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Colorado's Amendment 2 Defeated: The Emergence of a Fundamental Right to Participate in the Political Process

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COMMENT

COLORADO'S AMENDMENT 2 DEFEATED: THE EMERGENCE OF A FUNDAMENTAL RIGHT TO PARTICIPATE IN THE POLITICAL PROCESS*

INTRODUCTION

Homosexuals have been a target for prejudice and discrimination in society and the political structure. Upon exposure of their sexual orientation to the "outside" world, they face possible criminalization for their sexual conduct,[1] discharge from or non-entry to the military,[2] and discharge from and discrimination in employment.[3] Ho-

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* Thanks to my parents for their love and support, and to my good friend Laura Nelson for her many hours of typing.

1. *See, e.g.*, ALA. CODE § 13A-6-65(a)(3) (1975) ("A person commits the crime of sexual misconduct if [h]e or [s]he engages in deviate sexual intercourse with another person . . . ."); ARK. CODE ANN. § 5-14-122 (Michie 1987) (prohibiting sodomy); KAN. STAT. ANN. § 21-3505 (1988 & Supp. 1993) ("Criminal sodomy is [s]odomy between persons who are 16 or more years of age and members of the same sex. . . ."); KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1990) ("A person is guilty of sodomy in the fourth degree when he engages in deviate sexual intercourse with another person of the same sex."). This section was found to violate the constitution of Kentucky in Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992). *See also* MD. CODE ANN. CRIM. LAW ART. 27, § 554 (1954) (categorizing homosexual acts as "[u]nnatural or perverted sexual practices"); MICH. COMP. LAWS ANN. § 750.158 (West 1991) (characterizing sodomy as a "crime against nature"); MINN. STAT. § 609.293 (1992) (prohibiting sodomy); N.Y. PENAL LAW § 130.38 (McKinney 1987) (prohibiting consensual sodomy); OKLA. STAT. ANN. tit. 21, § 886 (West 1983 & Supp. 1993) (characterizing homosexual acts as "crimes against nature"); S.D. CODIFIED LAWS ANN. § 22-22-2 (1988 & Supp. 1993) (prohibiting sodomy); *see* Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that criminalization of homosexuals sex under Georgia sodomy law was constitutional).

2. *See* Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) (upholding army regulation which made homosexuality or admitted homosexuality nonwaivable disqualification for service), *cert. denied sub nom.* Ben-Shalom v. Stone, 494 U.S. 1004 (1990); Dronenberg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984) (permitting mandatory discharge for homosexual conduct under navy policy); Steffan v. Cheney, 780 F. Supp. 1, 16 (D.D.C. 1991) (upholding Navy regulations prohibiting those with homosexual orientation from serving in the Navy or attending the Naval Academy), *aff'd sub nom.* Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994). *But see* Watkins v. United States Army, 875 F.2d 699, 703 (9th Cir. 1989) (prohibiting army from barring soldier's reenlistment solely because of his acknowledged homosexuality), *cert. denied*, 498 U.S. 957 (1990); Dahl v. Secretary of the U.S. Navy, 830 F. Supp. 1319, 1327 (E.D. Cal. 1993) (enjoining Navy from taking any adverse action against plaintiff by reason of his homosexual status or on account of his statements of his sexual orientation).

mosexual relationships have also received disparate treatment in rights afforded a heterosexual relationship, such as the right to marriage,[4] and the obtaining of a spouse's health benefits,[5] health insurance coverage,[6] or inheritance.[7] Homosexuals have unsuccessfully raised these issues as a denial of equal protection.[8] However, with *Evans v. Romer*,[9] there is hope for protection against certain types of homosexual discrimination[10] because the Colorado Supreme Court refused to allow the majority of Colorado voters to eliminate existing laws and policies prohibiting discrimination based on an individual's sexual orientation.

In *Evans*, the Colorado Supreme Court declared that homosexuals have a fundamental right to participate on an equal basis in the political process.[11] However, this right was not limited to homosexuals; it extended to all classes of people.[12] This fundamental right concept was developed through the Fourteenth Amendment of the

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3. *See* Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 448 (6th Cir. 1984) (upholding firing of high school guidance counselor because she revealed her sexual preference), *cert. denied*, 470 U.S. 1009 (1985); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329 (9th Cir. 1979) (finding that Title VII of the Civil Rights Act of 1964 prohibiting "sex" discrimination only applies to gender discrimination and does not include sexual preference such as homosexuality); Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340, 1347 (Wash.) (upholding discharge of teacher because he was a known homosexual), *cert. denied*, 434 U.S. 879 (1977).

4. *See* Baehr v. Lewin, 852 P.2d 44, 48 (Haw. 1993) (finding that the Hawaii Constitution did not give rise to a fundamental right of persons of the same sex to marry).

5. *See* Phillips v. Wisconsin Personnel Comm'n, 482 N.W.2d 121, 122-23 (Wis. Ct. App. 1992) (upholding the denial of a state employee's application for family health insurance coverage for her lesbian companion).

6. *See* Hinman v. Department of Personnel Admin., 213 Cal. Rptr. 410, 418 (Cal. Ct. App. 1985) (upholding the denial of dental care benefits for homosexual state employees).

7. *See In re* Cooper, 187 A.D.2d 128, 131 (N.Y. App. Div.) (finding that the survivor of a homosexual relationship alleged to be a "spousal relationship" was not entitled to the right of election against decedent's will), *appeal dismissed*, 82 N.Y.2d 801 (1993).

8. *See supra* notes 3-7 (noting cases in which claims based on equal protection brought by homosexuals have failed).

9. 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

10. In fact, four months after the Colorado Supreme Court decided Evans v. Romer, the United States District Court preliminarily enjoined a similar measure to Amendment 2 which the voters in Cincinnati, Ohio passed. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 838 F. Supp. 1235, 1238 (S.D. Ohio 1993). The court in that case recognized the Colorado Supreme Court's invalidating Amendment 2 based on its infringement with a fundamental right to participate equally in the political process. *Id.* at 1239. Following the *Evans* court's analysis, the United States District Court found that the measure at issue in that case infringed on homosexuals' fundamental right to participate equally in the political process, as well as on first amendment rights. *Id.* The district court then issued a permanent injunction in 1994. Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417 (S.D. Ohio 1994).

11. 854 P.2d at 1285.

12. *Id.* at 1284.

United States Constitution which guarantees every United States Citizen the right to equal protection of the laws.[13] The case evolved when voters in Colorado passed an amendment to the state Constitution which eliminated and forbade any laws that protected homosexuals from discrimination.[14] When amendment opponents filed suit declaring the amendment unconstitutional, the Colorado Supreme Court affirmed the issuance of a preliminary injunction, thus enjoining state officials from enforcing the amendment.[15]

This Note examines the underlying analysis used by the Colorado Supreme Court to develop a fundamental right for homosexuals to participate equally in the political process.[16] The Background section explores the history behind the creation and enactment of the Colorado amendment, the campaign literature, the impact of the amendment after it was voted on, as well as proponent and opponent arguments concerning the amendment.[17] Next the Background examines the history of gays' struggle for equal rights.[18] The Background concludes with an overview of equal protection analysis and the development of a fundamental right, particularly as it pertains to political participation.[19]

The Section regarding the Subject Opinion, *Evans v. Romer*,[20] first discusses the arguments proposed by the Colorado amendment

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13. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

14. 854 P.2d at 1272.

15. On September 17, 1993, Attorney General Gale Norton, counsel for the amendment, made her formal bid to take the case to the United States Supreme Court. Steven Wilmsen, *High Court Asked to OK Amend. 2*, DENVER POST, Sept. 18, 1993, at 1A. On November 1, 1993, the United States Supreme Court denied certiorari. The trial on the constitutionality of the amendment occurred in October of 1993 in Denver District Court. District Court Judge Bayless ruled the amendment unconstitutional on December 14, 1993. Evans v. Romer, No. CIV.A.92-CV-7223, 1993 WL 518586 (Colo. Dist. Ct. Dec. 14, 1993). Judge Bayless relied on the guidelines set forth by the Colorado Supreme Court in Evans v. Romer, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993). In October of 1994, the Colorado Supreme Court affirmed the district court's ruling the amendment unconstitutional. Evans v. Romer, Nos. 94SA48, 94SA128, 1994 WL 554621 (Colo. Oct. 11, 1994).

16. *See infra* notes 270-371 and accompanying text (discussing the legal doctrine relied upon by the Colorado Supreme Court in finding a fundamental right for homosexuals to participate equally in the political process).

17. *See infra* notes 27-115 and accompanying text (discussing the amendment and its impact after it was voted on).

18. *See infra* notes 116-39 and accompanying text (providing a historical analysis of claims brought by homosexuals).

19. *See infra* notes 140-235 and accompanying text (detailing how the fundamental right to equal political participation is developed through the equal protection clause).

20. 854 P.2d 1270, 1270 (Colo.), cert. denied, 114 S. Ct. 419 (1993).

opponents, the plaintiffs, before the trial court.[21] Next is a detailed discussion of prior case law the Colorado court utilized to develop its fundamental right to equal participation in the political process.[22] The focus of the majority opinion centers on cases concerning the right to vote, reapportionment, candidate eligibility, and voter initiated amendments preventing enactment of particular desired legislation. Next the dissenting opinion and the arguments upon which it relies are examined.[23]

The Analysis begins by rehabilitating the majority's stance in its fundamental right development and combating the arguments presented by the dissent.[24] The Analysis further justifies the majority's analysis by advancing the position that political participation is fundamental for all classes of persons, not just those deemed "suspect."[25] The section concerning the impact of the Colorado court's holding discusses first, the extension of the fundamental right "list," second, the safeguarding of the political process, and last, the hope for the future the right encompasses for homosexuals.[26]

I. BACKGROUND

In May of 1992, the requisite number of Colorado voters submitted a proposed amendment to the Colorado Constitution.[27] On November 3, 1992, Colorado voters approved the proposal, referred to as "Amendment 2," by a vote of 813,966 to 710,151 (53.4% to 46.6%).[28] Amendment 2 provided:

> 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

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21. *See infra* notes 240-56 and accompanying text (addressing the plaintiffs' arguments).

22. *See infra* notes 270-371 and accompanying text (discussing prior case law the Colorado court relied on in developing its fundamental right).

23. *See infra* notes 372-426 and accompanying text (addressing the arguments proposed by the dissent).

24. *See infra* notes 427-86 and accompanying text (arguing that the majority was correct in relying on prior U.S. Supreme Court precedent to develop a fundamental right to political participation).

25. *See infra* notes 487-524 and accompanying text (supporting the majority's position that everyone, not just those belonging to a "suspect" class, are entitled to protection when their right to participate in the political process in restricted).

26. *See infra* notes 525-41 and accompanying text (discussing the impact of the holding in *Evans*).

27. Evans v. Romer, 854 P.2d 1270, 1272 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

28. *Id.*

> 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.[29]

The amendment made unenforceable and unconstitutional, all Colorado laws, regulations, ordinances, and policies which prohibited discrimination based on an individual's sexual orientation.[30]

On November 12, 1992, the plaintiffs[31] instituted an action to have Amendment 2 declared unconstitutional on its face, and to enjoin its enforcement.[32] All the individually named plaintiffs, Colorado residents, were homosexual men and lesbians, except for one heterosexual man suffering from Acquired Immune Deficiency Syndrome (AIDS).[33] Generally, plaintiffs argued that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment, as well as other state and federal constitutional provisions, by consigning "gay men, lesbians and bisexuals to a second class citizenship."[34]

Defendants,[35] the Governor and Attorney General of Colorado, argued that Amendment 2, on its face, did not infringe on any constitutional rights, approve or further discrimination, or prevent dis-

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29. LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, AN ANALYSIS OF 1992 BALLOT PROPOSALS 9 (Research Pub. No. 369, 1992) [hereinafter LEGISLATIVE COUNCIL].

30. *Id.* For examples of legislation that Amendment 2 made unenforceable, see *infra* notes 88-99 and accompanying text.

31. Richard G. Evans (a gay man employed by the City and County of Denver); Angela Romero (a lesbian employed as a police officer of the City and County of Denver); Linda Fowler (a lesbian employed as a contract administrator by a private employer); Paul Brown (a gay man employed by the State of Colorado); Jane Doe (assumed name of lesbian citizen employed by a public entity in Jefferson County); Martina Navratilova (a lesbian professional tennis player residing in Aspen); Bret Tanberg (a heterosexual infected with the Human Immunodeficiency virus "HIV" and diagnosed as having "AIDS" and discriminated against based on a perception he is gay); Priscilla Inkpen (lesbian ordained minister); John Miller (a gay man employed as a Spanish Professor at the University of Colorado); the Boulder School District RE-2; The City and County of Denver; the City of Boulder; the City of Aspen; and the City Council of Aspen. Amended Complaint at 2-4, Evans v. Romer, No. 92-CV-7223, 1993 WL 19678 (Colo. Dist. Ct. Jan. 15, 1993), *aff'd on other grounds*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

32. *Evans*, 854 P.2d at 1272.

33. Brief in Support of Plaintiffs' Motion for Preliminary Injunction at 9-12, Evans v. Romer, 1993 WL 19678 (Colo. Dist. Ct. Jan. 15, 1993) (No. 92 CV 7223), *aff'd on other grounds*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

34. Amended Complaint at 1, *Evans* (No. 92 CV 7223).

35. Governor of the state of Colorado, Roy Romer; Attorney General of the state of Colorado, Gale A. Norton.

crimination claims in lawsuits.[36] They further added that the amendment "ha[d] only the intent and effect of establishing a statewide policy of governmental neutrality with respect to sexual orientation," and "simply provide[d] that homosexual or bisexual orientation should not be granted special protection such as the federally-recognized categories of race, gender, religion, and national origin."[37]

On January 15, 1993, the Colorado District Court issued a preliminary injunction preventing state officials from enforcing the amendment.[38] On July 19, 1993, the Colorado Supreme Court affirmed the District Court's issuance of the preliminary injunction and held that the amendment infringed on plaintiffs' fundamental right to participate equally in the political process.[39] In order to understand the Colorado court's rationale in finding such a fundamental right, it is helpful to know the history behind the enactment of Amendment 2.

A. Origination of and Beliefs Behind Amendment 2

Amendment 2 arose during an era involving increased governmental activity in the area of civil rights. Congress and the states extended the concepts of the federal Civil Rights Act of 1964[40] to prohibit discrimination in employment,[41] public education,[42] and access to public accommodations.[43] Amendment 2 prohibited Colorado's state and local governments from enacting or enforcing civil rights laws and policies concerning the issue of discrimination based on a homosexual, lesbian, or bisexual's orientation, conduct, practice, or relationship.[44]

Colorado for Family Values ("CFV"), a non-profit corporation based in Colorado Springs, drafted and campaigned for Amendment

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36. Motion to Dismiss at 1, Evans v. Romer, 1993 WL 19678 (Colo. Dist. Ct. Jan. 15, 1993) (No. 92 CV 7223), *aff'd on other grounds*, Evans v. Romer, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

37. *Id.* at 2.

38. 1993 WL 19678 (Colo. Dist. Ct. Jan. 15, 1993).

39. Evans v. Romer, 854 P.2d 1270 (Colo. 1993). The Colorado Supreme court ruled the amendment unconstitutional in Evans v. Romer, Nos. 94SA48, 94SA128, 1994 WL 554621 (Colo. Oct. 11, 1994).

40. 42 U.S.C.A. § 2000(a)-(h) (West 1993).

41. *Id.* § 2000(e).

42. *Id.* § 2000(c).

43. *Id.* § 2000(a).

