" case, and as such, it provided no support for the Evans majority's identification of the fundamental right for groups to participate equally in the political process.

To bolster this conclusion, Justice Erickson primarily relied upon James v. Valtierra, an opinion to which the Evans majority paid only cursory attention. In that case, black and Mexican-American indigents challenged Article XXXIV of the California Constitution, which provided that no low-rent housing project could be developed, constructed or acquired in any manner by a state public body until the project was approved by a majority of those voting at a community election. The plaintiffs contended that Article XXXIV unreasonably discriminated, explicitly against the poor and implicitly against minority groups. While the James Court could have invalidated the legislation by applying the Evans majority's interpretation of Hunter, it did not. Specifically and significantly, the James Court stated: "Unlike the Akron referendum provision [in Hunter], it cannot be said that California's Article XXXIV rests on 'distinctions based on race. . ' The present case could be affirmed only by extending Hunter, and this we decline to do."'

Justice Erickson found James to be dispositive of the issue in Evans, and concluded that the Supreme Court has not yet articulated a fundamental right to participate equally in the political process. Justice Erickson reasoned: "[A] straightforward application of James indicates that the strict scrutiny standard of review does not apply in this case," since Amendment 2 does not involve any suspect classification.

Justice Erickson reached the same conclusion by analyzing Gordon. In particular, he noted the way in which the Gordon Court distinguished the West Virginia legislation from the Akron charter amendment in Hunter: "Unlike the restrictions in [Hunter], the West Virginia Constitution singles out no 'discrete and insular minority' for special treatment. . . . The class singled out in Hunter was clear -- 'those who would benefit from laws barring racial, religious, or ancestral discriminations."' Justice Erickson thereby concluded that Gordon is best understood as "a case where strict scrutiny analysis did not apply because a suspect classification was not involved."

Justice Erickson similarly interpreted Washington v. Seattle School District No. 1. Whereas the Evans majority considered Washington's reliance on Justice Harlan's neutral principle formulation as evidence that the Hunter doctrine protected against more than racial discrimination, Justice Erickson found no such evidence. Instead, he found grounds to confirm his own conclusion that the Hunter doctrine should be construed narrowly, applicable only to legislation that is racially discriminatory.

Accordingly, Justice Erickson found that Amendment 2 could not possibly have infringed upon the plaintiffs' fundamental right to participate equally in the political process, because "the Supreme Court has never explicitly stated that a fundamental right to participate equally in the political process exists that is subject to the strict scrutiny standard of review." Thus, Justice Erickson disagreed with the majority that Amendment 2 should be subject to strict scrutiny in a full hearing on the merits, and would have reversed the trial court's issuance of the preliminary injunction against Amendment 2.

III. CHOOSING SIDES BETWEEN THE EVANS MAJORITY AND DISSENT

Under the analyses employed by both the majority and the dissent, the question of whether Amendment 2 infringed upon a fundamental constitutional right for groups to participate equally in the political process rests upon the breadth of the Hunter doctrine and whether its neutral principles formulation protects against non-racial discrimination. Whereas the majority primarily looked to Washington and Gordon to bolster its

conclusion that the Supreme Court has recognized such a right, Justice Erickson primarily looked to James and considered it dispositive that the Court refused to extend Hunter to a case involving non-racial discrimination.

By framing the contest in this particular manner, Justice Erickson would appear to have the upper hand. After all, the Supreme Court has shown a reluctance to recognize new fundamental constitutional rights. In addition, the cases upon which the Evans majority primarily relied did not consider non-racially discriminatory legislation. Finally, as Justice Erickson's analysis showed, the holding in James would seem to be dispositive in this case; specifically, that the Court has not recognized a fundamental right for groups to participate equally in the political process.

However, the Evans v. Romer inquiry is not yet complete, for the majority failed to introduce one additional class of cases bearing on its search for a fundamental right of groups to participate equally in the political process, and the dissent failed to adequately explore the Supreme Court's rationale in James.

The additional class of cases not covered by the Evans majority includes two relatively recent Supreme Court decisions that considered the justiciability of political gerrymandering; namely, Karcher v. Daggett and Davis v. Bandemer.

For years, the Supreme Court had been reluctant to subject legislative apportionment plans to careful scrutiny, even where the districts varied significantly in population. In Baker v. Carr and Reynolds v. Sims, the Court retreated somewhat from its position of extreme judicial restraint and enunciated the "one person, one vote" principal. Under that standard, all electoral districts within a state were required to contain substantially the same number of individuals. Therefore, so long as legislative districts were drawn equipopulously, the Court would not likely strike them down--even if they were intentionally designed to dilute or cancel out the voting strength of a particular political group. Over time, a number of the Justices grew frustrated with this narrow approach.

In Karcher v. Daggett, the Court considered the validity of a New Jersey congressional reapportionment plan that included de minimis numerical population differences between the districts. Although the differences were mathematically insignificant, the majority struck the plan, largely basing its holding on the Reynolds one person, one vote rule. While the actual holding of the Karcher majority bears little relevance to the Evans case, the underlying theme found in the concurring and dissenting opinions does. In each, the Justices asserted that a rigid and myopic application of the one person, one vote rule may contravene the Reynolds requirement of "full and effective participation by all citizens" in the political process.

In his provocative concurrence, Justice Stevens complained of the inadequacy of the Reynolds rule: "The major shortcoming of the numerical standard is its failure to take account of other relevant data--indeed, more important-- criteria relating to the fairness of group participation in the political process." He thereby articulated a rule against political gerrymandering:

> When a State adopts rules governing its election machinery . . , those rules must serve the interests of the entire community. If they serve no purpose other than to favor one segment--whether racial, ethnic, religious, economic, or political--. . . or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection.

Together with Justice Powell, who approvingly cited these remarks in his own dissent, Justice Stevens interpreted the Equal Protection Clause to prohibit the states from purposefully excluding any political group (whether it be racial or otherwise) from the political process by the gerrymander. The two Justices thereby concluded that political gerrymandering is justiciable, and they specified that apportionment plans having "the purpose and effect of substantially disenfranchising identifiable groups of voters" are unconstitutional.