44. For the text of Amendment 2, see *supra* text accompanying note 29.

2.[45] The National Legal Foundation, an organization founded by Reverend Pat Robertson, assisted CFV in drafting the amendment.[46] CFV was formed in 1991 in response to the enactment of a local ordinance protecting individuals from certain types of discrimination based on sexual orientation.[47] Their mission was to "pro-actively lead and assist those opposing the militant homosexual attack on traditional values;" to preserve "the fundamental freedoms of speech, association, assembly, belief and conscience" and to "preserve the right to disagree with and resist, in a civil and compassionate manner, the forced affirmation of the homosexual lifestyle."[48]

CFV developed its campaign theme of "no special rights for homosexuals" with assistance from the "religious right," a composition of national organizations.[49] The 'religious right' adheres to conservative religious and political beliefs which include staunch anti-communism, a prominent place within society for church and family, and a traditional role within the family for the husband, wife and children.[50] CFV advanced numerous arguments through its campaign literature to support its views. The following section explores these arguments.

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45. Brief in Support of Plaintiffs' Motion for Preliminary Injunction at 2, Evans v. Romer, 1993 WL 19678 (Colo. Dist. Ct. Jan. 15, 1993) (No. 92 CV 7223), *aff'd on other grounds*, Evans v. Romer, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

46. *Id.* at 4.

47. COLORADO FOR FAMILY VALUES, AMENDMENT 2 & BEYOND (1993) [hereinafter CFV]. The ordinance protected individuals from discrimination in employment, housing, educational institutions, real estate transactions, public accommodations, and health and welfare service on the basis of their sexual orientation. DENVER, COLO., REV. MUN. CODE art. IV, § 28-91 to -116 (1991).

48. CFV, *supra* note 47. The entire mission statement read:

> The mission of COLORADO FOR FAMILY VALUES is to pro-actively lead and assist those opposing the militant homosexual attack on traditional values; to act as a resource equipping grass-roots efforts through education and training of like-minded organizations and individuals across America dedicated to preserving the fundamental freedoms of speech, association, assembly, belief and conscience protected by Colorado's Amendment Two; to preserve the right to disagree with and resist, in a civil and compassionate manner, the forced affirmation of the homosexual lifestyle.

Id.

49. Plaintiffs-Appellees' Answer Brief at 10, Evans v. Romer, 854 P.2d 1270 (Colo.) (No. 93SA17), *cert. denied*, 114 S. Ct. 419 (1993) (Letter from the National Legal Foundation to CFV) (on file with the Plaintiffs-Appellees). CFV denied being a "religious fundamentalist" organization. CFV, *supra* note 47. Instead, CFV stated its position as not based on religious views, but "rather on a concern for fairness and true civil rights." *Id.*

50. Plaintiffs-Appellees' Answer Brief at 10 n.9, *Evans* (No. 93SA17). The California-based Traditional Values Coalition led by the Reverend Louis Sheldon developed the "no special rights" theme in 1989 and 1990. *Id.*

1. CFV's "Social" Arguments to Support Amendment 2

To support its anti-homosexual rights view, CFV filed materials with the Legislative Council and campaign brochures which described the purposes of Amendment 2. These purposes were designated as: protecting "traditional family values and structures," safeguarding children from sexual molestation, protecting "individuals' rights to view homosexuality as immoral," preventing dissolution of civil rights protection for "authentic minorities," diminishing the cost for treatment of AIDS and its "deadly consequences," and furthering the view that homosexuality is curable.[51]

To support these purposes, CFV maintained that gays and lesbians "threaten[ed] . . . to undermine traditional family values and structures" because if homosexuals were allowed to marry, the traditional family structure would dissolve, insurance rates increase, and children, as "wretched victims of 'such marriages,' would become miserable."[52] CFV further asserted that homosexuals were "notorious practitioners of sex with minors"[53] and that they were society's link to sexually transmitted diseases.[54] According to CFV, by 1995, AIDS-infected homosexuals would overcrowd hospitals, resulting in fewer hospital beds for others in need of medical aid.[55]

CFV proposed a "deeper purpose" as "bringing a message of hope to individuals who . . . have chosen to go down a wrong road."[56] They argued that "homosexual practices [were] misguided efforts to fill love needs not provided for in early childhood by same-gender parents."[57] CFV also believed that homosexuality was a behavior which could be changed.[58]

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51. *Id.* at 10-11 (quoting CFV's campaign material).

52. *Id.* at 11.

53. *Id.* CFV asserted in its campaign propaganda that homosexuals were responsible for the majority of child molestation, arguing that they were responsible for one third of the population's molestation reports. DR. PAUL CAMERON, FAMILY RESEARCH INSTITUTE, INC., CHILD MOLESTATION AND HOMOSEXUALITY para. 17 (1993).

54. Plaintiffs-Appellees' Answer Brief at 11, *Evans* (No. 93SA17).

55. *Id.* at 12.

56. *Id.*

57. *Id.*

58. *Id.* To support this proposition, CFV argued that 1) there has been no "provable" evidence of "biological or genetic differences between heterosexuals and homosexuals" that were not caused by behavior; 2) "sexual desires and behavior" were learned; 3) homosexuality was "handed down" by adults to children; 4) "early homosexual experiences influence[d] adult patterns of behavior;" 5) religion and other cultural factors influenced sexual conduct; 6) men and women shifted their sexual preferences; and 7) "there [were] many ex-homosexuals." DR. PAUL CAMERON, FAMILY RESEARCH INSTITUTE, INC., WHAT CAUSES HOMOSEXUAL DESIRE AND CAN IT BE CHANGED?

CFV further asserted that the government should not become involved by imposing values in this area of public controversy.[59] For CFV, Amendment 2 was created only to prevent homosexuals from qualifying for quota preferences, filing discrimination claims, or obtaining minority status based on their sexual preference.[60] They maintained that history granted these rights only to ethnic minorities suffering "clear, systematic discrimination and economic disadvantage."[61] That is why, CFV concluded, Amendment 2 did not deny homosexuals any civil rights.[62] It was against this backdrop of belief that the amendment was proposed, campaigned, and passed.[63] The arguments proposed by CFV were attacked by numerous opponents of Amendment 2. These counter-arguments are discussed next.

2. *Amendment 2 Opponents Counter-Arguments*

Opponents of Amendment 2 consisted of a wide variety of groups. Amicus briefs in opposition to the amendment were submitted to the Colorado Supreme Court by the National Education Association, the AIDS Action Council, the Colorado Bar Association, and the Coalition of Associations of Mental Health Professionals.[64] These

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(1992).

59. Howard Pankratz, *Initiative Awaits its Day in Court*, DENVER POST, Sept. 19, 1993, at 8D. They argued that Amendment 2 ensured that government would not interfere with a private citizen's choice to associate with homosexuals and bisexuals. *Id.* In support of the amendment, the Attorney General also stated that Amendment 2 "wasn't intended to deprive gays and lesbians of constitutionally guaranteed rights, but was designed to remove 'state-based grounds' for putting homosexuals in a more favorable position than other citizens." *Id.*

60. CFV, *supra* note 47.

61. *Id.* In its campaign propaganda, CFV argued that Amendment 2 protected Colorado's "true minorities." CFV, HOW VOTING "YES!" ON AMENDMENT 2 PROTECTS COLORADO'S TRUE MINORITIES (1992). CFV stated that "true minority rights [were] under attack—by a few people who [thought] civil rights [did not] *have* to be based on *need* . . . just how *they* [had] sex!" *Id.* at para. 1.

62. *Id.*

63. Opponents of Amendment 2 argued that the CFV's campaign propaganda clouded the issue in such a way that voters did not know for what they were voting. Jean Torkelson, *On the March Amendment 2 Foes Lost Election, But They Vow to Still Win the War*, ROCKY MTN. NEWS, Nov. 15, 1992, at 160. For example, after a debate with Amendment 2 advocates prior to the election, campaign manager, Joseph Marione, stated that numerous people came up to them and said "You know, when we walked in here we were all set to vote yes on [Amendment] 2 because we don't believe in special rights. But now we know this is really an issue of discrimination and we really appreciate your clarifying it for us." *Id.*

64. Other amicus briefs in opposition to Amendment 2 were submitted by the American Federation of State, County and Municipal Employees, AFL-CIO, and a combined brief by the American Jewish Committee, United Church of Christ Office for Church in Society, Union of American

opponents, along with plaintiffs, countered CFV's beliefs by arguing that sexual orientation was not chosen,[65] and homosexuals should not be required to adopt a heterosexual orientation any more than should a heterosexual be required to change his or her sexual orientation.[66] Furthermore, they argued that homosexuality did not impair "judgment, stability, reliability or general social or vocational capabilities."[67] They pointed out that the American Psychological Association asked its members to remove the "stigma of mental illness" associated with homosexuality.[68]

To counter other "myths" laid out by CFV, such as the gay child molester proposition, Amendment 2 opponents argued that according to studies, neither heterosexual men nor gay men were more likely than the other to commit acts of child molestation.[69] They also rejected the "traditional family structure disintegration" argument by stating that children who live with both the mother and her lesbian companion, have "a richer, more open and stable family life" than do children raised solely by the lesbian mother.[70] As for the proponents' "public health" argument, opponents argued that public health is hindered by discrimination against homosexuals be-

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Hebrew Congregations, and the Anti-Defamation League. Amicus briefs in support of Amendment 2 were submitted by CFV and the Institute in Basic Life Principles.

65. Brief Amicus Curiae of Coalition of Associations of Mental Health Professionals at 4, Evans v. Romer, 854 P.2d 1270 (Colo.) (No. 93SA17) (relying on a study of gay male, lesbian, and bisexual twins in Bailey, Pillord et al., *Heritable Factors Influence Sexual Orientation in Women*, 50 ARCH. GEN. PSYCHIATRY 217 (Mar. 1993); Bailey & Benishay, *Familial Aggregation of Female Sexual Orientation*, 150 AM. J. PSYCHIATRY 272 (1993); Bailey & Pillard, *A Genetic Study of Male Sexual Orientation*, 48 ARCH. GEN. PSYCHIATRY 1089 (1991), *cert. denied*, 114 S. Ct. 419 (1993).

66. Brief Amicus Curiae of Coalition of Associations of Mental Health Professionals at 6, *Evans* (No. 93SA17).

67. *Id.* (quoting AMERICAN PSYCHIATRIC ASSOCIATION, RESOLUTION (Dec. 15, 1973)).

68. *Id.* at 25 (quoting AMERICAN PSYCHOLOGY ASSOCIATION, RESOLUTION (Jan. 1975)).

69. *Id.* at 23 (referring to Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 156 (1991)). In its amicus brief, the mental health professionals argued that "[c]hild sexual molestation, pedophilia, [did] not relate to sexual orientation, any more than heterosexual rape [was] related to heterosexuality." *Id.* It pointed out that early studies on the sexual orientation of child molesters were problematic because a molestation was labeled 'homosexual' if the perpetrator and victim were of the same biological sex, regardless of the perpetrator's sexual orientation. *Id.* Further, they indicated that researchers found that "homosexuals [were] less likely to be aroused by children of their own gender than [were] heterosexuals by children of the opposite gender." *Id.* at 24 (referring to A. N. Groth & H. J. Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons*, 7 ARCH. SEXUAL BEHAVIOR 175 (1978); K. Freund, R. Langevin et al., *Heterosexual Aversion in Homosexual Males*, 122 BRIT. J. PSYCHIATRY 163, 165 (1973)).

70. *Id.* at 27 (quoting Roy Kirkpatrick, *Clinical Implications of Lesbian Mother Studies*, *in* INTEGRATED IDENTITY 201, 204 (Coleman ed., 1987)).

cause it forces homosexuals to falsify or suppress important information as well as obstruct efforts in public education.[71] They pointed out that researchers found that societies which punish homosexual conduct "suffer from poorer reporting and treatment of sexually transmitted diseases among lesbians and gay men than more progressive societies."[72] Furthermore, HIV infections are appearing at a faster rate among heterosexuals than new infections are in gay men.[73] Thus, by attacking CFV's alleged statistics and facts, Amendment 2 opponents furthered the belief that homosexuals were entitled to equal protection of the laws. The debate regarding homosexual rights continued, perhaps to a larger degree, after Colorado voters passed the amendment. The effect of the passage of Amendment 2 on Colorado, the citizens, the law, and nationwide, is discussed next.

B. Impact of the Amendment

After the amendment was passed, a boycott of Colorado occurred, designed to promptly repeal the amendment and "make voters in other states think twice before passing similar measures."[74] The boycott successfully persuaded major convention groups to cancel meetings in Denver.[75] Those heading the boycott claimed the state of Colorado lost at least $120 million in business due to their efforts; however, this figure included an unproven decline in tourism.[76]

Despite this negative reaction, Amendment 2 influenced the proposal of similar ballot initiatives for 1994 in Arizona, California, Florida, Georgia, Idaho, Iowa, Maine, Michigan, Minnesota, Missouri, Montana, Ohio, Oregon, and Washington.[77] Furthermore, in all fifty states, plans developed to instigate anti-gay rights laws.[78]

Gay-rights activists also engaged in their own strategies. The National Gay and Lesbian Task Force spread throughout the United

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71. Brief Amici Curiae of AIDS Action Council, et al. at 12, Evans v. Romer, 854 P.2d 1270 (Colo.) (No. 93SA17), *cert. denied*, 114 S. Ct. 419 (1993).

72. *Id.* (taken from D. G. Ostrow & N. L. Altman, *Sexually Transmitted Diseases and Homosexuality*, 10 SEXUALLY TRANSMITTED DISEASES 208, 212 (1983)).

73. *Id.* at 18-19 (referring to A. Greenspan & K. Castro, *Heterosexual Transmission of HIV Infection*, 19 SEICUS REP. No. 1, at 1 (1990)).

74. Fred Brown, *Politicians Steer Clear of Issue*, DENVER POST, Sept. 19, 1993, at 12D.

75. *Id.*

76. *Id.*

77. Michael Booth & Steven Wilmsen, *The Great Divide: Basic Values at Heart of Debate*, DENVER POST, Sept. 19, 1993, at 1D.

78. *Id.*

States and initiated local campaigns availing "media saturation, 'coming-out parties,' education drives, and grassroots political organization."[79] Their goal was to stifle anti-gay movements before they gained support and to encourage local governments to adopt gay-rights laws.[80] They supported gay-rights legislation in New Mexico, New York, Rhode Island, and West Virginia.[81]

Homosexuals, lesbians, and bisexuals, themselves, felt the impact of the amendment. After the passage of Amendment 2, gay rights activists found an increase in hate crimes toward homosexuals.[82] Leaders of the Gay and Lesbian Community Center[83] of Colorado reported that they received forty-five reports of "bias incidents" against gays from November 1, 1992, to December 23, 1992, the time period immediately following passage of the amendment, representing almost four times more than during other months in 1992.[84] The "incidents" ranged from verbal harassment to murder.[85] They further stated that homosexual hate crimes more than quadrupled in January through March of 1993, as compared to the same period in 1992.[86] When the Gay and Lesbian Community Center released its results, San Francisco forbade official travel to Colorado, and the National Organization for Women proclaimed that it

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79. *Id.*

80. *Id.*

81. *Id.*

82. *See* Ann Carahan, *Gay Leaders: Stats Show Amendment 2 Fuels Violence But Denver Cops Cite No Major Hike in Bias Crimes,* ROCKY MTN. NEWS, Mar. 12, 1993, at 12 (homosexual leaders cite statistics of post Amendment 2 anti-homosexual crimes and incidents reported); Ann Carahan & John Brinkley, *Hate Crimes Increasing, Gay Activists Say but Police Say There's No Evidence That Assaults are up Since Amendment 2 Vote,* ROCKY MTN. NEWS, Dec. 23, 1992, at 6 (activists reporting increased hate crimes against gays while police question validity of activists' supporting statistics); Thaddeus Herrick, *Anti-Gay Hate Crimes Double in Denver,* ROCKY MTN. NEWS, June 30, 1993, at 10A (Denver police reported twice the anti-gay hate crimes than the prior quarter. Gay and lesbian leaders identify Amendment 2 as the main catalyst of this increase.). However, Denver police did not find any significant increase in assaults on gays after the election. Carahan & Brinkley, *supra,* at 6.

83. The Gay and Lesbian Community Center collects data on hate crimes against homosexuals. Herrick, *supra* note 82, at 10A.

84. Carahan & Brinkley, *supra* note 82, at 6. Police said that they could not confirm these figures because they did not categorize crimes according to the victim's or perpetrator's sexual orientation. *Id.* The Executive Director for the Community Center said the Center received 189 reports of violence against homosexuals in 1992 compared to 89 in 1991 (as of December 23, 1992). *Id.*

85. *Id.* The Center reported five "gay-related" murders in 1992 compared to two in 1991. *Id.* However, police stated that most or all of these murders were committed by gays. *Id.*

86. Herrick, *supra* note 82, at 10A. Denver police reported an increase only in hate crimes between January and March of 1993, in which 9 were reported, as compared to the same period in 1992, in which 4 were reported. *Id.*

would no longer hold meetings or events in Colorado.[87] The immediate impact of Amendment 2 appeared to be widespread.

Not only did Amendment 2 affect the community and livelihood of Colorado, it also affected existing legislation. Passage of Amendment 2 made existing ordinances that prohibited discrimination based on sexual orientation with regard to homosexual, lesbian, and bisexual persons unenforceable and unconstitutional.[88] When the amendment was passed, there were local ordinances, state laws and policies in Colorado, other states and municipalities, and in higher education institutions that offered limited protection against, or prohibited discrimination based on sexual orientation.[89] There were no federal civil rights laws protecting persons from discrimination based on sexual orientation in the areas of housing, employment, or public accommodations.[90] However, the federal Hate Crime Statistics Act of 1990[91] required the United States' Attorney General to monitor, in addition to other crimes, those crimes that manifested evidence of prejudice based on sexual orientation.[92]

Three Colorado local ordinances protect individuals from discrimination based solely on sexual orientation in the areas of employment, housing, and public accommodations.[93] None of the ordinances require quotas, affirmative action, minority status or require

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87. Carahan & Brinkley, *supra* note 82, at 10A.

88. LEGISLATIVE COUNCIL, *supra* note 29, at 10.

89. *See infra* notes 93-111 and accompanying text (discussing these other laws and policies preventing discrimination against sexual orientation).

90. *See* Civil Rights Act of 1964, 42 U.S.C.A. § 2000(a)-(h) (West 1993) (preventing discrimination based on color, gender, race, national origin, and religion).

91. Hate Crime Statistics Act, Pub. L. No. 101-275, §§ 1, 2, 104 Stat. 140 (1990) (set as a note under 28 U.S.C.A. § 534).

92. *Id.*

93. Aspen's ordinance prohibited discrimination in the areas of employment, housing, and public accommodations because of race, creed, color, religion, ancestry, national origin, sex, age, marital or familial status, physical handicap, sexual orientation, or political affiliation. ASPEN, COLO., MUN. CODE § 13-98 (1977). The Aspen ordinance did not exempt religious institutions. *Id.* In Boulder, religious institutions could not refuse to hire an individual or restrict access to public accommodations or housing because of that person's race, creed, color, gender, sexual orientation, marital or familial status, pregnancy, national origin, ancestry, age, or mental or physical disability. BOULDER, COLO., REV. CODE § 12-1-2 to -4 (1987). Also, the Boulder ordinance did not permit the owner of an owner-occupied, one-family dwelling or duplex to deny housing to an individual based on his or her sexual orientation. *Id.* However, the ordinance did allow owners to limit renters or lessees to persons of the same sex. *Id.* The Denver ordinance entirely exempted religious institutions, thus allowing them to refuse to hire persons or restrict access to public accommodations or housing based on a person's sexual orientation. DENVER, COLO., REV. MUN. CODE art. IV, § 28-91 to -116 (1991). It also exempted owners with rental spaces in their homes or duplexes (in which they resided). *Id.*

that employers or landlords seek out homosexual, lesbian, or bisexual employees or tenants. The anti-discrimination laws do not designate homosexuals, lesbians, or bisexuals as "ethnic minorities," rather, they prohibit discrimination based on *sexual orientation.*[94] Thus, they also prohibit discrimination against heterosexuals.[95] The Denver Public Schools also adopted a policy prohibiting discrimination based on an individual's sexual orientation.[96]

As for state laws and policies, the Governor of Colorado issued an executive order in 1990,[97] prohibiting employment discrimination (i.e. hiring, promotion, firing) based on the sexual orientation of classified and exempt state employees. The order applied to primary educational state institutions and to executive departments.[98] The only Colorado statute forbidding discrimination based on sexual orientation prohibited health insurance companies from relying on an individual's sexual orientation when determining insurability.[99] The Colorado Civil Rights Commission voted to recommend amending the state's civil rights laws to include a prohibition against discrimination based on sexual orientation.[100]

Anti-discrimination laws and policies exist in other states besides Colorado. Six states (Connecticut,[101] Hawaii,[102] Massachusetts,[103] New Jersey,[104] Vermont,[105] Wisconsin[106]) and the District of Columbia[107], and approximately 110 cities and counties in 25 states have enacted legislation in areas of employment, housing, and public

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94. LEGISLATIVE COUNCIL, *supra* note 29, at 10.

95. *Id.* Colorado Springs and Fort Collins defeated similar anti-discrimination ordinances. *Id.*

96. *Id.*

97. Exec. Order No. D0035 (Dec. 19, 1990).

98. LEGISLATIVE COUNCIL, *supra* note 29, at 10. Metropolitan State College of Denver had a policy which prohibited discrimination in membership in college sponsored social clubs on the basis of a person's sexual orientation. *Id.* Colorado State University had a nondiscrimination policy which applied to everyone, not just sponsored social clubs. *Id.* On the other hand, the Colorado Board of Regents declined to enact a resolution prohibiting discrimination based on sexual orientation. *Id.*

99. COLO. INS. CODE § 10-3-1104, 4A C.R.S. (Supp. 1994). In 1991, legislation failed which would have extended Colorado's ethnic intimidation law to include protection against harassment for everyone, regardless of age, handicap, disability, or sexual orientation. LEGISLATIVE COUNCIL, *supra* note 29, at 10.

100. LEGISLATIVE COUNCIL, *supra* note 29, at 10.

101. CONN. GEN. STAT. ANN. § 46a-60 (West 1986 & Supp. 1994).

102. HAW. REV. STAT. § 378-2 (Supp. 1992).

103. MASS. GEN. LAWS ANN. ch. 151B, § 4, ch. 272, § 98 (West 1993).

104. N.J. STAT. ANN. §§ 10:5-4, -12 (West 1994 & Supp. 1994).

105. VT. STAT. ANN. tit. 9, § 4502 (1993).

106. WIS. STAT. ANN. §§ 66.432, 111.36 (West 1993).

107. LEGISLATIVE COUNCIL, *supra* note 29, at 10.

accommodations protecting homosexuals, lesbians, and bisexuals from discrimination based on their sexual orientation.[108] In November of 1992, the Oregon Court of Appeals struck down a statute that permitted state officials to take a personnel action against an employee on the basis of the employee's sexual orientation, thus reaffirming the validity of its rules that expressly prohibit discrimination on that basis.[109]

Governors in eight states (California, Minnesota, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, and Washington) issued executive orders protecting state employees from discrimination in employment based on their sexual orientation.[110] Also, nearly sixty-five colleges and universities nationwide have issued non-discrimination policies protecting heterosexual, homosexual, lesbian, and bisexual persons.[111]

With the birth of such measures as Amendment 2, non-discrimination laws and policies regarding homosexuality are in jeopardy. This type of initiative nullifies and voids anti-discrimination ordinances and policies concerning homosexuals. Amendment 2 made all existing anti-discrimination ordinances, laws, regulations, and policies in Colorado prohibiting discrimination based on an individual's homosexual, lesbian, or bisexual orientation unenforceable and unconstitutional.[112] As demonstrated by the aforementioned school policies, laws, and executive orders passed in other states, support exists for gay rights in areas of employment, education, and public accommodations. However, since Amendment 2 inspired drives for similar ballot measures in other states,[113] the existence of anti-homosexual discrimination laws and policies remains vulnerable.[114]

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108. *Id.*

109. Merrick v. Board of Higher Educ., 841 P.2d 646 (Or. Ct. App. 1992). In 1988, Oregon voters overturned an executive order that protected homosexuals from discrimination in state government. LEGISLATIVE COUNCIL, *supra* note 29, at 10. For a discussion of the Oregon situation as of the end of 1993, see *infra* note 114.

110. LEGISLATIVE COUNCIL, *supra* note 29, at 10.

111. *Id.*

112. *Id.* at 9.

113. *See supra* text accompanying note 77 (listing the states inspired by Amendment 2).

114. Although Colorado was the first state to pass an anti-gay state constitutional amendment, it was not the first to attempt to place such a measure on the state ballot. California and Oregon both attempted to adopt by ballot a measure that repealed existing state legislation relating to homosexual rights.

In California, citizens sought to place an anti-homosexual and acquired immune deficiency syndrome (AIDS) ordinance on the ballot. Citizens for Responsible Behavior v. Superior Ct., 1 Cal. App. 4th 1013 (1991). The California Court of Appeals did not allow their proposed ordinance to

In addition to the recent struggle homosexuals, lesbians, and bisexuals experience in the states in attempting to uphold existing anti-discrimination policies and legislation, this class of persons has met resistance in the past as well. Homosexuals have used various provisions of the federal Constitution in an attempt to be placed on equal ground with everyone else. The court in *Evans v. Romer,*[115] by declaring the existence of a fundamental right to political participation, provided a means for homosexuals, lesbians, and bisexuals, to have equal involvement in the governmental process. A discussion of the history of gays' struggle for equal rights is useful to understand the step the *Evans* court took to ensure that the democratic process was accessible to all, in particular here, homosexuals, lesbians, and bisexuals.

C. History of Gays' Struggle for Equal Rights

The history of the United States demonstrates that "when a despised minority must fend for itself in the tumult of electoral and legislative politics, the majority may deny it a fair chance."[116] In the summer of 1986, in *Bowers v. Hardwick,*[117] the U.S. Supreme Court clearly stated its position regarding homosexuality. The Court declared that no fundamental privacy right attached to consensual homosexual sodomy.[118] Thus stood the breaking ground for a denial of other rights as well.

Homosexuals fought for status and equal rights by challenging policy and legislation through the First Amendment freedom of ex-

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be presented on the ballot, stating that it violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1026-27.

In Oregon, the debate concerned the exact wording of an anti-homosexual ballot title. However, unlike the California court's outright refusal to place a similar measure on the ballot, the Oregon Supreme Court, in 1993, certified a ballot title for a proposed initiative measure. Mabon v. Keisling, 856 P.2d 1023 (Or. 1993).

Both the Oregon and California initiative were similar to Amendment 2. They prevented the state government from creating classifications based on homosexuality and indirectly allowed discrimination based on an individual's sexual orientation. These cases demonstrate the impact on homosexual rights of a measure like Amendment 2. They further illustrate how other courts dealt with the issue prior to having the measure placed on the ballot, where as the Colorado court was not faced with the issue until after the amendment was already passed.

115. Evans v. Romer, 854 P.2d 1270 (Colo.), *cert. denied,* 114 S. Ct. 419 (1993).

116. Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity,* 36 UCLA L. REV. 915, 916 (1989).

117. Bowers v. Hardwick, 478 U.S. 186 (1986).

118. *Id.*

pression and association,[119] fundamental right to privacy,[120] and equal protection clause.[121] However, the United States Supreme Court held that homosexuals have no fundamental right to privacy[122] and the federal courts consistently hold that homosexuals are neither a suspect nor a quasi-suspect class, which would guarantee them protection against discrimination.[123]

For example, in *Gay Students Organization of the University of New Hampshire v. Bonner,*[124] gay students succeeded on a first amendment right to association claim, allowing them to express their beliefs on a college campus. In *Bonner,* a gay student's organization challenged the state university's prohibition against the organization's holding social functions on campus.[125] The court found that this prohibition denied the gay students their right to association.[126]

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119. *See* Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652 (1st Cir. 1974) (prohibiting gay organization from social activities on campus denied members of organization their right of association); Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980), (holding that gay male high school student's taking male date to prom was "symbolic speech" protected by the first amendment) *vacated and remanded,* 627 F.2d 1088 (1st Cir. 1981). *But see* Gay & Lesbian Students Ass'n v. Gohn, 656 F. Supp. 1045 (W.D. Ark. 1987) (holding that the denial of funding to gay and lesbian student's association did not unduly interfere with the association's right of free speech and free association).

120. *See* Dronenberg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (holding that the Navy policy of mandatory discharge for homosexual conduct did not violate constitutional right to privacy); State v. Walsh, 713 S.W.2d 508 (Mo. 1986) (finding that there is no fundamental right to engage in private consensual homosexuality). *But see* Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (invalidating a statute criminalizing private sexual relations between consenting adults of the same sex because it violated state constitutional right to privacy); *accord* State v. Morales, 826 S.W.2d 201 (Tex. Ct. App. 1992).

121. *See* Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) (upholding against equal protection challenge an army regulation which made homosexuality or admitted homosexuality a nonwaivable disqualification for service), *cert. denied sub nom.* Ben-Shalom v. Stone, 494 U.S. 1004 (1990); *In re* Opinion of the Justices, 530 A.2d 21 (N.H. 1987) (upholding against equal protection challenge a bill which excluded homosexuals as foster parent or adoptive parent). *But see* Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991) (holding that former Army Reserve Officer stated an equal protection claim by alleging she was discharged based on her status as a homosexual), *cert. denied,* 113 S. Ct. 655 (1992).

122. Bowers v. Hardwick, 478 U.S. 186 (1986).

123. Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied sub nom.* Ben-Shalom v. Stone, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied,* 494 U.S. 1003 (1990); National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1984), *aff'd,* 470 U.S. 903 (1985). *But see* Jantz v. Muci, 759 F. Supp. 1543 (D. Kan. 1991)(finding inherently suspect a government classification based on an individual's sexual orientation), *rev'd on other grounds,* 976 F.2d 623 (10th Cir. 1992).

124. Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652 (1st Cir. 1974).

125. *Id.*

126. *Id.*

However, in *Gay and Lesbian Students Association v. Gohn*,[127] an Arkansas court rejected homosexual students' claim of a right to free speech and association. The court upheld a university's denial of funding to a homosexual rights student organization.[128] The court found that the denial of funding did not infringe on the organization's right of free speech or right of free association because the organization had equal access to campus facilities and communications, and it did not prevent the gay students from advocating their views.[129] The Arkansas court also found that the denial of funding did not infringe on the organization's right to equal protection because it was "rationally related to a legitimate interest" in distributing a limited amount of funds in a manner beneficial to the entire campus.[130]

As for the right to privacy claim, overall, homosexuals have been unsuccessful. The Supreme Court in *Bowers v. Hardwick*[131] laid the foundation for the inapplicability of this right to homosexual conduct by holding that homosexuals do not have a fundamental right to engage in sodomy. Even consensual homosexual conduct occurring in the privacy of one's own home was not protected.[132] Some state courts, on the other hand, ignored *Bowers* and found that a constitutional right to privacy existed for consenting homosexuals to engage in private sexual relations.[133]

Homosexuals have likewise struggled in the courts to gain equal status with heterosexuals. For example, the Supreme Court of Hawaii recently affirmed the denial of marriage license applications to homosexuals, finding no equal protection violation.[134] The Hawaii court held that homosexuals do not have a fundamental right to

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127. Gay & Lesbian Students Ass'n v. Gohn, 656 F. Supp. 1045 (W.D. Ark. 1987). Note that this decision was decided a year after Bowers v. Hardwick, 478 U.S. 186 (1986), while the *Bonner* decision was twelve years prior to *Bowers*.