Similarly, in their dissenting opinion, Justices White, Powell, Rehnquist and Chief Justice Burger expressed their own concern that the Reynolds rule is incapable of restraining "a far greater potential threat to equality of representation, the gerrymander." They stated:

> "Legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality. . . " Here, the dissenters asserted a concern that groups be accorded equal representation within the political process. Along with Justices Stevens and Powell, they forcefully rejected gerrymandering practices aimed to dilute the voting strength of identifiable political groups, regardless of whether the groups be racial or otherwise. Such a rejection corresponds well with the Evans majority's reading of Hunter, specifically, that states may not rig their political processes in order to disadvantage any particular group from obtaining legislation in its own behalf.

In Davis v. Bandemer, the Supreme Court went a step further than the five Justices in Karcher. At issue in that case was an Indiana redistricting plan designed to "save as many incumbent Republicans as possible." With Justice White writing for a plurality, the Court ruled for the first time that equal protection challenges to political gerrymandering are

not barred by the political question doctrine. In essence, the Court recognized that each political group in a state should have the same chance to elect the representatives of its choice as any other political group. Accordingly, the Court declined to hold that "[political gerrymandering] claims are never justiciable."

Significantly, the Court did not limit this ruling to the context of racial discrimination. Instead, the Court espoused the following approach to detect impermissible gerrymandering: "[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." The Court's inquiry would consider, inter alia, the affected group members' resulting chance to directly influence the election returns and to attract the attention of the winning candidate. In this way, "a finding of unconstitutionality must be supported by evidence of . . . [an] effective denial to a minority of voters of a fair chance to influence the political process."

Thus, under Davis, the Court recognized a "generalized group right to equal representation" under the Equal Protection Clause. By holding political gerrymandering claims justiciable, the Davis plurality endorsed the constitutional right for political groups to enjoy an equal opportunity to influence the political process. Here, any political group, whether it be racial or otherwise, may not be denied a fair chance to participate along with the other various political groups. While it is not certain that a majority of the justices on the current Supreme Court would support the Davis ruling on the justiciability of political gerrymandering, the case goes far to demonstrate that the Evans majority's interpretation of the Hunter doctrine is convincing, for if States are prohibited from marginalizing political groups from the political process by the gerrymander, it arguably follows that they are not permitted to marginalize any particular group by legislation which effectively denies that group the ability to obtain laws favorable to it.

As for Justice Erickson's failure to adequately explore the Court's rationale in James v. Valtierra, that case stands more for the questionable proposition that legislation enacted by direct democracy deserves increased judicial deference than it does for the Court's unwillingness to apply Hunter to invalidate non-racially discriminatory legislation.

Justice Black, the dissenter in Hunter, wrote the majority opinion for the James Court. A literal reading of Hunter and other Court precedent would have made James seem "an open and shut case." After all, the only major difference between the legislation in James and the charter amendment in Hunter was that one discriminated on the basis of wealth, the other on the basis of race. Moreover, earlier Supreme Court decisions concerning the right to fair treatment in the criminal process, voting rights and the ability to engage in interstate travel indicated that the Court intended to scrutinize classifications based on wealth under the same increased standard of review as racial classifications. Nevertheless, "[a]s if writing on a clean slate rather than a complicated body of seemingly contrary precedent," Justice Black summarily concluded that Article XXXIV did not discriminate against the poor; but even if it did discriminate against the poor, it did not discriminate on the basis of race. He thereby refused to strike Article XXXIV, stating that the legislation could be invalidated "only by extending Hunter [to wealth classification] and this we decline to do." In response to Justice Black's apparent disregard of applicable Court precedent and the de jure wealth classification in Article XXXIV, one commentator has written that the approach taken in James "cries out for an explanation."

One primary explanation for the Court's anomalous decision in James is Justice Black's notable, and arguably misplaced, enthusiasm for direct democracy and the voter-initiative process. In terms reflective of his dissent in Hunter, Justice Black wrote: "[P]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." Noting that the California statute books contain much legislation first enacted by voter initiative, he continued: "This [voter initiative] procedure ensures that all the people of a community will have a voice in a decision. . . . It gives them a voice in decisions that will affect the future development of their own community." Justice Black thereby upheld Article XXXIV, largely due to his strong support for the voter initiative process as a structure for local government law. As one critic put it: "[James] can be explained only by a deep-seated faith in the sanctity of referenda results. . . . "

While a discussion of the wisdom of Justice Black's "faith" is beyond the scope of this Note, it is important to mention that some commentators have expressed deep skepticism concerning the value of voter initiatives, especially where a proposition refers to a group of individuals in pejorative or stigmatizing terms, or requires voters to take sides for and against a particular social group. And as the Evans majority noted in its review of Amendment 2, the Supreme Court itself has declared: "One's right to life liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." Further, "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."

Therefore, contrary to Justice Erickson's assertion in Evans, James is not dispositive of Amendment 2, for it does not necessarily demonstrate that Hunter is limited only to the racial discrimination context. Instead, James stands more for the questionable proposition that legislation

enacted by direct democracy deserves increased judicial deference.

IV. CONCLUSION

Presently, at least eight states have initiatives pending that would outlaw enactment of laws protecting gay men, lesbians and bisexuals. Like Amendment 2, these initiatives aim to prevent an identifiable class of persons from seeking legislation and other governmental action favorable to it. Pursuant to the Hunter doctrine, augmented by the Supreme Court's rationale in Washington, Gordon, Karcher and Davis, the constitutional validity of these initiatives is highly suspect, for the Court disfavors legislation that seeks to "fence out" identifiable groups from the political process.

More specifically, these cases establish that the Supreme Court has recognized that identifiable groups have a fundamental right to participate equally in the political process under the Equal Protection Clause. As the Evans majority correctly held, initiatives like Colorado Amendment 2 trigger the highest level of scrutiny from the courts because they infringe upon this particular constitutional right. As a result, courts are likely to strike them down even before they can be enforced. Such bleak prospects should serve to stifle legislative efforts similar to those that successfully placed Amendment 2 before the voters of Colorado.