128. *Id.* at 1057.

129. *Id.* at 1056.

130. *Id.* at 1057.

131. 478 U.S. 186 (1986). The Supreme Court made no mention of whether heterosexuals were also denied this right although the Georgia statute criminalizing sodomy did not make a distinction between homosexuals and heterosexuals. "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . ." *Id.* at 188.

132. *Id.* at 195-96.

133. *See* Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992); State v. Morales, 826 S.W.2d 201 (Tex. Ct. App. 1992).

134. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

marry.[135] The Supreme Court of New Hampshire also found no equal protection violation by a bill which excluded homosexuals as foster parents or adoptive parents.[136] A California court rejected an equal protection challenge to the state's denial of dental care benefits to partners of homosexual state employees.[137] Overall, courts have consistently rejected equal protection challenges by homosexuals, lesbians, and bisexuals.

The Colorado Supreme Court turned the tide of a history of denying rights to homosexuals. The *Evans* court safeguarded existing legislation protecting homosexuals from discrimination in areas of housing, public accommodations, and employment[138] by preventing Amendment 2 from repealing this legislation. In what could have resulted in a denial of equal protection for homosexuals, lesbians, and bisexuals, had the *Evans* court supported the amendment, resulted in a statement that homosexuals deserve the right to equal protection of the laws.

Through the fundamental right strand of the equal protection clause, the Colorado Supreme Court has now provided a new constitutional argument for this class of persons by holding that homosexuals, lesbians, and bisexuals have a fundamental right to participate equally in the political process.[139] In order to understand how the court developed this fundamental right, it is helpful to review how the fundamental right and political participation concept developed.

D. Overview of Equal Protection Analysis

The equal protection clause has been called " 'the single most important concept in the Constitution for the protection of individual rights.' "[140] The United States Supreme Court has interpreted this clause to protect suspect classifications such as women,[141] racial mi-

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135. *Id.*

136. *In Re* Opinion of the Justices, 530 A.2d 21 (N.H. 1987).

137. Hinman v. Department of Personnel Admin., 213 Cal. Rptr. 410 (1985). The court stated that homosexual state employees were not unlawfully discriminated against because the Dental Care Act at issue denied benefits to "unmarried partners of the state employees." *Id.* at 414. *Cf.* Phillips v. Wisconsin Personnel Comm'n, 482 N.W.2d 121 (Wis. Ct. App. 1992) (upholding the denial of family health insurance coverage for a lesbian companion).

138. *See supra* notes 93-99 and accompanying text (discussing the existing legislation protecting homosexuals from discrimination).

139. Evans v. Romer, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

140. Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 121 (1989).

141. *See* Frontiero v. Richardson, 411 U.S. 677 (1973) (invalidating federal law that automati-

norities,[142] resident aliens,[143] and illegitimate children[144] from discriminatory treatment. The clause further prevents the government from infringing on a fundamental right of any class of persons. The clause also requires that all government classifications be rationally related to legitimate purposes.[145] A description of what constitutes a suspect class and a fundamental right under the equal protection clause is helpful to understand the basis of the Colorado court's decision in *Evans*, as the court did not recognize homosexuals as a suspect class,[146] but provided an outlet for protection under the fundamental right strand.

1. Suspect Classifications

A suspect class is a group of individuals deserving special protection in our judicial system and political structure because they have been subjected to a history of "purposeful, unjustified discrimination," and to "political powerlessness."[147] Since such groups appear unable to utilize normal political processes to change adverse legislation, courts proceed more cautiously in reviewing relevant legislation to determine if its purpose is legitimate and is not simply a

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cally granted benefits to spouse of male member of armed forces, but granted such benefits to spouses of women in the armed forces only if she demonstrated his dependence on her for support); Reed v. Reed, 404 U.S. 71 (1971) (invalidating Idaho statute providing preference to males for administering a decedent's estate). Gender is considered to be more of a quasi-suspect class than a suspect class. Galloway, *supra* note 140, at 125. Gender-based classifications violate the equal protection clause unless the government can show that the classification is "substantially related to an important interest." *Id.*

142. *See* Hunter v. Erickson, 393 U.S. 385 (1969) (invalidating city charter amendment that prohibited city council from enacting any housing ordinance dealing with race, religion, or ancestral discrimination without voter approval); Brown v. Board of Educ., 347 U.S. 483 (1954) (finding racial segregation in schools a denial of equal protection).

143. *See* Plyler v. Doe, 457 U.S. 202 (1982) (finding no rational basis for a Texas statute that denied education to children of illegal aliens); Graham v. Richardson, 403 U.S. 365 (1971) (invalidating provisions of state welfare laws which imposed durational residency requirements on aliens).

144. *See* Pickett v. Brown, 462 U.S. 1 (1983) (holding that two-year statute of limitations on proof of paternity for children born out of wedlock violated equal protection); Gomez v. Perez, 409 U.S. 535 (1973) (holding that the failure to provide support rights for children born out of wedlock violated the equal protection clause). *But see* Lalli v. Lalli, 439 U.S. 259 (1978) (finding no equal protection violation with a New York statute that required illegitimate children who would inherit from their fathers to provide proof of paternity). Illegitimacy is considered to be a quasi-suspect class rather than a suspect class. Galloway, *supra* note 140, at 125.

145. Galloway, *supra* note 140, at 121.

146. Evans v. Romer, 854 P.2d 1270, 1275 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

147. Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 938 (1991).

discriminatory measure aimed at an unprotected minority.[148]

The Supreme Court has articulated the relevant characteristics of a suspect class as follows: a suspect class has suffered a long history of discrimination; the class is "discrete, insular, and relatively powerless politically;" it is defined by an immutable characteristic; and is "defined by a stigmatizing characteristic that is generally irrelevant as a basis for legislation."[149] For example, "classifications based on race, ethnicity, nationality, and alienage are suspect."[150] The Court has recently resisted the recognition of any new suspect classes.[151] This reluctance appears to originate from a belief that all true suspect classes have been identified.[152] Numerous courts consistently reject homosexuals as constituting a suspect classification.[153] The *Evans* court followed this pattern and restated the current position that homosexuals do not qualify as a suspect class.[154] Since homosexuals were not a suspect class, the Colorado court based its holding on the fundamental right strand of the Equal Protection Clause.

2. *Fundamental Rights Generally*

Fundamental rights are rights which the Court determines as "having a value so essential to individual liberty in our society" that they permit the Court to review acts of other government branches.[155] The test for determining whether a particular right is fundamental is whether the right is "explicitly or implicitly guaranteed by the Constitution."[156] For example, freedom of speech and religion are fundamental rights because the first amendment explicitly protects them.[157] Similar to rejecting an expansion of the list of

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148. *Id.* (citing the decision in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) wherein the Court discussed whether prejudice against particular minorities would require judicial scrutiny due to possible failure in the political process).

149. *Id.* at 975.

150. *Id.* at 939 (citations omitted); Galloway, *supra* note 140, at 124.

151. Strasser, *supra* note 147, at 947.

152. *Id.*

153. *See supra* note 123 (listing cases which stated that homosexuals were not a suspect class).

154. Evans v. Romer, 854 P.2d 1270, 1275 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

155. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.7, at 388 (4th ed. 1991).

156. Galloway, *supra* note 140, at 148 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973)).

157. *Id.* "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. CONST. amend. I. Likewise, the right of privacy is a fundamental right because the Supreme Court has implicitly upheld it as

"suspect classes," the Supreme Court is also wary of expanding the fundamental rights list, stating that it was unwilling to recognize a new fundamental right "particularly if it require[d] redefining the category of rights deemed to be fundamental."[158]

One of the most significant fundamental rights recognized by the Supreme Court is the right to vote and to participate in the process of government.[159] The right of citizens to participate in the governmental process also involves the right to be represented in a republican form of government and the right to petition the government for redress of grievances.[160] Actions which interfere with the exercise of such fundamental rights by particular individuals or groups are subject to strict scrutiny under the equal protection clause.[161] In *Evans,*

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such through the due process clauses. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down a statute which forbade the use of contraceptives because it violated a marital privacy right found implicit in the Due Process Clause). The rights of interstate migration, Shapiro v. Thompson, 394 U.S. 618 (1969), and equal voting weight are also fundamental because they are implicitly protected by the Constitution. *See* Reynolds v. Sims, 377 U.S. 533 (1964) (emphasizing the "one man one vote"); *see also* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE § 17.7, at 435 (2d ed. 1992) (stating there is a fundamental right to have one's vote counted equally).

158. Strasser, *supra* note 147, at 954.

159. *See, e.g.,* Reynolds v. Sims, 377 U.S. 533 (1964) (recognizing that the right to vote cannot be diluted and that each citizen has a right to full and effective participation in the political process).

160. *Id.*; *see also* Jarmel v. Putnam, 499 P.2d 603 (Colo. 1972) (holding that a three month durational residency requirement for voting in non-presidential elections was unconstitutional under the Fourteenth Amendment).

161. Williams v. Rhodes, 393 U.S. 23, 31 (1968) (holding that when strict scrutiny applies, a state's law violates the Equal Protection clause by interfering with the fundamental right to vote if it favors traditional political parties over new parties); *Reynolds,* 377 U.S. at 562 (holding that each person is entitled to a vote of equal value). Strict scrutiny is one of three standards of review applied under the Equal Protection Clause. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE § 18.3, at 14-16 (2d ed. 1992). Besides strict scrutiny, there is the rational basis test and intermediate scrutiny. *Id.*

Strict scrutiny is the harshest standard to meet to justify creating distinctions between one group from another. Classifications based on race, ethnicity, and national origin violate the equal protection clause unless the government can satisfy "strict scrutiny" by showing that the classification is "necessary to further a compelling interest." *See, e.g.,* Loving v. Virginia, 388 U.S. 1 (1967) (holding that classification based on race was subject to strict scrutiny test); Korematsu v. United States, 323 U.S. 214 (1944) (holding that national ancestry and ethnic origin deserved strict scrutiny analysis). Even if the government demonstrates a compelling interest, the Court will not uphold the classification unless the classification is necessary, or narrowly tailored, to promote that interest. NOWAK & ROTUNDA, *supra* note 155, § 14.3. Courts apply this standard under the equal protection clause when a suspect class or fundamental right is involved. *Id.* The application of strict scrutiny recognizes that political choices hindering fundamental rights or embedding bias against a minority group such as race, require special judicial inquiry "in order to preserve substantive values of equality and liberty." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6 (2d ed. 1988).

the Colorado Supreme Court found a fundamental right to participate equally in the political process.[162] Therefore, the court applied a strict scrutiny analysis and held that the defendants did not satisfy a compelling interest justifying enforcement of Amendment 2.[163] A discussion of the fundamental right theory as it pertains to political participation follows in the next section.

F. Development of Fundamental Rights Concerning the Right to Political Participation

As recognized in the preceding section, fundamental rights are "[t]hose rights which have their source, and are explicitly or implicitly guaranteed, in the federal Constitution . . . and state constitutions."[164] Legislative and administrative classifications that interfere with fundamental rights are given strict scrutiny and will be held unconstitutional absent a compelling interest justification.[165] Inequalities directly infringing the access to, or levels of, a fundamental right are particularly harmful when they interfere with voting and litigating, "the two major sources of political and legal legitimacy."[166]

The right to participate in the political process in the context of

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In order to satisfy the rational basis test, the governmental classification must be rationally related to a government end not prohibited by the Constitution. 3 ROTUNDA & NOWAK, *supra*, at 14. Under this test, the law at issue is presumed constitutional and those challenging the law must demonstrate that there is no rational relationship between the classification and the legislative purpose. David M. Treiman, *Equal Protection and Fundamental Rights — A Judicial Shell Game*, 15 TULSA L.J. 183 (1980). As long as the government has a rational basis for creating the classification, the court will uphold the law. This standard of review has been applied to uphold statutes requiring a retirement age, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Vance v. Bradley, 440 U.S. 93 (1979), and to uphold a school financing system based on local property taxes, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

When the Supreme Court adopts an intermediate standard of review, less deference is given to the classification at issue than under the rationality test; however, it is not as difficult a standard for the government to meet as the strict scrutiny test. 3 ROTUNDA & NOWAK, *supra*, at 17. Under the intermediate standard of review, the classification must have a "substantial relationship" to an "important" government interest. *Id.* This standard has been applied in cases involving gender, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), illegitimacy, Lalli v. Lalli, 439 U.S. 259 (1978), alienage, Plyler v. Doe, 457 U.S. 202 (1982), and the mentally retarded, Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

162. Evans v. Romer, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

163. *Id.* at 1286.

164. BLACK'S LAW DICTIONARY 674 (6th ed. 1990); *see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (suggesting that fundamental rights must be explicitly or implicitly guaranteed by the federal Constitution).

165. TRIBE, *supra* note 161, § 16-7, at 1454.

166. *Id.*

voting has been held to be a "fundamental constitutional value" recognized as a "guise of liberty" under the due process clauses.[167] Application of this fundamental right protects classes such as race, through the equal protection clause.[168] Although by itself, the right to political participation has not been held fundamental, a fundamental right to participate in the political process has evolved through case law interpreting the Constitution in the context of voting, minority party rights, reapportionment, and measures preventing voters from enacting a particular type of legislation. A review of Supreme Court decisions concerning these four categories is useful to understand the Court's position on political participation.

1. Exercising the Right to Vote

The federal Constitution contains explicit provisions pertaining to the right to vote. The Fifteenth Amendment prohibits the states from impairing the right to vote on the basis of a person's "race, color, or previous condition of servitude."[169] The Nineteenth Amendment forbids discrimination in voting based on gender.[170] The Twenty-Fourth Amendment prevents states from imposing a poll tax or any tax as a requirement to vote in a primary election or other election for federal office.[171] The Twenty-Sixth Amendment provides the right to vote for citizens eighteen years or older.[172] The

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167. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965). This is not to be confused with the *Evans* court's analysis of a fundamental right to political participation in the context of legislation which is directly adverse to a group and with regard to the overall governmental process.

168. Dunn v. Blumstein, 405 U.S. 330 (1972) (holding that state laws requiring potential voters to be a resident of that state for a year and a resident of the county for three months do not further any compelling state interest and violate the equal protection clause); Gray v. Sanders, 372 U.S. 368 (1963) (ruling that a Constitutionally protected right to vote includes protection against the dilution of citizen's votes); *see, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (finding that the equal protection clause protects every citizen's inalienable right to full and effective participation in the political processes).

169. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

170. "The right of citizens . . . to vote shall not be denied or abridged by the United States or by any State on account of sex." *Id.* amend. XIX.

171. "The right of citizens . . . to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative of Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." *Id.* amend. XXIV, § 1.

172. "The right of citizens . . . eighteen years of age or older, to vote shall not be denied or abridged by the United States or any State on account of age." *Id.* amend. XXVI, § 1.