Over two hundred years ago the framers of the Constitution recognized the dangers inherent in a democracy in which the will of an unfettered majority could overrun the interests of a particular minority. As a result, various institutional mechanisms were designed to simultaneously enact rule in accord with the consent of the majority and provide effective protection for minority interests. The political process was thus styled upon a strategy of "pluralism"; "one of structuring the government, and to a limited extent society generally, so that a variety of voices [are] guaranteed their say and no majority coalition [can] dominate." To the extent that all interests are represented in the process, the resulting value determinations are deserving of trust; that is, they may be considered "legitimate."

Initiatives like Colorado Amendment 2, however, serve to undermine the political process contemplated by the Framers. By expressly "fencing out" members of an identifiable group so as to deny then an "effective voice in the governmental affairs which substantially affect their lives," such initiatives restructure the process in a way that is "undoubtably . . . contrary to the notion that '[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.'" As a result, legislation that prohibits an identifiable class of persons from participating equally in the political process is constitutionally suspect: specifically, as an infringement upon a fundamental constitutional right under the Equal Protection Clause; and more generally, as a process defect in the republican form of government prescribed by the contours of the Constitution.

HIGH COURT TO DECIDE WHETHER STATES MAY BAN LAWS PROTECTING HOMOSEXUALS

The Wall Street Journal

Wednesday, February 22, 1995

Paul M. Barrett
Staff Reporter of The Wall Street Journal

Washington – The Supreme Court, stepping into the fray over gay rights, agreed to decide whether states may ban government policies or laws that specifically protect homosexuals.

The justices said yesterday they would hear Colorado's appeal defending a popularly enacted state constitutional amendment that blocked cities and the state from giving civil-rights protection to homosexuals. Colorado's top court last year upheld a trial judge's order throwing out the antigay amendment as a violation of the federal Constitution.

The case gives the Supreme Court its first opportunity to rule on the merits of antigay ballot initiatives, which have become a conservative rallying point in many places across the country. Colorado is the only state to pass such a measure on a statewide basis, but there were unsuccessful campaigns for similar provisions in 10 other states last year, according to the Lambda Legal Defense and Education Fund.

A decision in the Colorado case, which will be argued in the fall, probably won't come until 1996, practically guaranteeing that it will become an issue in the presidential election campaign. A legal challenge to the Clinton administration's modified military ban on homosexuals is proceeding on a separate track. Although both cases involve gay rights, there are significant factual and legal differences, and the Colorado case won't necessarily determine the outcome in the military case.

Passed by voters in 1992, Colorado's so-called Amendment 2 would have eliminated existing state policies and local ordinances in Aspen, Denver and Boulder that prohibited discrimination based on sexual orientation. A group of individuals and those three cities sued the state, claiming the amendment violated the constitutional rights of homosexuals.

The challengers persuaded a state trial judge to bar the state from implementing Amendment 2, and the state Supreme Court upheld that ruling. The state Supreme Court based its decision on what it saw as a violation of the "fundamental right" of "an independently identifiable group" -- gay and bisexual citizens -- "to participate equally in the political process." The participation the state court had in mind was seeking approval of ordinances and government policies banning antigay bias. The state court said this right has its roots in the "equal protection" guarantee in the U.S. Constitution.

In its appeal to the U.S. Supreme Court, Colorado asserted that the state's high court had improperly invented a new constitutional right. The state defended Amendment 2's proponents as trying to preclude official state "approval of homosexuality as a legitimate alternative lifestyle." The amendment, the state asserted, "was intended to prevent homosexuals and bisexuals from receiving preferred legal status," not to eliminate all legal rights for these groups, "much less to protect those who broke the law by threatening or harming homosexuals and bisexuals."

Colorado warned that if adopted broadly, the lower court's approach would undermine federal and state authority to block controversial social policies adopted locally.

COURT TO CONSIDER COLORADO'S ATTEMPT TO NEGATE LOCAL GAY RIGHTS LAWS

The Washington Post
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Joan Biskupic
Washington Post Staff Writer

The Supreme Court said yesterday it will decide whether states can override city laws that protect homosexuals from discrimination, marking the first time in almost a decade that the justices will address a major conflict over gay rights.

The Colorado case comes to the court as gay rights has become a prominent issue in state ballot initiatives and in politics nationwide.

Since 1986, when the court said states could outlaw homosexual conduct between consenting adults, the justices have avoided ruling on the rights of gay men and lesbians. The consequences of the new case for homosexual rights will depend on the breadth of the decision, but it is likely to at least set rules for states trying to adopt initiatives opposing gay rights.

Separately, the court has said it will consider whether gay and bisexual marchers can be excluded from the annual St. Patrick's Day parade organized by Boston veterans. That case focuses on whether the privately organized parade is a "public accommodation" that must allow a range of marchers.

"This is a critical moment for gay men and lesbians," said gay rights lawyer William Rubenstein, surveying cases nationwide.

Rex E. Lee, a former U.S. solicitor general representing the state of Colorado, said yesterday that the new case will be important for state authority. The Colorado Supreme Court had struck down the state's voter-approved constitutional amendment, saying it prevented homosexuals from participating equally in politics.

"There are few issues as divisive as the standing of homosexuals and bisexuals in American society," Lee and Colorado Attorney General Gale A. Norton had said in the state's appeal, adding that states should be able to preempt city policies giving homosexuals special legal status.

Colorado's "Amendment 2," prohibiting municipalities from passing special legal protections for homosexuals, was adopted in 1992 after Denver, Boulder and Aspen enacted ordinances against discrimination based on sexual orientation in jobs, housing and public accommodations. Because of the legal challenge by the cities and a group of gay individuals, it has never been enforced.

The key question in the case to be argued next fall is whether a state's prohibition on local protections for homosexuals violates a fundamental right. That question is in itself important, but the more basic test for homosexual status -- whether homosexuality can be equated with race or sex for constitutional protection against discrimination -- may not be reached in this case. The Colorado Supreme Court avoided that question when it ruled that the amendment violated the constitutional guarantee of equal protection of the laws.

The state court said Amendment 2 was unconstitutional "because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs, insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation."

The state court focused on the "fundamental right . . . [of an identifiable group] to participate equally in the political process" by getting cities to pass specific anti-discrimination laws. It said the amendment wrongly singled out one form of discrimination, based on sexual orientation, and removed it from consideration by the political process.

The court said a state can infringe a "fundamental right" of an "identifiable group" only if the state has a compelling interest. It then spurned all of the state's asserted interests, including that the amendment preserved the integrity of the state's "political functions" and deterred "factionalism" and that it prevented the government from interfering with personal, familial and religious privacy.

The Colorado court relied on a line of cases dating to 1969 that preserve groups' rights to participate in the political process.

Lee, who is president of Brigham Young University, said that precedent, involving the ability to ask local governments for protection against discrimination, was misapplied because it relates only to racial minorities. He and Colorado officials insist that Amendment 2 also does not infringe on the ability of homosexuals to vote or otherwise be part of politics.

Colorado said the state ruling implicitly elevated sexual orientation to the level of protection accorded race or sex against government discrimination.

Jean Dubofsky, counsel for gay men and lesbians challenging Amendment 2, countered that the state court properly relied on high court language saying that states may not "disadvantage any particular group by making it more difficult to enact legislation on its behalf."

Overall, she said yesterday, the case of Romer v. Evans presents the justices with an opportunity to rule broadly on gay rights. But she said that the court would be reluctant to say whether sexual orientation should be a "suspect classification," deserving constitutional protection comparable to that for racial minorities.

"I'm not sure we would win on that," she added, given the court's generally conservative composition and the paucity of lower court rulings it uses for guidance.

"Perhaps most important . . . could be the political ramifications," said Rubenstein, a former director of the American Civil Liberties Union's lesbian and gay rights project who now teaches courses on sexual orientation and the law at Harvard and Yale universities. He said that while numerous states and cities have proposed initiatives similar to Colorado's, other states are moving on the opposite track by amending anti-bias laws to include protections against discrimination based on sexual orientation. The District of Columbia and eight states offer some anti-bias protection for homosexuals.

The states of Virginia, Nebraska, Alabama and Idaho had urged the court to take the Colorado conflict. In a "friend of the court" brief filed by former federal judge Robert H. Bork, the states said the Colorado court wrongly created a new fundamental right "of breathtaking scope."

GOVERNMENT TO STAY OUT OF LEGAL BATTLE OVER GAY RIGHTS

Los Angeles Times

Friday, June 9, 1995

David G. Savage

The Clinton Administration announced Thursday that it will stay out of a Supreme Court battle over whether states and cities can strip lesbians and gays of legal protection against discrimination, a move that gay rights activists immediately derided as cowardly.

U.S. Atty. Gen. Janet Reno said that the Justice Department will not file a friend-of-the-court brief and will take no legal position in the case, which challenges Colorado's anti-gay rights initiative. "There was no federal program or federal statute involved and so we determined that at this point the federal government should not participate," Reno said.

White House Press Secretary Mike McCurry said that President Clinton is "fully supportive" of Reno's decision.

For months, Administration lawyers have been divided over whether they should enter the case and support the challenge to the Colorado initiative. The issue apparently was complicated by the Administration's obligation to defend its own anti-gay rights policy for military personnel.

Clearly the issue has strong political overtones. Clinton and his advisers have acknowledged that they were hurt politically two years ago when, shortly after taking office, Clinton tried to end the military's strict exclusion of gays.

Gay rights lawyers and activists accused the Administration on Thursday of abandoning its commitment to civil rights and caving in to political pressure.

"It is disappointing that the Clinton Administration refuses to stand up for basic civil rights for all people," said Suzanne Goldberg, an attorney for the Lambda Legal Defense Fund in New York. "There's no question this was a political decision."

Daniel Zingale, political director for the Human Rights Campaign Fund in Washington, said that the decision "just gives aid and comfort to the anti-gay extremists. This will impress the folks who don't support the President anyway."

Administration officials insisted that their decision was based solely on legal grounds. McCurry said the President was "aware of the case (but) it was the attorney general's decision based on her reasoning, her examination of the law."

A Washington attorney defending the initiative on behalf of the state of Colorado said that the Administration was stymied by its need to defend the Defense Department policy that continues to exclude gays from the military. That policy recently was struck down by a federal judge in New York; a case is expected to reach the Supreme Court eventually.

"I don't think it's humanly possible to argue that Amendment 2 (in Colorado) is unconstitutional but their gays-in-the-military policy is constitutional," said the attorney, Carter G. Phillips.

The disputed Colorado initiative does not call for discrimination against gays and lesbians. However, it prevents gays from bringing claims of discrimination based on sexual orientation. As a practical matter, it would invalidate anti-discrimination ordinances in Denver, Boulder and Aspen.

Colorado's Amendment 2 proclaims a state constitutional policy of "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation" and states that gays may not bring "any claim of minority status, quota preferences, protected status or claim of discrimination."

It won the approval of 53% of the state's voters but was struck down by the state's courts.

The Colorado Supreme Court said that the amendment denies gays equal protection of the laws guaranteed by the U.S. Constitution because it "fences out . . . an identifiable class of persons" from seeking legal protections. The justices agreed to hear the state's appeal of that conclusion.

Last month, California Atty. Gen. Dan Lungren, joined by counterparts in six states, filed a brief supporting Colorado and arguing that judges should not take away "the right of the people (as a whole) to set public policies."

The justices will hear arguments in the case (Romer vs. Evans, 94-1039) in October and issue a ruling early next year.

COURT'S DECISION PLEASES SOME MORE THAN OTHERS

Denver Post
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Al Knight
Denver Post Perspective Editor

When the U.S. Supreme Court announced last Tuesday that it will review Colorado's Amendment 2 case, both sides claimed they were pleased by the decision.

Common sense suggests that the joy was not evenly shared. Attorney General Gale Norton and her staff had asked for the review and had many more reasons to rejoice than did attorney Jean Dubofsky and her clients who had argued against review.

If the court hadn't agreed to hear the case, it would have been all over for the attorney general and for those 800,000-plus voters who had approved the amendment in 1992, believing it to be a perfectly valid exercise of the initiative process.

Give Dubofsky and her clients credit, however, for the speed with which they put on their happy faces. Some of them even claimed that the court may be about to issue an order as sweeping as its 1954 Brown vs. Topeka Board of Education decision desegregating the nation's public schools.