Supreme Court has used the Fourteenth Amendment to place further restrictions on the state's ability to place qualifications on the right to vote and also to develop a fundamental right to vote applicable to the states.[173] Therefore, any alleged impairment of this right should be subject to strict scrutiny.[174]

States have attempted to place restrictions on the right to vote in "qualification"[175] cases by requiring as a precondition to voting, the payment of a poll tax,[176] that the person be a civilian,[177] or have property or children.[178] In each of these types of cases, the Court applied strict scrutiny and found the precondition invalid as a violation of the equal protection clause. For example, in *Kramer v. Union Free School District No. 15*,[179] the Court invalidated a statute which allowed only owners or lessees of taxable realty and parents or guardians of children in public schools a right to vote. The Court held that "statutes granting the [right to vote] to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives."[180]

Similarly, in *Harper v. Virginia Board of Elections*,[181] the Court struck down the state's imposition of a poll tax as a voting requirement. The Court concluded that a "[s]tate violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."[182] Likewise, in *Dunn v. Blumstein*,[183] the Court struck down

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173. *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964) (finding that the right to vote without any restrictions is a valued political right, and any infringement on that right is subject to strict judicial scrutiny).

174. *Id.*; *see* NOWAK & ROTUNDA, *supra* note 155, § 14.31 at 816-31 (analyzing the right to vote as a fundamental right). For a discussion of "strict scrutiny," analysis, see *supra* note 161. In more recent cases, the Supreme Court applied a balancing approach for voting instead of using strict scrutiny. 3 ROTUNDA & NOWAK, *supra* note 161, § 18.3, at 1 (Supp. 1993). For an example of the Court's use of a balancing test in a voting rights case, see Burdick v. Takushi, 112 S. Ct. 2059 (1992) (holding that the interests asserted by the state of Hawaii in justifying its prohibition of write-in voters were greater than the slight burdens the policy imposed on voters).

175. Term borrowed from Brief Amicus Curiae of the Colorado Bar Association at 10, Evans v. Romer, 854 P.2d 1270 (Colo.) (No. 93SA17), *cert denied*, 114 S. Ct. 419 (1993). The term "qualification" refers to the states placing a qualification or precondition on an individual's right to vote. *Id.*

176. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

177. Carrington v. Rash, 380 U.S. 89 (1965).

178. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969).

179. *Id.*

180. *Id.* at 626-27.

181. 383 U.S. 663 (1966).

182. *Id.* at 666.

durational residency requirements imposed by the states as a precondition to voting.[184] In this type of case, the Court recognized that when states deny some citizens the right to vote, those citizens are essentially deprived of a fundamental political right safeguarding all rights.[185]

The legislation under review in these cases violated the equal protection clause because the restriction directly "fence[d] out"[186] certain classes of voters. The Court recognized that the right to vote is the root of our constitutional system and is a fundamental right of every citizen.[187] The Court acknowledged that exercising the right to vote is necessary to preserve our democratic system of government and cannot be constitutionally annihilated because of fear of differing political views.[188] The right to vote is necessary to maintain a citizen's full and effective participation in the political process.[189]

2. *Candidate Eligibility Cases*

Similar to the restriction on voting cases, candidate eligibility cases involve legislation preventing individuals from possessing a full and effective voice in the political process. Candidate eligibility concerns legislation which restricts or limits the number or type of parties to be placed on the voting ballot. The practical barrier to ballot access for independent candidates or non-established parties varies greatly from state to state. In ballot access cases, the Court focuses its inquiry on whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity.[190]

The Supreme Court first considered the constitutionality of ballot access restrictions in 1968 in *Williams v. Rhodes*.[191] In that case,

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183. 405 U.S. 330 (1972).

184. The Colorado Supreme Court also invalidated such durational residency requirements. *See* Jarmel v. Putnam, 499 P.2d 603 (Colo. 1972) (holding that a three month durational residency requirement for voting in non-presidential elections was unconstitutional).

185. *Dunn*, 405 U.S. at 336.

186. Carrington v. Rash, 380 U.S. 89, 94 (1965).

187. *See* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (stating that "even the most basic [rights], are illusory if the right to vote is undermined"); *Jarmel*, 499 P.2d at 603 (referring to past cases that have shown that "the right to vote is at the core of our constitutional system and is a fundamental right of every citizen").

188. *Carrington*, 380 U.S. at 94.

189. *See* Reynolds v. Sims, 377 U.S. 533, 565 (1964) (finding that full and effective participation by all citizens in the state government required that each citizen have an equally effective voice in the election).

190. Anderson v. Celebrezze, 460 U.S. 780, 806 (1983).

191. 393 U.S. 23 (1968), *noted in The Supreme Court, 1968 Term*, 83 HARV. L. REV. 60, 86-

Ohio law required new parties to file within ninety days before the Ohio primary and that nominating petitions signed by a number of registered voters equal at least fifteen percent of the total state vote in the last gubernatorial election.[192] The Court found that the election laws made it virtually impossible for a new political party to be placed on state ballots and effectively limited the ballot to the two major parties.[193] The Court invoked strict scrutiny and held that there was a denial of equal protection because a burden was placed on the right of individuals to associate to further their political ideas.[194] The Supreme Court has followed the same rationale in similar cases.[195]

Equal access to the ballot for political parties as demonstrated in *Williams* is important to safeguard the democratic institution and further political participation. However, the states may enact differing legislation based on their own ideas of what constitutes fair and effective participation in the context of candidate eligibility.[196] Nevertheless, ballot access appears to be a vital part of preserving equal access to political participation. Another aspect of the right to political participation is reapportionment, discussed in the next section.

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97 (1969).

192. *Id.* at 24-25.

193. *Id.* at 30. Only the Republican and Democratic candidates qualified for the ballot. *Id.* at 25. The Democratic and Republican parties only needed to obtain 10% of the votes cast in the last gubernatorial election in order to retain their positions on the ballot. *Id.* at 25-26

194. *Id.* at 30; *see* Note, *Developments in the Law: Elections,* 88 HARV. L. REV. 1111, 1135-36 (1975) (discussing possible infringement of associational freedoms as a better justification for applying strict scrutiny).

195. *See* Anderson v. Celebrezze, 460 U.S. 780 (1983) (inquiring whether ballot access restriction unnecessarily burdened availability of political opportunity); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (holding that regulation of a political party's fundamental rights of freedom of association and right to cast votes required a compelling justification).

However, the Colorado Supreme Court applied its own rationale with regard to "candidate eligibility" in Colorado Libertarian Party v. Secretary of Colo., 817 P.2d 998 (Colo. 1991). In that case, the Colorado court held that a one-year unaffiliation requirement on candidates of a "qualified political organization" that was not imposed on candidates of the two major political parties did not violate the equal protection clause. *Id.* at 1004. The Colorado Supreme Court relied on Storer v. Brown, 415 U.S. 724 (1974), which upheld a California election statute that denied ballot access to an independent candidate seeking elective public office if the candidate had a registered affiliation with a qualified political party within one year prior to the immediately preceding primary election. *Id.* at 1003. The requirement in *Colorado Libertarian Party* involved no discrimination among independents and therefore, was valid. *Id.* at 1003-04.

196. *See supra* note 195 (discussing Colorado's own analysis of what constituted effective participation).

3. *Reapportionment*

Reapportionment is a "realignment or change in legislative districts brought about by changes in population."[197] It is constitutionally mandated by the requirement of equal representation, i.e., one person, one vote.[198] The United States Constitution requires a new apportionment of seats in the House of Representatives among states "according to their respective numbers."[199] A state statute which violates a person's right to vote on a one man-one vote apportionment is contrary to the equal protection clause of the fourteenth amendment.[200]

In reapportionment cases, such as *Reynolds v. Sims*,[201] the Supreme Court established the historic "one man one vote" test which altered the analysis of political participation under the equal protection clause.[202] These cases reiterate the Court's realization of participation as an important independent value demanding strict judicial scrutiny. For example, in *Reynolds*, the Court noted that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[203]

In *Reynolds*, the Court was confronted with a challenge to the malapportionment of the Alabama state legislature. The Court relied on the equal protection clause to formulate the one person one vote rule[204] and held that the two legislatively proposed plans for

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197. Reapportionment is defined as a "realignment or change in legislative districts brought about by changes in population and mandated by the constitutional requirement of equality of representation." BLACK'S LAW DICTIONARY, *supra* note 164, at 1264. Apportionment involves the right to have one's vote be as meaningful as the vote of others. Reynolds v. Sims, 377 U.S. 533, 568 (1964) (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963)). It is referred to as the "one person, one vote" rule. *Id.* at 558.

198. BLACK'S LAW DICTIONARY, *supra* note 164, at 1264 (stating under "reapportionment," that a statute "which violates the rights of persons to vote on a one man-one vote apportionment is contrary to the equal protection clause") (citing Baker v. Carr, 369 U.S. 186 (1962).

199. "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . . ." U.S. CONST. art. I, § 2.

200. Reynolds v. Sims, 377 U.S. 533, 568 (1964).

201. 377 U.S. 533 (1964).

202. *Id.* at 562.

203. *Id.*; *see also* Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (finding that before the right to vote can be restricted, "the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny"); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (stating that "even the most basic [rights] are illusory if the right to vote is undermined").

204. Chief Justice Warren formulated the one person, one vote rule:

> Legislators represent people, not trees or acres. . . . And, if a State should provide

apportionment of seats in the Alabama legislature were invalid under the equal protection clause because the apportionment was not based on population and lacked rationality.[205] The Court recognized that citizens have an "inalienable right to full and effective participation in the political processes" of the state legislature.[206]

In a companion case, *Lucas v. Forty-Fourth General Assembly of Colorado,*[207] decided on the same day as *Reynolds,* the Court found that a constitutional right exists for citizens to have their vote given equal weight. The Court held that this right could not be rejected, even by a majority vote of the state's electorate, if the plan for apportionment did not satisfy the requirements of the equal protection clause.[208] The fact that an apportionment scheme was adopted by a majority was insufficient to uphold it or to restrict a court from taking action.[209] The Court rationalized this holding by stating 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.' A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."[210]

These cases stand for the proposition that dilution of the right to vote violates the Equal Protection Clause. Reapportionment affects an individual's right to have an equal say in our political society and thus affects their political participation.[211] The last category of cases, those concerning voter initiated amendments, is discussed

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> that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.

Reynolds, 377 U.S. at 562. "[T]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* at 568.

205. *Id.* at 585. The voting regulation discriminated against residents living in populous areas in favor of those residents in rural sections. *Id.* at 562-63.

206. *Id.* at 565. The Court went on to say that a citizen's full and effective participation in state government depended on each citizen having an "equally effective voice" in the election of its members for the state legislature. *Id.*

207. 377 U.S. 713, 736-37 (1964).

208. *Id.*

209. *Id.*

210. *Id.* (quoting West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

211. The equal protection guarantee of one person, one vote extends not only to congressional districting plans and to state legislative districting, but also to local government apportionment. *See* Board of Estimate of N.Y. v. Morris, 489 U.S. 688, 692 (1989) (holding that the equal protection guarantee of one person, one vote extended to local government apportionment); *accord* Avery v. Midland County, 390 U.S. 474 (1968).

next.

4. Voter Amendments that Prevent Enactment of Particular Legislation

Cases concerning voter initiated amendments preventing a political institution from enacting a certain type of legislation, most closely resemble the development of a fundamental right to political participation and the application of that right to homosexuals in the *Evans* case. Such voter initiated amendments or measures are most often held to violate the equal protection clause because they place special burdens on a class of persons[212] and interfere with the political process.[213]

In *Hunter v. Erickson*[214] and *Washington v. Seattle School District No. 1*,[215] the Court was confronted with racial classifications in voter initiatives. In both cases, the Court held that the initiative violated the equal protection clause of the fourteenth amendment. In *Hunter*, the voters passed an amendment to the city charter which required voter approval for any housing ordinance based on race, religion, or ancestry, whereas other ordinances could be enacted by the city council.[216] The Court applied strict scrutiny review and invalidated the law due to the presence of a suspect class — race.[217] The Court stated that the law placed "special burdens on racial minorities within the governmental process."[218] The Court found that this was just as unlawful as denying them the right to vote on equal footing with others.[219] Although the amendment was adopted through popular referendum, that did not immunize it from the equal protection clause.[220] The Court reasoned that "the 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

212. *See* Hunter v. Erickson, 393 U.S. 385, 391 (1969) (holding that a city charter amendment violated equal protection because it "place[d] special burdens on racial minorities within the governmental process").

213. *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) (holding that voter initiative interfered with the political process because it restricted minority group's ability to secure public benefits).

214. 393 U.S. 385 (1969).

215. 458 U.S. 457 (1982).

216. 393 U.S. at 386.

217. *Id.* at 392-93.

218. *Id.* at 391.

219. *Id.*

220. *Id.* at 392.

vote or give any group a smaller representation than another of comparable size."[221]

In *Washington,* the voters adopted an initiative which prohibited school boards from requiring any student to attend a school other than the one geographically nearest or next nearest to his home.[222] However, exceptions were permitted for almost all purposes except racial integration. The Court relied on *Hunter* in holding that the initiative violated the equal protection clause. The Court found that the initiative reallocated power similar to what occurred and was condemned in *Hunter.*[223] The initiative removed the authority to address a racial problem from the existing decisionmaking body in a way that burdened minority interests.[224] The Court held that the equal protection clause "guarantee[d] racial minorities the right to full participation in the political life of the community."[225]

In a similar case, *Reitman v. Mulkey,*[226] the Court held that an article in the California Constitution violated the equal protection clause because it involved the state in private racial discriminations. The article was an initiative measure submitted to the people in a state-wide ballot. It prohibited the state from denying any person the right to decline to sell, lease, or rent his real property to any person he chose.[227] The Court approved the California court's examining the article in terms of its "immediate objective," its "ultimate effect," and its "historical context and conditions existing prior to its

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221. *Id.* at 393. The *Hunter* Court held that the Akron amendment discriminated against minorities in that it "disadvantage[d] those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor." *Id.* at 391. The Court concluded that although the amendment was facially neutral, that Negroes, Whites, Jews, and Catholics were all subject to the same requirements if there was housing discrimination against them, "the reality [was] that the law's impact [fell] on the minority." *Id.*

222. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 462-63 (1982). Prior to the passage of this initiative, the local school board had the power to determine what programs would most appropriately fill a school district's educational needs, including desegregation and student assignments. *Id.* at 479-80.

223. *Id.* at 474.

224. *Id.*

225. *Id.* at 467.

226. 387 U.S. 369 (1967).

227. *Id.* at 371. The measure was termed Proposition 14 and provided:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

Id.

enactment."[228] The article did not just repeal existing law forbidding private racial discriminations, "it was intended to authorize, and [did] authorize, racial discrimination in the housing market."[229] In this situation, the Court held it was necessary to assess the potential impact of the action to determine whether the state was significantly involved in discrimination.[230] The Supreme Court agreed with the California court that the article would "significantly encourage and involve the State in private discriminations."[231] Therefore, the initiative violated the equal protection clause.

In each of these three cases, *Hunter, Washington,* and *Reitman,* the Court applied strict scrutiny to invalidate the initiative. Such a standard was necessary due to the substantial burden the legislation placed on the group's ability to participate in the governmental process.[232] For example, in *Washington,* the Court found that the law removed the authority of the decisionmaking body to address a racial problem in such a way as to burden minority interests.[233] The legislation required a compelling justification because it restructured the political process in a way that burdened certain groups.[234]

Overall, the aforementioned categories of cases — precondition on voting, candidate eligibility, reapportionment, and voter initiatives preventing enactment of desired legislation — reflect the proposition that effective political participation is necessary to maintain a just democratic society. All the cases dealt with participation in

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228. *Id.* at 373. The immediate effect of the amendment was to repeal existing anti-racial discrimination housing legislation and to prohibit similar measures from passing in the future. *Id.* at 374. The Supreme Court held that the initiative violated the equal protection clause because it immunized "[t]he right to discriminate, including the right to discriminate on racial grounds . . . from legislative, executive, or judicial regulation at any level of the state government." *Id.* at 377.