What nonsense. Making such ill-informed remarks does an enormous disservice to the history of racial minorities in this country and badly misrepresents the development of the Amendment 2 case (Evans vs. Romer). The court is not being asked to legislate some whole new set of principles. It is being asked to decide if the Colorado Supreme Court erred in interpreting past U.S. Supreme Court cases on racial and voting matters and applying them to homosexuals and bisexuals.

It is simply inconceivable that the court, even if it wished, would be able to use the Colorado case to issue some sweeping edict elevating sexual orientation to the same category of importance as racial distinctions.

The court, which has been struggling with endless school-desegregation issues, with affirmative-action programs gone awry, and with a variety of other concerns based on race and ethnicity, is not likely to want to start a whole new round of social and political turmoil based on sexual orientation and newly minted claims of group rights.

For the record, Dubofsky's brief arguing against U.S. Supreme Court review tried to minimize the importance of the Amendment 2 case. She argued that "No federal policy is affected by Evans, and the Colorado Supreme Court decision does not bind other state or federal courts. At most Evans enjoins one state law. If the state is correct that this issue will come up in other states, this court will have ample opportunity to review the federal question without prematurely foreclosing lower court development of the law."

This is a lawyer's way of saying, "There's nobody here but us chickens." Dubofsky cited a 10-year-old law review article in an effort to avoid Supreme Court review. The article claimed there is value to letting legal issues "percolate" in lower courts before being resolved by the Supreme Court. Apparently the Supreme Court thought the issues had percolated enough.

To be sure, the learned law review writers will be working overtime between now and when the arguments are heard this fall. The legal academy will be manufacturing new arguments and novel legal notions to aid Amendment 2 opponents in the quite sound belief that the high court may toss out all or substantial parts of the Colorado Supreme Court's analysis holding that homosexuals have a "fundamental right to participate equally in the political process."

You can be sure that a whole new set of arguments will be fashioned by fall.

That doesn't mean those who supported Amendment 2 should be discouraged. There are a couple of encouraging developments on their side, these among them:

The U.S. Supreme Court in January agreed to review a Massachusetts Supreme Court ruling that required the sponsors of the Boston St. Patrick's Day Parade to accommodate a gay and lesbian group of marchers.

The court held essentially that the planned parade didn't have anything to do with the exercise of free speech by parade participants. To say the least, this is a novel notion of what a parade is for. People for years have paraded to promote something, to honor someone or to commemorate a group, a memory or an event. The idea that a parade is not an exercise of free speech, and that opposite messages must be welcomed, is therefore a novel one. A lone dissenting judge argued that gays and lesbians were barred from the parade not because they are gays and lesbians, but rather because the sponsors did not wish to endorse their particular message. The rights that were threatened, in other words, were the rights of the parade sponsors.

The Supreme Court review of this case may help to establish a somewhat better set of rules that will

protect the free-speech interests of all American citizens, not just the nosiest and most pushy among us.

Arguments will be heard next month in the Sixth Circuit Court on a Cincinnati case very similar to the one in Colorado. Robert Bork, once a nominee for the U.S. Supreme Court, will be handling the case. Because the issues are similar to those in the Amendment 2 case, the experience before the Sixth Circuit Court and the way the court responds may be helpful to the Colorado Attorney General's Office.

Importantly, the cases involving homosexuality in the military have largely been taken care of without any significant erosion of military authority.

In the most recent setback for homosexual litigants, the full Washington D.C. Circuit Court rejected a claim by a Naval cadet that his "mere" admission of homosexuality couldn't be used to discharge him from the service. The court held 7 to 3 that the admission of homosexuality may be interpreted by military commanders as a common-sense indicator that the serviceman or servicewoman is likely to actually engage in homosexual conduct. This was not the result sought by gay and lesbian interests, yet the lawyers decided not to appeal for fear the U.S. Supreme Court might simply affirm the decision.

It should go without saying that this is a battle being fought on many fronts. While gay and lesbian activists continue to talk about the importance of the court battles they have been very busy indeed in the regular political arenas trying to win there the victories that have eluded them in court.

In Denver, for example, there is a proposal before the Career Service Authority to recognize domestic partnerships by either heterosexual or homosexual couples. Under the proposal, a city workers would be able to take sick leave to care for sick partners or their children or family members.

There is no fiscal impact, since under city law the worker either may use the sick leave or be compensated for it.

There is a looming fiscal impact of several million dollars per year, however, if the domestic partnerships became the basis for dispensing health insurance or pension benefits.

Something like 40 percent of the city's work force is unmarried.

Efforts to win domestic-partnership benefits have been under way for 10 years in various American cities with considerable success. Over 25 of the nation's most liberal cities have recognized some form of domestic partnership. Some cities extend this category only to same-sex partners and some do not. Some limit it to sick leave; many do not. In San Francisco, domestic partners on the city's payroll will receive pension benefits at a cost of $2.1 million per year. Under Proposition H, approved last November, the surviving partner receives everything a surviving spouse would receive.

What has been taking place is a kind of second political wave. The first was to establish the applicability of civil rights laws to homosexuals. Most American cities, including almost all of the small- and medium-size cities, were untouched by this activity. Now, however, the most liberal cities are being visited again with demands for sick leave, domestic-partnership registration, pension benefits or tax reform that would wipe out the distinctions between the married and unmarried.

The lesson here is simple. Gays and lesbians shouldn't be able to have it both ways. They have done quite well winning benefits for themselves in the normal political arenas, and that is where most of these disputes should be resolved. The courts, including especially the U.S. Supreme Court, ought to take notice and opt to maintain guiding principles that will leave disputes between competing groups for public funds and public benefits where ordinary people can have a say in how they are resolved.

That is what Amendment 2 was and is about.

GAYS EQUATE COURT BATTLE TO BROWN VS. BOARD OF ED.

Denver Post

Wednesday, February 22, 1995

Jeffrey A. Roberts
Denver Post Staff Writer

Evans vs. Romer could be as significant to gays and lesbians as Brown vs. Board of Education was to blacks.

That's what Richard G. Evans, John Miller and Priscilla Inkpen suggested yesterday. They are three of the people who sued the governor, the state and the state attorney general after Colorado voters approved Amendment 2 in November 1992.

"This is our Brown," said Evans, the 34-year-old plaintiff whose name is forever attached to the case because it is listed first on the original court filing. "Hopefully, it'll go the same way."

In the 1954 landmark civil-rights decision, the U.S. Supreme Court struck down the notion of separate-but-equal facilities for blacks and whites. In ruling that racial segregation in public schools violated the constitutional right of blacks to equal protection under the law, the justices paved the way for the civil-rights movement of the 1960s.

Evans, a grants manager in the Denver mayor's office, hopes the high court comes to a similar conclusion about Amendment 2 after it reviews the anti-gay rights initiative later this year.

In the process, he said, gay and lesbian issues will be "raised to a national level like they've never been raised before."

"I think we'll win on a 5-4 vote," predicted Miller, a 57-year-old language professor at the University of Colorado at Colorado Springs. "There are certainly conservative members of the court who will not vote in favor of it. But I also see a middle ground developing among the civil libertarians, and that middle ground will give us a fair hearing."

Miller said he's excited about the Supreme Court taking the Amendment 2 case, and he plans to be in Washington, D.C., the day it is argued.

For him, this is the culmination of more than 30 years of civil rights work that began when he was a college student protesting racial segregation on the eastern shore of Maryland. In 1988, he sparked a battle over gay rights by proposing a Colorado Springs charter amendment that would have banned discrimination on the basis of sexual orientation.

Miller said he was one of the few gay leaders in the state who expected Amendment 2 to pass, yet he was devastated when it did. Now he realizes "there has been some very positive fallout."

"I think there was a strong fusion of diverse groups in the gay-and-lesbian community as a result," he said. "The community is stronger. . . . I also think the passage of Amendment 2 has led a number of people to think about the rights of other individuals."

Inkpen, a 48-year-old ordained minister from Boulder, said she's worried that a Supreme Court review of Amendment 2 will put the plaintiffs' lives on the line, possibly jeopardizing their jobs and safety. But she also believes that, sooner or later, the court was going to hear a gay-rights case.

CHRONOLOGY

*MARCH 1991 - Responding to proposed gay-rights laws, a group of Colorado Springs business leaders and Christian activists forms Colorado for Family Values. Co-founders Tony Marco and Kevin Tebedo begin circulating drafts of a proposed constitutional amendment that would ban passage or enforcement of gay-rights laws in Colorado.

*JULY 31, 1991 - CFV files the proposed ballot initiative and begins gathering signatures.

*MARCH 20, 1992 - CFV delivers 85,000 petition signatures to Secretary of State Natalie Meyer in an armored truck. Though thousands of signatures are thrown out as invalid, Meyer later rules enough were gathered to get the measure on the ballot.

*NOV. 3, 1992 - Amendment 2 passes with 53.4 percent of the vote.

*NOV. 12, 1992 - A coalition of gay-rights activists and lawyers files suit in Denver District Court, asking a judge to throw out Amendment 2 as unconstitutional.

*JAN. 14, 1993 - On the day before Amendment 2 is scheduled to take effect, Denver District Judge Jeff Bayless issues a one-day restraining order suspending it.

*JAN. 15, 1993 - Bayless issues an injunction prohibiting Amendment 2 from becoming law until he can hear full arguments in October.

*JULY 19, 1993 - The Colorado Supreme Court affirms the injunction against Amendment 2.

*OCT. 12, 1993 - Full trial on Amendment 2 begins in Bayless' court, bringing a parade of national experts on homosexuality and civil rights.

*DEC. 14, 1993 - Bayless declares Amendment 2 unconstitutional. The state immediately says it will appeal to the Colorado Supreme Court.

*OCT. 11, 1994 - The Colorado Supreme Court, in a 6-1 decision, affirms Bayless' ruling that Amendment 2 is unconstitutional.

*DECEMBER 1994 - The state appeals to the U.S. Supreme Court.

*YESTERDAY - The U.S. Supreme Court agrees to hear the state's Amendment 2 appeal.

GAY-RIGHTS BAN VOIDED

Denver Post
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Wednesday, October 12, 1994

Howard Pankratz
Denver Post Legal Affairs Writer

The Colorado Supreme Court yesterday declared Amendment 2 unconstitutional, saying it violates a fundamental right of gays and lesbians to participate equally in the political process.

Gov. Roy Romer and Attorney General Gale Norton said they will immediately appeal the decision to the U.S. Supreme Court.

The amendment, which was passed on Nov. 3, 1992, by a vote of 813,966 to 710,151, barred governments from protecting gays and lesbians from discrimination and nullified gay-rights ordinances on the books in Denver, Boulder and Aspen.

The state high court said the state failed to show either a "compelling state interest" to justify the amendment or that the measure was written to serve such interests.

Norton said if the U.S. Supreme Court accepts the case for review, it could rule on it by next July.

"I believe very strongly that we have an obligation to the people to pursue this case further," said Norton. "The entire basis of the Colorado Supreme Court decision was flawed in our view. The Colorado Supreme Court created a brand new fundamental right that had never been recognized by any other court."

Said Romer: "The people of Colorado deserve a final decision on this question which is of serious concern to so many. I have spoken with the attorney general, and we have agreed that preparation of the appeal to the nation's highest court will begin immediately."

Suzanne Goldberg, staff attorney at the Lambda Legal Defense and Education Fund and a co-counsel for opponents of the amendment, called the state court's decision a "major victory" for lesbian and gay rights.

But Will Perkins, chairman of Colorado for Family Values, which sponsored Amendment 2, said the ruling "is no surprise to the people of Colorado. Our state's courts have already made known their willingness to cast aside the freedoms of those who hold "politically incorrect' beliefs in today's society."

In yesterday's decision, the Colorado high court said the amendment destroyed the most fundamental rights of gays and lesbians by "fencing" them out of the political process that is open to all citizens of the United States.

"Amendment 2 would forbid governmental entities from prohibiting discrimination against gay men, lesbians, and bisexuals in all aspects of commercial and public life," said a majority of six justices in the 34-page opinion written by Chief Justice Luis Rovira.