229. *Id.* at 381.

230. *Id.* at 380.

231. *Id.* at 381.

232. *See* TRIBE, *supra* note 161, § 16.6, at 1451-54 (discussing the application of strict scrutiny and the equal protection clause).

233. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 474 (1982).

234. Although each of these cases involved a suspect classification — race — the *Evans* court argued that these cases cannot be limited to evaluation based on only a suspect classification. *See infra* notes 278-357 and accompanying text (discussing the *Evans* court proposition that these cases are analogous to their own situation and can be used to develop a fundamental right to equal political participation).

The Court upheld a statute involving political participation, but where no suspect class was discriminated against, in Gordon v. Lance, 403 U.S. 1 (1971). In *Gordon,* a West Virginia statute required that political subdivisions receive approval of 60% of the voters in a referendum election before they could incur bonded indebtedness. *Id.* at 2. The Court found that the requirement did not discriminate or permit discrimination against any particular class and therefore, did not violate the Equal Protection Clause. *Id.* at 7.

the political process, whether it was the right to vote, or the right to be placed on a ballot. The Colorado court, in *Evans v. Romer*,[235] explored these cases in developing its fundamental right to participate equally in the political process. A detailed analysis of the court's opinion follows in the next section.

II. SUBJECT OPINION: *EVANS V. ROMER* AND THE EMERGENCE OF A FUNDAMENTAL RIGHT

A. Facts and Procedure

On November 3, 1992, the Colorado voters passed a state constitutional amendment ("Amendment 2") by a margin of 53.4% to 46.6%.[236] The amendment prohibited the state, its branches or departments, or any of its agencies, political subdivisions, municipalities, and school districts from adopting or enforcing any law or policy that entitled any person to claim discrimination, protected status, minority status, or quota preferences based on homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships.[237] The amendment further made all existing anti-discrimination ordinances, laws, regulations, and policies prohibiting discrimination based on an individual's homosexual, lesbian, or bisexual orientation unenforceable and unconstitutional.[238]

On November 12, 1992, eight homosexuals, one heterosexual, ("individual plaintiffs") the Boulder Valley School District RE-2, the City and County of Denver, the City Council of Aspen, and the City of Boulder and City of Aspen ("governmental plaintiffs") (referred to collectively as "plaintiffs")[239] filed suit in Denver District Court to enjoin the enforcement of Amendment 2 claiming that the amendment was unconstitutional.[240] The individual plaintiffs challenged Amendment 2 as violating their right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution on two grounds: (1) Amendment 2 did not rationally advance any legitimate purpose, and (2) the amendment placed unique burdens on the plaintiffs' ability to participate in the political

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235. 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

236. *Evans*, 854 P.2d at 1272. For the full text of Amendment 2, see *supra* text accompanying note 29.

237. LEGISLATIVE COUNCIL, *supra* note 29, at 9.

238. *Id.*

239. *See supra* note 31 (detailing the list of plaintiffs).

240. *Evans*, 854 P.2d at 1272.

process.[241] The plaintiffs also raised First Amendment violations,[242] as well as violations of the Supremacy[243] and Due Process Clause[244] of the United States Constitution, arguing that the amendment prohibited state courts from enforcing statutes, regulations, ordinances, and policies concerning discrimination based on sexual orientation.[245]

Two of the governmental plaintiffs — the cities of Denver and Boulder that have ordinances prohibiting discrimination in employment, housing, and public accommodations on the basis of sexual orientation[246] — asserted that Amendment 2 affected their home rule powers because it limited their authority to adopt and enforce legislation or regulations protecting rights granted under the United States Constitution, particularly legislation and regulations prohibiting discrimination within their municipal boundaries on the basis of sexual orientation.[247] The Boulder Valley School District RE-2, which has a policy permitting students to seek redress for discrimination based on sexual orientation,[248] claimed that Amendment 2 would violate local control over educational policies protected by

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241. *Id.* at 1272-73 n.2.

242. *Id.* They alleged that Amendment 2 violated their right to petition their government for a redress of grievances; violated their rights to free expression and association, including the chilling effect of Amendment 2 on those who would normally speak freely on matters related to gay, lesbian, or bisexual orientation; violated the constitutional prohibition against the establishment of religion; and was unconstitutionally vague. *Id.*; Amended Complaint at 7-9, Evans v. Romer, No. 92 CV 7223, 1993 WL 19678 (Colo. Dist. Ct. Jan. 15, 1993), *aff'd on other grounds*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993). The federal constitutional claims were brought under 42 U.S.C. § 1983 (1988). Amended Complaint at 7, *Evans* (No. 92 CV 7223). In addition, the individual plaintiffs claimed that the use of the initiative to adopt Amendment 2 violated the republican form of government guaranteed to each citizen by article IV, section 4 of the United States Constitution and the Enabling Act to the Colorado Constitution. *Id.* at 9. They also claimed that Amendment 2 constituted a revision of the state constitution that can only be done through the constitutional convention process provided in article XIX, section 1 of the Colorado Constitution. *Id.* at 9-10.

243. U.S. CONST. art. VI, para. 2.

244. *Id.* amend. XIV, § 1.

245. *Evans*, 854 P.2d at 1272 n.2. They also maintained that Amendment 2 violated the access to the courts provision of the Colorado Constitution. Amended Complaint at 11, *Evans* (No. 92 CV 7223) (referring to the COLO. CONST. art. II, § 6).

246. DENVER, COLO., REV. MUN. CODE art. IV, § 28-91 to -116 (1991); BOULDER, COLO., REV. CODE § 12-1-2 to -4 (1987).

247. Amended Complaint at 12, *Evans* (No. 92 CV 7223).

248. In June of 1992, the school district's board of education adopted Policy JFH, Student Complaints and Grievances. *Id.* at 6. It was issued simultaneously with implementing regulation. *Id.* Both the policy and its regulation prohibited discrimination against any student. *Id.* A procedure was established to provide the right for aggrieved students to seek redress for discrimination, including discrimination based on sexual orientation. *Id.*

Article IX, section 15 of the Colorado Constitution.[249] All of the governmental plaintiffs claimed that Amendment 2 placed them in the position of incurring legal liability for violation of the federal constitution under the Supremacy Clause.[250]

After the district court denied the plaintiffs' request for an expedited hearing on the merits,[251] the plaintiffs filed a motion seeking a preliminary injunction to enjoin the enforcement of the amendment.[252] In support of this motion, plaintiffs argued that Amendment 2 denied gay men, lesbians, and bisexuals equal protection of the laws under the Fourteenth Amendment and that it violated the First Amendment's protection for expressive conduct.[253] Under the Equal Protection Clause, the plaintiffs argued first that Amendment 2 burdened their right to participate equally in the political process.[254] Second, plaintiffs argued that Amendment 2 did not rationally advance any legitimate governmental purpose.[255] Following an evidentiary hearing, the district court granted the plaintiffs' motion barring the enforcement of Amendment 2 pending the outcome of a trial on the merits.[256] The district court did not address the First

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249. *Evans*, 854 P.2d at 1272 n.2.

250. Amended Complaint at 11, *Evans* (No. 92 CV 7223) (citing to a violation of the U.S. CONST. art. VI, para. 2).

251. *Evans*, 854 P.2d at 1273.

252. *Id.* A plaintiff may move for a preliminary injunction in order to prevent the defendant from doing something, or, in this case, to prevent enactment of the amendment. BLACK'S LAW DICTIONARY, *supra* note 164, at 784-85. The injunction is granted when the suit is commenced, and it may either be "discharged or made perpetual, according to the result of the controversy, as soon as the rights of the parties are determined." *Id.* at 785. A preliminary injunction is granted when the party clearly shows "(1) probable success upon a trial on the merits, and (2) likely irreparable injury [] unless the injunction is granted, or (3) [although there is difficulty showing probable success, the party] raised substantial and difficult issues meriting further inquiry, that the harm to [that party] outweighs the injury to others if it is denied." *Id.* at 1180.

253. *Evans*, 854 P.2d at 1273.

254. *Id.*

255. *Id.*

256. Evans v. Romer, No. 92 CV 7223, 1993 WL 19678, at *12 (Colo. Dist. Ct. Jan. 15, 1993). The trial court evaluated plaintiffs' claims under Rathke v. MacFarlane, 648 P.2d 648, 653-54 (Colo. 1982), which enunciated a six part test — the applicable standard for the issuance of a preliminary injunction. The trial court held that plaintiffs satisfied this test. *Evans*, No. 92 CV 7223, 1993 WL 19678, at *12. Under *Rathke*, a moving party must establish "a clear showing that injunctive relief [was] necessary to protect existing . . . fundamental constitutional rights." *Rathke*, 648 P.2d at 653. If this threshold requirement was met, the trial court was to determine whether the moving party demonstrated: a likelihood that they would succeed on the merits; a risk immediate and irreparable injury which could be prevented by injunctive relief; that there was no other timely adequate remedy at law; that granting a preliminary injunction would not harm the public interest; that balancing equities favored the injunction; and that the status quo would be preserved while awaiting a trial on the merits. *Id.* at 653-54.

Amendment claim.

The trial court concluded that plaintiffs met their burden of proof under *Rathke v. MacFarlane*[257] by demonstrating that it was necessary to enjoin the enforcement of Amendment 2 in order to protect their right to equal protection of the laws under the United States Constitution.[258] The trial court reasoned that homosexuals, lesbians, and bisexuals were an "identifiable class"[259] that had a fundamental right "not to have the State endorse and give effect to private biases."[260]

The trial court held that because there was a fundamental right involved with Amendment 2, its constitutionality would have to be assessed under the strict scrutiny standard of review.[261] Under this standard, the trial court concluded that the plaintiffs had a reasonable probability of proving that Amendment 2 was unconstitutional.[262]

Defendants appealed[263] and the Colorado Supreme Court granted review. The basis of defendants' challenge to the preliminary injunction pertained only to the trial court's determination that the plaintiffs had met their burden of proof under *Rathke*[264] "that injunctive relief [was] necessary to protect existing fundamental constitutional rights."[265] The defendants argued that Amendment 2 did not infringe on any legal precedent or right established under the Fourteenth Amendment's equal protection clause.[266] Plaintiffs presented the same equal protection arguments to the Colorado Supreme Court that it did to the trial court; however, plaintiffs did not urge the Court to rely on the right identified by the trial court.[267] In-

257. 648 P.2d 648 (Colo. 1982); *see supra* note 256 (discussing the *Rathke* standard).

258. *Evans*, No. 92 CV 7223, 1993 WL 19678, at *12.

259. *Id.*

260. *Id.* at *11. The trial court cited Palmore v. Sidoti, 466 U.S. 429 (1984) and Reitman v. Mulkey, 387 U.S. 369 (1967) as support for this position. *Evans*, No. 92 CV 7223, 1993 WL 19678, at *10-11 (analyzing these as cases submitted by plaintiffs). The court quoted the Supreme Court's statement in *Palmore*, that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* at *11 (quoting *Palmore*, 466 U.S. at 433). The court also stated that *Reitman* involved a fundamental right because it took "private discrimination [in housing] and . . . gave state support to it." *Id.* at *10.

261. *Id.* at *12. For an analysis of the strict scrutiny standard, see *supra* note 161.

262. *Evans*, No. 92 CV 7223, 1993 WL 19678, at *12.

263. 854 P.2d 1270 (Colo. 1993), *cert. denied*, 114 S. Ct. 419 (1993).

264. 648 P.2d 648 (Colo. 1982); *see supra* note 256 (discussing the *Rathke* standard).

265. *Evans*, 854 P.2d at 1274.

266. *Id.*.

267. *Id.*; *see supra* notes 257-62 and accompanying text (discussing the right identified by the trial court).

stead, the plaintiffs argued that the right identified by the trial court was a fundamental right to political participation, a right violated by Amendment 2.[268] The Colorado Supreme Court considered this argument on appeal.[269]

B. *The Majority Opinion*

Although the Colorado Supreme Court affirmed the trial court's issuance of a preliminary injunction to prevent enforcement of the amendment,[270] it did so for different reasons. Instead of relying on the trial court's "private biases" argument,[271] the Colorado Supreme Court held that homosexuals, lesbians, and bisexuals have a fundamental right to participate on an equal basis in the political process.[272] The *Evans* court developed the fundamental right through case law concerning preconditions on the right to vote,[273] reapportionment,[274] "candidate eligibility,"[275] and legislation which prevented political processes from enacting particular legislation desired by a certain class of voters.[276] After establishing that a fundamental right existed, the court discussed the objective and effects of Amendment 2 in relation to the right to participate equally in the

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268. *Evans*, 854 P.2d at 1273.

269. The Colorado Supreme Court recognized "[t]hat gay men, lesbians, and bisexuals have not been found to constitute a suspect class . . . and that plaintiffs [did] not claim that they constitute[d] such a class." *Id.* at 1275. However, the court found that the equal protection clause still applied through the existence of a fundamental right. *Id.* at 1276.

270. In affirming the trial court's issuance of a preliminary injunction, the Colorado Supreme Court independently reviewed the question of whether Amendment 2 violated an existing constitutional right. *Id.* at 1275. The court stated that the requirement the plaintiffs must meet under Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982), pertained only to whether an existing constitutional right was infringed by Amendment 2. *Id.*; *see supra* note 256 (discussing the *Rathke* standard). The issue under review was strictly a question of law and was subject to *de novo* review on appeal. *Evans*, 854 P.2d at 1275.

271. *See supra* note 260 and accompanying text (discussing the trial court's "private biases" argument).

272. *Evans*, 854 P.2d at 1286.

273. *Id.* at 1277. The "precondition to voting" cases were: Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (invalidating the requirement that voters have property or children); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (invalidating the requirement that voters pay a poll tax); Carrington v. Rash, 380 U.S. 89 (1965) (invalidating the requirement that voters be civilians).

274. *Evans*, 854 P.2d at 1277-78 (focusing on Reynolds v. Sims, 377 U.S. 533 (1964)).

275. *Id.* at 1278 (discussing Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) and Williams v. Rhodes, 393 U.S. 23 (1968)).

276. *Id.* at 1279-84 (focusing on Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982), Gordon v. Lance, 403 U.S. 1 (1971), and Hunter v. Erickson, 393 U.S. 385 (1969)).

political process[277] and found that this right was "clearly affected by Amendment 2, because it bar[red] gay men, lesbians, and bisexuals from having an effective voice in governmental affairs" and "alter[ed] the political process so that a targeted class [was] prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination."[278] Thus, Amendment 2 infringed on the homosexuals, lesbians, and bisexuals fundamental right to equal participation in the political process and the court enjoined its enforcement.[279]

The *Evans* court developed this fundamental right through the fundamental right strand of the Fourteenth Amendment Equal Protection Clause.[280] The court determined that a fundamental right existed and thus strict scrutiny applied by relying on numerous equal protection cases decided by the United States Supreme Court over the last thirty years.[281] The *Evans* court found that these cases manifested a democratic value on the individual's ability to participate in the political process.[282] The court separated the equal protection cases into four categories: (1) cases involving direct restrictions or "preconditions" on the exercise of the political participation franchise, i.e., the right to vote; (2) reapportionment cases; (3) minority party rights or "candidate eligibility" cases; and (4) cases involving attempts to limit a certain groups' ability to have desired legislation implemented through the normal political processes.[283] The *Evans* court held that these cases combined demonstrated that the equal protection clause guaranteed the fundamental right to equal participation in the political process.[284] The court further held that any attempt to infringe on a group's exercise of this right was subject to strict scrutiny.[285] These four categories of cases are discussed in the following text.

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277. *Id.* at 1284-86.

278. *Id.* at 1285.