Rovira noted that the amendment clearly affects the ability of gays to equally participate in the political process because it denies them an "effective voice in governmental affairs."

"Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive and judicial protection or redress from discrimination absent the consent of a majority of the electorate," said Rovira.

LONE DISSENT

The lone dissenter, Justice William Erickson, blasted the majority.

He charged that his fellow justices have "crafted a new fundamental right that has never been recognized by the United States Supreme Court" and only one federal district court judge.

"Ironically, judicial review of Amendment 2 has accomplished exactly what the voters who passed Amendment 2 sought to prevent - the majority has effectively created a heightened protection for homosexuals, lesbians and bisexuals," said Erickson.

Yesterday's decision upheld a ruling by Denver District Judge Jeff Bayless that he made last December after listening to weeks of testimony on the emotional issue.

In its appeal, the state claimed that the amendment was an effort by well-meaning citizens concerned over basic questions of morality.

In briefs filed with the state Supreme Court earlier this year, deputy attorney generals John Dailey and Paul Farley said that public morality has been at the crux of the Amendment 2 litigation since it began.

They claimed that although Coloradans for the most part are tolerant of homosexuality, they are unwilling to support governmental action that could be viewed as promoting the homosexual lifestyle. Amendment 2, claimed the state, "insists on the right to a cultural and educational environment that conveys, without disrespect but without apology, a societal preference for heterosexuality."

The state suggested that if a child hears from his parents that homosexuality is bad but gets the opposite message from the government, parental authority is undermined.

Yesterday, Rovira and his five colleagues directly addressed the questions of morality raised by the state lawyers and its impact on the family.

"This argument fails because it rests on the assumption that the right of familial privacy engenders an interest in having government endorse certain values as moral or immoral," said the opinion. "While it is true that parents have a constitutionally protected interest in inculcating their children with their own values, (the state) points to no authority . . . holding that parents have the corresponding right of insuring that government endorse those values."

COURT PRECEDENT

Rovira said that the U.S. Supreme Court has repeatedly held that the individual's right to profess or practice certain moral or religious beliefs does not entail a right to have government itself reinforce or follow those beliefs or practices.

With or without Amendment 2, parents retain full authority to express their views about homosexuality to their children, said Rovira.

Staff writer Michael Booth contributed to this story.

KEY POINTS

Some of the key observations made by the Colorado Supreme Court in its Amendment 2 ruling:

*The United States Supreme Court has repeatedly held that the individual's right to profess or practice certain moral or religious beliefs does not entail a right to have government itself reinforce or follow those beliefs or practices.

*Furthermore, even recognizing the legitimacy of promoting public morals as a government interest, it is clear to us that Amendment 2 is not necessary to preserve heterosexual families, marriage, or to express disapproval of gay men, lesbians and bisexuals.

*The right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians and bisexuals from having an effective voice in governmental affairs. . . .

*Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of the majority of the electorate through the adoption of a constitutional amendment.

ANGRY GAYS VOW TO KEEP FIGHTING
Lawsuits and Boycotts Appear to Be Coming after Amendment 2 Wins by 100,000 Votes

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Gary Massaro
Rocky Mountain News staff writer

A coalition of gay and other community leaders angered by the passage of Amendment 2 on Wednesday threatened national boycotts of Colorado and vowed to challenge the measure in court.

Gov. Roy Romer said he believes the amendment is unconstitutional. A gay physicians' group canceled its convention in Denver. Someone painted the word "queer" on Folsom Field at the University of Colorado in Boulder, and two Colorado lawmakers promised to back a federal gay and lesbian civil rights act.

Late Wednesday, the Colorado AIDS Education Foundation board voted to end all contracts with Colorado companies that provide medical supplies and printing. Executive director Rick Sanchez said the agency serves a nine-state region and annually spends more than $8 million to provide AIDS education and hospice care.

Colorado voters passed Amendment 2 by 100,000 votes Tuesday. The initiative prohibits a protected status for homosexuals at all levels of government in the state.

It also repeals anti-bias ordinances in Denver, Boulder and Aspen.

Will Perkins, chairman of Colorado for Family Values, had predicted before the vote that the initiative "will open a can of worms" because of numerous lawsuits.

On Wednesday, Mary Celeste, an attorney for the Colorado Legal Initiatives Project, said she is inviting Denver, Boulder, Aspen and other communities and groups to join her in the challenge she plans to file in Denver District Court.

Romer and Denver Mayor Wellington Webb met with Amendment 2 opponents in hopes of defusing an angry response to the vote and to discuss ways to fight the amendment.

"My personal opinion is it's unconstitutional to discriminate based on sexual orientation," Romer told about 800 angry people crowded into the First Baptist Church, 1331 Grant St.

A sign in the pews said, "Fire Me. It's Legal." Said another, "Shame on You, Colorado."

Supporters raised more than $3,600 to start financing the legal battle.

Webb told the group he thinks the law is invalid in Denver because it is a home-rule city. But because of promised legal action, it's unclear what the passage of Amendment 2 will do to the portion of Denver's civil rights ordinance that prohibits discrimination based on sexual orientation in employment, housing, public accommodations and health and welfare services, City Attorney George Cerrone said.

Rep. Pat Schroeder, D-Colo., shared a letter with the group at First Baptist that she sent to President-elect Clinton, noting that "Colorado became the first state in the nation to deny its lesbian and gay citizens equal rights."

Schroeder told Clinton, "The only way we can stem the tide of discrimination within our state or nationwide is through passage of a federal gay and lesbian civil rights bill, which has languished in Congress for 18 years."

Rep. David Skaggs, D-Colo., told the crowd he will work to get a federal civil rights law passed to protect gays.

The vows to continue the battle don't surprise Perkins, chairman of Colorado for Family Values, the Colorado Springs-based group that initiated the amendment.

"Equal Protection Campaign Colorado has said from the outset that it will test the consitutionality of our amendment," Perkins said. "It was drawn up by constitutional lawyers. It was scrutinized by the attorney general's office. EPOC protested it three times. And the attorney general never changed a word.