279. *Id.* at 1286.

280. *See supra* notes 272-79 and accompanying text (discussing the fundamental right analysis).

281. *See supra* notes 273-76 and accompanying text (citing and discussing these cases).

282. *Evans*, 854 P.2d at 1276.

283. *Id.*

284. *Id.*

285. *Id.* To support this conclusion, the court cited Dunn v. Blumstein, finding that "[i]n decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Id.* at 1276-77 (citing *Dunn*, 405 U.S. 330, 336 (1972)).

1. *Legislation Restricting the Exercise of the Right to Vote*

The *Evans* court noted that its first category of cases, those involving legislation placing preconditions on the exercise of the right to vote, were consistently struck down by the United States Supreme Court as violating equal protection because the legislation under review directly "fenced out"[286] certain classes of voters.[287] The Court pointed out that restrictions on the right to vote based on a requirement that voters pay a poll tax,[288] be civilians,[289] or have property or children[290] violated the equal protection clause.[291] The *Evans* court adopted the rationale in *Kramer v. Union Free School District No. 1*[292] to support applying strict scrutiny in these cases.[293] The *Kramer* Court expressed that legislation which selectively granted the franchise "always pose[d] the danger of denying some citizens any effective voice in the governmental affairs which substantially affect[ed] their lives."[294] Thus, the *Evans* court indicated that close judicial scrutiny was required when "legislation impair[ed] a group's ability to effectively participate [] in the [governmental] process."[295] The *Evans* court analogized this emphasis on the value of equal participation discussed in the precondition to voting cases, to the second category of cases, those concerning reapportionment.[296]

2. *Reapportionment*[297]

The *Evans* court cited *Reynolds v. Sims*[298] to both analogize and

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286. The court was referring to Carrington v. Rash, where the Court held that " '[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Carrington*, 380 U.S. 89, 94 (1965). In *Carrington*, the Court held unconstitutional as a violation of the equal protection clause, a Texas provision that prohibited any member of the United States armed forces who moved to Texas during the course of his military duty from ever voting in any election in that state so long as he or she was in the armed forces. *Id.* at 97.

287. *Evans*, 854 P.2d at 1277.

288. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

289. Carrington v. Rash, 380 U.S. 89 (1965).

290. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969).

291. *Evans*, 854 P.2d at 1277.

292. 395 U.S. 621 (1969); *see supra* notes 179-80 and accompanying text (discussing *Kramer*).

293. *Evans*, 854 P.2d at 1277.

294. *Kramer*, 395 U.S. at 627.

295. *Evans*, 854 P.2d at 1277 (noting that "effective" participation was not to be confused with "successful" participation).

296. *Id.* at 1277-78

297. *See supra* note 197 (defining reapportionment).

298. 377 U.S. 533 (1964).

distinguish reapportionment with the precondition on voting cases discussed in the previous section.[299] The court cited *Reynolds* as recognizing the significance of political participation and the necessity for applying a standard of strict scrutiny when that participation may be limited or hindered.[300] The *Evans* court quoted *Reynolds* as acknowledging the proposition that " 'since the right to exercise the [right to vote] in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.' "[301]

The legislation involved in the reapportionment cases differs from legislation imposing a precondition on the right to vote in that dilution of the vote, not denial of the vote, is at issue.[302] The *Evans* court discussed this distinction in reference to *Reynolds,* stating that the legislation involved in that case did not require fulfillment of a contingency before one could vote because no one was prevented or deterred from voting.[303] Rather, the *Evans* court indicated, *Reynolds* involved the equal protection clause and its "participatory effectiveness, i.e., the right to have one's vote be as meaningful as the votes of others."[304] Thus, the *Evans* court concluded that *Reynolds* reflected the proposition set forth in reapportionment cases that the equal protection of the laws guarantee was violated when a group's exercise of the right to vote was made less effective not only because the right to vote is constitutionally mandated, but because that right insures meaningful and effective participation in the political process.[305] The *Evans* court analyzed this principle of "full and effec-

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299. *Evans,* 854 P.2d at 1277-78.

300. *Id.* at 1277; *see supra* notes 201-06 and accompanying text (discussing the *Reynolds* case as it applies to reapportionment).

301. *Evans,* 854 P.2d at 1277 (quoting *Reynolds,* 377 U.S. at 562). To further support this proposition, the *Evans* court cited Wesberry v. Sanders, stating that " 'even the most basic [rights], are illusory if the right to vote is undermined.' " *Id.* (citing Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).

302. *See Reynolds,* 377 U.S. at 565 (holding that an individual's right to vote for state legislators is unconstitutionally impaired when its weight is substantially diluted compared with votes of citizens living in other parts of the state); *see also* Board of Estimate of N.Y. v. Morris, 489 U.S. 688, 701 (1989) (adopting the *Reynolds* Court analysis that in order to "calculat[e] the deviation among [election] districts, the relevant inquiry is whether 'the vote of any citizen is approximately equal in weight to that of any other citizen' ").

303. *Evans,* 854 P.2d at 1277-78. In *Reynolds,* the voting regulation discriminated against residents of the states' populous counties in favor of rural areas. *Reynolds,* 377 U.S. at 563.

304. *Evans,* 854 P.2d at 1278; *see supra* notes 198-200 (discussing the one-man-one-vote rule).

305. *Evans,* 854 P.2d at 1278.

tive political participation" developed in the reapportionment cases in relation to the third category of cases, those concerning "candidate eligibility."[306]

3. *"Candidate Eligibility"*[307]

The *Evans* court expanded on the one-man-one-vote principle in its review of ballot access or "candidate eligibility" cases. The *Evans* court first considered *Williams v. Rhodes*.[308] The court recognized *Williams* as illustrating that state statutes deny equal protection of the laws by placing a considerable burden on the voters' right to effectively cast their votes, regardless of their political affiliation.[309] The *Evans* court pointed out that the *Williams* court applied the strict scrutiny standard of review to hold the Ohio election laws invalid under the equal protection clause, concluding that "only a compelling interest could justify 'imposing such heavy burdens on the right to vote and to associate.' "[310]

The *Evans* court also briefly examined *Illinois State Board of Elections v. Socialist Workers Party*[311] where the Supreme Court held unconstitutional an Illinois Election Code that required more than 25,000 signatures to place independent candidates and new political parties on state ballots whereas only signatures of five percent of eligible voters was required at the local level.[312] The *Evans* court noted that even though the Supreme Court recognized a valid state interest in regulating the number of candidates appearing on a ballot, the Court invalidated the Illinois laws, holding that they "unnecessarily restricted a constitutionally protected liberty."[313]

The *Evans* court noted that the "precondition," reapportionment, and "candidate eligibility" cases did not directly control the Amend-

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306. *Id.*

307. *See supra* note 190 and accompanying text (defining candidate eligibility).

308. 393 U.S. 23 (1968); *see supra* notes 188-93 and accompanying text (discussing *Williams*).

309. *Evans*, 854 P.2d at 1278 (citing *Williams*, 393 U.S. at 31).

310. *Id.* (quoting *Williams*, 393 U.S. at 31).

311. 440 U.S. 173 (1979).

312. *Id.* at 187.

313. *Evans*, 854 P.2d at 1278. The Supreme Court held the Illinois laws unconstitutional under the Fourteenth Amendment Equal Protection Clause and the First Amendment freedom of association. *Socialist Workers Party*, 440 U.S. at 184. The Supreme Court recognized that ballot access restrictions burden two fundamental rights: "the right of individuals to associate for the advancement of political beliefs" (First Amendment) and "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively" (Fourteenth Amendment). *Id.*

ment 2 issue.[314] The court admitted that those cases involved constitutional problems distinct from those addressed in *Evans v. Romer*.[315] However, the *Evans* court explained that the relevance of those cases to the Amendment 2 issue concerned the consistent recognition by the United States Supreme Court of the exceeding importance of political participation in our governmental system.[316] The Supreme Court articulated that importance through the principle 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."[317] The *Evans* court recognized that this fundamental principle applied to the fourth category of cases, those involving legislation which prevented the normal political institutions and processes from enacting particular legislation desired by a certain group of voters.[318]

4. Legislation Which Prevents Certain Voters From Enacting Desired Legislation

The *Evans* court observed that legislation which prevents the normal political institutions and processes from enacting legislation desired by a certain group of voters, more closely resembled the question presented by Amendment 2.[319] Yet, the *Evans* court indicated that all four categories of cases it discussed[320] adopted the principle that laws may not burden the right to equal political participation for a certain group unless supported by a compelling state interest.[321]

In each case falling within this fourth category, the legislation was held to violate the Equal Protection Clause.[322] The *Evans* court relied on three cases to further develop its finding that a fundamen-

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314. *Evans*, 854 P.2d at 1278.

315. *Id.*

316. *Id.* at 1279.

317. *Id.*

318. *Id.*

319. *Id.*

320. Namely, the precondition on voting cases, the reapportionment cases, the cases involving candidate eligibility, and cases concerning voter initiatives preventing enactment of desired legislation.

321. *Evans*, 854 P.2d at 1279.

322. For a discussion of the cases striking down such legislation as violating equal protection, see *supra* notes 212-34 and accompanying text.

tal right to equal participation in the political process exists not only for everyone, but also in this particular circumstance, for homosexuals, lesbians, and bisexuals. The first case discussed was *Hunter v. Erickson.*[323]

The *Evans* court recognized that a municipal charter amendment in *Hunter* was aimed at minority racial groups, and noted that the concerns addressed in *Hunter* were not limited to racial discrimination.[324] To support this proposition, the court in *Evans* referred to Justice White's[325] conclusion in *Hunter* that although Akron could have required a majority vote on all its municipal legislation, by doing otherwise, "Akron could '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.' "[326] The *Evans* court pointed out that the *Hunter* court did not rely on precedent concerning racial minorities in relation to voting in reaching this conclusion.[327] Instead, the *Evans* court noted, the Supreme Court cited *Reynolds v. Sims*[328] and *Avery v. Midland County,*[329] neither of which involved racial discrimination, or any other recognized suspect class.[330]

The *Evans* court further justified its finding that *Hunter* was not limited to racial discrimination by comparing Justice Harlan and Justice Stewart's concurring opinions in *Hunter* with their dissents in *Reitman v. Mulkey.*[331] In *Reitman,* the dissenting Justices disagreed that an article to the California constitution was unconstitu-

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323. 393 U.S. 385 (1969); *see supra* notes 214-21 and accompanying text (discussing *Hunter*).

324. *Evans,* 854 P.2d at 1279-80.

325. Justice White wrote the majority opinion in *Hunter.*

326. *Evans,* 854 P.2d at 1279 (quoting *Hunter,* 393 U.S. at 393).

327. *Id.*

328. 377 U.S. 533 (1964).

329. 390 U.S. 474 (1968).

330. *Evans,* 854 P.2d at 1280. The Supreme Court has held race, ethnicity, and national origin to be traditionally suspect classes. Galloway, *supra* note 140, at 124; *see supra* text accompanying notes 147-54 (discussing relevant characteristics of a suspect class). The voting regulation in *Reynolds* discriminated against residents living in populous areas in favor of those residents in rural sections. *Reynolds,* 377 U.S. at 545-46; *see supra* notes 201-06 and accompanying text (discussing the *Reynolds* case). In *Avery,* the discrimination was between taxpayers in different districts. *Avery,* 390 U.S. at 474. The Court held in *Avery* that, when developing local government arrangements, the Constitution required that units with "general governmental powers over an entire geographical area not be apportioned among single-member districts of substantially unequal population." *Id.* at 485-86.

331. *Evans,* 854 P.2d at 1280; *see supra* notes 226-31 and accompanying text (discussing *Reitman*).

tional because the state action was neutral, meaning it did not actively and purposefully promote discrimination.[332] The *Evans* court indicated that in their concurring opinions in *Hunter,* Justices Harlan and Stewart observed that, "unlike the California initiative, 'the City of Akron [had] not attempted to allocate governmental power on the basis of any general principle.' "[333] Instead, the *Evans* court continued, the concurring Justices found that the fair housing ordinance in *Hunter* violated the Equal Protection Clause because it was passed with the intent of ensuring that racial and religious minorities had more difficulty enacting beneficial legislation.[334]

The second case the *Evans* court relied on in discussing its fourth category of cases was *Washington v. Seattle School District No. 1.*[335] The *Evans* court analyzed this case as presenting another situation in which a minority group was denied consideration of an issue through the political process.[336] The *Evans* court noted that the Supreme Court in *Washington* relied on *Hunter v. Erickson*[337] to hold that by passing an initiative which prevented the use of busing to achieve desegregation, the voters had "impermissibly interfered with the political process and unlawfully burdened the efforts of minority groups to secure public benefits."[338]

The *Evans* court emphasized that the Court in *Washington* held

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332. Justice Harlan believed that "the state action required to bring the Fourteenth Amendment into operation must be affirmative and purposeful, actively fostering discrimination." *Reitman,* 387 U.S. at 395.

333. *Evans,* 854 P.2d at 1280 (citing Hunter v. Erickson, 393 U.S. 385, 395 (1969) (Harlan, J., concurring)). In *Hunter,* Justices Harlan and Stewart described the "general principle" as follows:

> The existence of a bicameral legislature or an executive veto may on occasion make it more difficult for minorities to achieve favorable legislation; nevertheless, they may not be attacked on equal protection grounds since they are founded on neutral principles. Similarly, the rule which makes it relatively difficult to amend a state constitution is commonly justified on the theory that constitutional provisions should be more thoroughly scrutinized and more soberly considered than are simple statutory enactments. Here, too, Negroes may stand to gain by the rule if a fair housing law is made part of the constitution, or they may lose if the constitution adopts a position of strict neutrality on the question. But even if Negroes are obliged to undertake the arduous task of amending the state constitution, they are not thereby denied equal protection. For the rule making constitutional amendment difficult is grounded in neutral principle.

Hunter, 393 U.S. at 394-95 (Harlan, J., concurring).

334. *Evans,* 854 P.2d at 1280 (citing *Hunter,* 393 U.S. at 395 (Harlan, J., concurring)).

335. 458 U.S. 457 (1982).

336. *Evans,* 854 P.2d at 1280; *see supra* notes 222-25 and accompanying text (discussing *Washington*).

337. 393 U.S. 385 (1969); *see supra* notes 214-21 and accompanying text (discussing *Hunter*).

338. *Evans,* 854 P.2d at 1280 (referring to *Washington,* 458 U.S. at 467-70).

that the Fourteenth Amendment applied to "political structures" that transform the governmental process in such a way that it places special burdens on the minority group's ability to achieve legislation in its interest.[339] As the Court in *Washington* indicated and the *Evans* court agreed, substantial burdens were imposed on racial minorities since the initiative used race to define the governmental decisionmaking structure instead of relying on neutral principles.[340]

After discussing *Hunter* and *Washington,* the *Evans* court concluded that the "neutrality" concept was applicable beyond the racial context.[341] The *Evans* court argued that to hold otherwise would make neutrality "a requirement of nondiscrimination with respect to racial minorities — and not at all a requirement that legislation must 'attemp[t] to allocate governmental power on the basis of any general principle.' "[342]

The *Evans* court supported this conclusion by discussing *Gordon v. Lance,*[343] the third case it relied on to analogize the fourth category of cases to the Amendment 2 issue. In *Gordon,* the Supreme Court upheld a West Virginia constitutional requirement that political subdivisions may not incur bonded indebtedness or increase taxes without a 60% majority.[344] The Court found that the requirement did not discriminate against or authorize discrimination against any identifiable class and therefore, did not violate the equal protection clause.[345]

The *Evans* court noted that the Court in *Gordon* distinguished *Hunter* on two grounds. First, the West Virginia statute applied "equally to all bond issues for any purpose" while the ordinance in *Hunter* required a referendum only for fair housing legislation.[346] Second, the legislation in *Hunter* singled out the group benefiting from anti-discrimination laws based on race, religion, or ancestry,

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339. *Id.* (citing *Washington,* 458 U.S. at 467).