"You must realize that the governor, in an effort to try to save face, has to go through this process. After all, he was the honorary chairman of EPOC. We are confident that it is constitutional. And the reason it is constitutional is it's not discriminatory to homosexuals."

Students at Colorado State University in Fort Collins joined in a "No on 2" rally.

In Denver, politicians and activists urged people to remain calm and fight legally.

One group already has vowed to boycott Colorado businesses. Another has canceled a convention in Denver next year.

In Boulder, someone poured bleach on and spray-painted the artificial turf at Folsom Field apparently in connection with the vote.

John Krueger, facilities and grounds manager, said workers could discern the word "queer" painted in letters about four feet tall on the south 10-yard line.

"I couldn't make out the second word," Krueger said.

An anonymous caller told the Rocky Mountain News the second word was "pride."

Romer reminded the church crowd that he is obligated to administer the laws.

"I opposed it, the people passed it," he said.

COLORADANS ON THE GAY AMENDMENT

The Wall Street Journal

Tuesday, December 15, 1992

Vincent Carroll

Denver -- Now that the Reagan-Bush era has expired, where will the nation's moral philosophers find a target for disdain? In Colorado, it seems, whose citizens banned gay-rights ordinances last month in a statewide vote.

Whoopi Goldberg, Joan Rivers and director Jonathan Demme have endorsed a ban of vacations, meetings and movie productions in Colorado. Barbra Streisand charged to a microphone to denounce Colorado's "vote for hate." Martina Navratilova has vowed to abandon her lush Aspen compound if Coloradans do not reverse their stand. Meanwhile, groups such as the American Association of Law Libraries and the National Council for Social Studies have canceled conventions in Denver. New York City, Atlanta and Philadelphia have barred all municipal travel to Colorado.

There is at least some question, however, whether the majority of boycotters really understands what happened in this state. Both before and after the election, the debate over Amendment 2 centered on an unexpected topic: not on the morality of gay behavior, although that discussion of course occurred, but on the very nature of civil rights enforcement. It is safe to say that public resentment over affirmative action policies was indispensable to the amendment's success.

Most Coloradans are a live-and-let-live breed, ill-cast as exemplars of intolerance. Most believe in frugal government, and hence are often described as conservative. But on social issues, they seem to take their cues less from the "religious right" than from a vague libertarianism.

Hence the surprise of nearly every political pundit and pollster that Amendment 2, which bars any legal claims of discrimination by homosexuals and overturns three gay-rights ordinances, in Aspen, Boulder and Denver, passed so handily last month, by 53.4% to 46.6%. The experts simply failed to appreciate the simmering resentment concerning preferential treatment of previously protected groups, and the public's resolve not to enlarge the list.

Evidence of this resentment is liberally scattered throughout hundreds of letters on Amendment 2 that have piled up in the Rocky Mountain News editorial offices -- more such letters, pro and con, than on any issue in memory.

To test the theory that Amendment 2 owed its success to a potent coalition of moralists opposed to homosexuality and egalitarians fearing special treatment for yet another minority, I classified the arguments of 100 of the most recent letters in favor of the amendment. The results were revealing, if admittedly something less than social science: About one-third of the letter writers offered moral reasons for supporting Amendment 2; about one-fourth cited idiosyncratic reasons that fit no category or simply weren't fully coherent; and the rest staked their case on an opposition to "special rights" for any group of Americans.

Within the last category, the following excerpts are typical. Beth Chilcote of Colorado Springs said she "voted yes on Amendment 2 not because I dislike homosexuals but because I disagree with special interests." Dana Yocom of Mancos argued that homosexuals "already have equal rights. They want preferential rights. . . " A Mrs. Aragon of Thornton wrote that "I was not promoting an open season of discrimination against homosexuals. Mine was not a hate vote. . . . Giving one special interest group special rights will only lead to another special interest group wanting another special rights amendment."

One amendment supporter noted that he also had voted for Bill Clinton and against school vouchers, but added that "no one group should be granted any special privileges." A few were obviously familiar with the legalese of affirmative action: "The sole purpose of Amendment 2," wrote Matthew Schaefer of Littleton, "is to prevent the labeling of homosexuals and bisexuals a protected class as defined in civil rights legislation."

Brian Pike of Arvada acknowledged a personal motive: "Caucasian males cannot vote in favor of any additional groups being given protective status concerning employment opportunities, be it new jobs or promotions." Wes Nelson of Aurora seconded the notion: "When I cast a yes vote for Amendment 2, it had nothing . . . to do with family values, since anyone with a two-digit IQ or better should realize by now that you cannot legislate morals. My vote had everything to do with an attempt to restore equal rights."

A few letter writers feared the effects of gay-rights laws on business. "What of the rights of employers," asked Lynda Lackey of Aurora, "when legitimate layoffs and firings are perverted into discrimination issues?" And so it went, with J.S. Gonzales of Golden pretty much summing up the prevailing sentiment among the egalitarians: "I am a supporter of Amendment 2, not because I hate

homosexuals but because I believe in equal rights. . "

Now, obviously, a lot of people did vote for Amendment 2 because of revulsion for homosexuality or the gay lifestyle as they conceive it. In Oregon, it is worth noting, a ballot proposal that went much further than Colorado's, actually describing homosexuality as abnormal and perverse, attracted 43% of the vote. For that matter, many people are notably coy about owning up to their real attitudes toward questions involving gay rights, as Colorado pollsters discovered to their embarrassment.

Still, in retrospect, it is clear that Amendment 2 became, in effect, a dual referendum, a judgment on homosexuality to some and on affirmative action to others. Opponents of Amendment 2 assured voters over and over that gay people only sought protection from discrimination in housing, employment and accommodations, not special rights. Thousands of Coloradans simply didn't believe it.

In assessing blame for their defeat, gay-rights activists and their allies understandably point toward the Christian right. But with nearly equal accuracy, they might direct some of the blame toward the nation's civil rights establishment, which for the past quarter century has perverted laws guaranteeing equal opportunity into policies that mock individual rights and confer benefits on the basis of membership in a protected group.

They fooled us once, many Colorado voters seemed to say, but we won't be fooled again.

— Mr. Carroll is editor of the editorial pages at the Rocky Mountain News.