340. *Id.* at 1281 (referring to *Washington,* 458 U.S. at 470).

341. *Id.*

342. *Id.* (referring to *Washington,* 458 U.S. at 470).

343. 403 U.S. 1 (1971).

344. *Id.* at 8.

345. *Id.* at 5. Plaintiffs were a group of individuals who voted in favor of two proposals which required 60% voter approval. One proposal required general obligation bonds to be issued in order to build new schools and improve existing educational facilities. *Id.* at 3. The second proposal authorized the Board of Education to levy additional taxes to support the current expenditures and capital improvements. *Id.* Of the votes cast, 51.55% favored the bond issue and 51.51% favored the tax levy. *Id.*

346. Evans v. Romer, 854 P.2d 1270, 1281 (Colo.) (citing *Gordon,* 403 U.S. at 5), *cert. denied,* 114 S. Ct. 419 (1993).

while the West Virginia statute singled out no such identifiable class.[347]

The *Evans* court considered the *Gordon* Court's discussion of *Hunter* significant in two respects. First, the *Evans* court noted that *Gordon* did not involve race or any other recognized suspect class, yet it discussed *Hunter*.[348] Furthermore, the *Gordon* Court did not discuss the fact that the West Virginia law was racially neutral, whereas the ordinance in *Hunter* was based on race.[349] The *Evans* court found that if, as the defendants suggested in the case at issue, *Hunter* was purely a "race" case, the Supreme Court in *Gordon* could have dismissed *Hunter* as inapplicable.[350] By not doing so, the *Evans* court suggested that the holding in *Hunter* was not limited in application to legislation based on racial discrimination.[351]

The second reason the *Evans* court believed the reference to *Hunter* in *Gordon* was important related to the concept of legislation singling out an identifiable class of persons. The *Evans* court pointed out that although in *Gordon* the Court recognized that the *Hunter* ordinance singled out those who would benefit from anti-discrimination legislation concerning race, religion, and ancestry, it did not consider the type of class discriminated against in *Hunter* to be important.[352] Rather, the *Evans* court explained, "the salient aspect of *Hunter* which distinguished it from the situation presented in *Gordon* was the absence of a group of voters that was 'independently identifiable' apart from the group created by the statute itself."[353]

The *Evans* court found that, together, these facts demonstrated that *Hunter* applied beyond racial discrimination, "to a broad spec-

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347. *Id.* at 1281-82 (citing *Gordon*, 403 U.S. at 5). The *Gordon* Court was unable to find any "independently identifiable group or category that favor[ed] bonded indebtedness over other forms of financing." *Gordon*, 403 U.S. at 5.

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

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.* To support this proposition, the *Evans* court referred to Town of Lockport, N.Y. v. Citizens for Community Action, Inc., 430 U.S. 259 (1977). The *Evans* court stated that the Court in *Town of Lockport* cited *Gordon* and *Hunter* as support for the proposition that " 'a referendum voting scheme that can be characterized in mathematical terms as giving disproportionate power to a minority does not violate the Equal Protection Clause, there being no discrimination against an identifiable class.' " *Evans*, 854 P.2d at 1282 n.20 (quoting *Town of Lockport*, 430 U.S. at 268 n.13).

trum of discriminatory legislation."[354] The controlling constitutional standard, the *Evans* court determined, was articulated in *Gordon* that so long as the legislation did not "discriminate against or authorize discrimination against any identifiable class," it did not violate the equal protection clause.[355]

Based on its analysis of the equal protection cases in all four categories (preconditions on voting; reapportionment; "candidate eligibility;" legislation which prevents the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters), the *Evans* court concluded that the equal protection clause of the federal Constitution "protect[ed] the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringe[d] on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny."[356] Therefore, the Colorado Supreme Court rejected defendants' contention that the amendment did not infringe on any recognized right protected by the Equal Protection Clause.[357]

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354. *Evans*, 854 P.2d at 1282. The Colorado Supreme court indicated that if *Gordon* and *Hunter* were decided solely on the basis of "suspect classification," the Court would not have "consistently" expressed the "paramount importance of political participation," nor would the Court have applied strict scrutiny to legislation which infringed on the right to participate equally in the political process. *Id.* at 1283. Instead, the *Evans* court explained, the Supreme Court need only have recognized the suspect class at issue and applied strict scrutiny regardless of the right or opportunity restricted. *Id.*

355. *Id.* at 1282 (referring to *Gordon*, 403 U.S. at 7). The *Evans* court recognized that in James v. Valtierra, 402 U.S. 137 (1971), the Supreme Court upheld an amendment to the California constitution that required approval by a majority of the voters in a local election for the development of any low-rent housing project. *Id.* at 1282 n.21. The mandatory referendum procedure was not limited to proposals for low-cost public housing. *James*, 402 U.S. at 142. In *James*, the Court held that this procedure "ensured democratic decisionmaking" and did not violate the equal protection clause. *Id.* at 143. The Court further declined to apply *Hunter* since the amendment did not concern race. *Id.* at 141. The *Evans* court noted that three Justices dissented, not by disagreeing with the majority's use of *Hunter*, but because the provision involved a suspect classification: poverty. *Evans*, 854 P.2d at 1282 n.21. Thus, the *Evans* court concluded that *James* was "best understood as a case declining to apply suspect class status to the poor, and not as a limitation on *Hunter*." *Id.*

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

357. *Id.* at 1283. The *Evans* court rejected defendants' proposition that Amendment 2 did not violate any right protected under the equal protection clause for several reasons. First, the defendants argued that the authority relied on by the Colorado Supreme Court was misplaced. *Id.* Defendants contended that, that authority recognized a cognizable equal protection claim " 'only when the political process ha[d] been restructured to place unusual burdens upon racial groups, or in the most expansive sense, [upon politically powerless groups].' " *Id.* The *Evans* court rejected this proposition by stating that much of the authority cited did not involve racial groups. *Id.*; *see, e.g.*, Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (holding state election statutes which discriminate against minority parties at local elections unconstitutional

5. *Amendment 2 Infringed on the Fundamental Right to Equal Political Participation*

Relying on cases such as *Hunter v. Erickson*[358] and *Gordon v. Lance*,[359] the Colorado Supreme Court found that there was a fundamental right to participate equally in the political process.[360] The inquiry, therefore, was whether Amendment 2 infringed on the fundamental right to participate equally in the political process.[361] By reviewing Amendment 2's immediate objective, ultimate effect, historical context, and the conditions prior to its enactment, the *Evans* court concluded that Amendment 2 did infringe on this fundamental right.[362]

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under the equal protection clause); Dunn v. Blumstein, 405 U.S. 330 (1972) (holding durational one-year residence requirement prior to voting unconstitutional); Gordon v. Lance, 403 U.S. 1 (1971) (holding municipal code which required three-fifth majority to incur debt constitutional); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (holding that limiting a franchise to those owning or leasing property or having children in school was unconstitutional); Williams v. Rhodes, 393 U.S. 23 (1968) (holding that the state election statutes which effectively eliminated voters a choice of two political parties was unconstitutional); Reynolds v. Sims, 377 U.S. 533 (1964) (holding that reapportionment diluting votes in one district violated the fundamental right to have votes counted equally); Wesberry v. Sanders, 376 U.S. 1 (1964) (holding that the Georgia statute on apportionment of district was unconstitutional). The *Evans* court reiterated its discussion of Gordon v. Lance, 403 U.S. 1 (1971) and Hunter v. Erickson, 393 U.S. 385 (1969), to support this proposition. *Evans*, 854 P.2d at 1283.

358. 393 U.S. 385 (1969); *see supra* notes 323-34 and accompanying text (relating to the court's analysis of *Hunter*).

359. 403 U.S. 1 (1971); *see supra* notes 343-53 (relating to the court's discussion of *Gordon*).

360. *Evans*, 854 P.2d at 1276-82.

361. *Id.* at 1284.

362. *Id.* The Colorado Supreme Court indicated the immediate objective of Amendment 2 was "at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation." *Id.* The *Evans* court pointed out that Amendment 2 also repealed "various provisions prohibiting discrimination based on sexual orientation at state colleges." *Id.* at 1284-85.

The *Evans* court found that "[t]he 'ultimate effect' of Amendment 2 [was] to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitutional is first amended to permit such measures." *Id.* at 1285. The court noted that if any governmental entity acted without such a constitutional amendment, it "would be acting contrary to the state constitution by 'adopting, enacting, or enforcing' any such measure." *Id.*

The *Evans* court also examined the political conditions for homosexuals, lesbians, and bisexuals prior to the passage of Amendment 2. *Id.* at 1286. The court noted that before Amendment 2 was passed, "gay men, lesbians, and bisexuals were . . . free to appeal to state and local government for protection against sexual orientation discrimination." *Id.* "[T]he political process was open to them to seek" beneficial legislation just as it was open for others. *Id.* However, the court illustrated, had Amendment 2 been in effect, the only political means available to this class of persons to seek protection would have been through adoption of a constitutional amendment. *Id.* Therefore, the court found that Amendment 2 infringed on a fundamental right protected by the equal protection clause and thus must be subject to strict judicial scrutiny. *Id.* Applying this standard,

The court found that Amendment 2 "clearly affected" the right to participate equally in the political process because it barred homosexuals, lesbians, and bisexuals from "having an effective voice in governmental affairs insofar as those persons deem[ed] it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation."[363] The court stated that "Amendment 2 alters the political process" by prohibiting gays, lesbians, and bisexuals "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."[364] The *Evans* court indicated that Amendment 2 did not attempt to entirely withdraw antidiscrimination issues from state and local control.[365] Instead, "it single[d] out one form of discrimination and remove[d] its redress from consideration by the normal political processes."[366]

The *Evans* court held that "[i]n short, gay men, lesbians, and bisexuals are left out of the political process through denial of having an 'effective voice in the governmental affairs which substantially affected their lives.' "[367] Therefore, the court ruled strict scrutiny was necessary because the normal political processes no longer protected these groups of individuals.[368] Amendment 2 prohibited this class of persons from seeking favorable governmental action and thus, from participating equally in the political process.[369] The court found no compelling interest that passed the strict scrutiny test.[370]

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the Colorado Supreme Court held that the defendants had not established a compelling state interest to justify enacting Amendment 2. *Id.*; *see, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (stating that to meet strict scrutiny, a law must be "suitably tailored to serve a compelling state interest"); Plyler v. Doe, 457 U.S. 202, 216-17 (1982) (explaining the necessity of strict scrutiny analysis when a fundamental right is challenged). Therefore, the court "conclude[d] that plaintiffs have met their burden under Rathke v. MacFarlane, 648 P.2d 648, 653 (Colo. 1982)." *Evans*, 854 P.2d at 1286; *see supra* note 256 (discussing the standard under *Rathke*).

363. *Evans*, 854 P.2d at 1285.

364. *Id.*

365. *Id.*

366. *Id.* The court compared Amendment 2 to the laws invalidated in Hunter v. Erickson, 393 U.S. 385 (1969). *Id.* Those laws singled out the class of persons "who would benefit from laws barring racial, religious, or ancestral discriminations." *Hunter*, 393 U.S. at 391. Similarly, the *Evans* court held, Amendment 2 singled out homosexuals, lesbians, and bisexuals from laws barring discrimination based on sexual orientation. *Evans*, 854 P.2d at 1285.

367. *Evans*, 854 P.2d at 1285 (quoting Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969)).

368. *Id.*

369. *Id.*

370. *Id.* at 1286; *see supra* note 161 (discussing the strict scrutiny standard of review).

Adding this reasoning to its finding of a fundamental right to equal political participation supported by U.S. Supreme Court precedent, the Colorado Supreme Court affirmed the granting of a preliminary injunction enjoining defendants from enforcing Amendment 2 pending a trial on the merits of plaintiffs' constitutional challenge.[371]

C. *Dissenting Opinion*

The dissent, written by Justice Erickson, re-stated the issue in *Evans v. Romer:* whether a preliminary injunction was properly issued in accordance with *Rathke v. MacFarlane*[372] and the requirements articulated therein.[373] Since the court was reviewing issues of law as opposed to issues of fact, the dissent stated that a *de novo* standard of review applied.[374] Based on that standard, Justice Erickson would reverse and discharge the preliminary injunction, remanding it for trial on the permanent injunction.[375]

1. *Rejection of the Majority's Fundamental Right Analysis*

The dissent first addressed the trial court's fundamental right theory. The trial court found that there was "a *fundamental right* 'not to have the State endorse and give effect to private biases' with respect to 'an identifiable class.' "[376] The dissent rejected the district court's finding of such a fundamental right as it had never been identified or recognized by the United States Supreme Court or any other court.[377] Although the majority did not rely on the district

371. *Evans*, 854 P.2d at 1286.

372. 648 P.2d 648 (Colo. 1982); *see supra* note 256 (discussing the *Rathke* standard).

373. *Evans*, 854 P.2d at 1286 (Erickson, J., dissenting).

374. *Id.*

375. *Id.*

376. *Id.* at 1287; *see supra* notes 257-62 and accompanying text (relating to the trial court's fundamental right analysis).

377. *Evans*, 854 P.2d at 1287 (Erickson, J., dissenting). The dissent took issue with the cases relied on by the district court and stated that those cases did not apply a fundamental right analysis, but instead involved traditionally suspect classifications or the application of rational basis review. *Id.* at 1293. The district court cited Reitman v. Mulkey, 387 U.S. 369 (1967) and Palmore v. Sidoti, 466 U.S. 429 (1984). In *Reitman*, the Supreme Court invalidated a California voter-initiated amendment because it expressly authorized the private right to discriminate against racial minorities. *Reitman*, 387 U.S. at 376. Justice Erickson stated the district court erred in analyzing this case as involving a fundamental right because the equal protection analysis was based solely on the racial classification. *Evans*, 854 P.2d at 1293.

In *Palmore*, the Supreme Court invalidated a child custody order even though the lower court had determined it would be harmful to a child to remain in a racially mixed household. *Palmore*, 466 U.S. at 431. The custody order was struck down because it represented invidious racial discrimination. *Id.* at 433. The dissent argued that *Palmore* was based on a traditional suspect classi-

court's fundamental right analysis, Justice Erickson also objected to the majority's analysis regarding its finding of a fundamental right to equal political participation.[378] Therefore, the dissent believed that the preliminary injunction should be discharged.[379]

The dissent began its analysis of the fundamental right concept by recognizing that the United States Supreme Court "has refused to expand the list of fundamental constitutional rights" beyond those developed in prior years.[380] The dissent pointed out that the Supreme Court "refused to declare education, housing, welfare payments, or government employment to be of fundamental constitutional value."[381]

The dissent indicated that fundamental rights can be described in two ways. First, a fundamental right is one " 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.' "[382] The second description of fundamental rights involved liberties " 'deeply rooted in this Nation's history and tradition.' "[383] The dissent acknowledged that under *Bowers v. Hardwick,* homosexuals have no fundamental right, under either formulation, " 'to engage in acts of consensual sodomy.' "[384] The dissent concluded its examination of the fundamental right concept by stating that "[t]he Court is most vulnerable and comes nearest to illegitimacy when [dealing] with judge-made constitutional law having [no explicit support] in the language or design of the Constitution."[385]

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fication analysis rather than a fundamental right not to have the state endorse private biases, as found by the district court. *Evans,* 854 P.2d at 1293 (Erickson, J., dissenting).

378. *Evans,* 854 P.2d at 1287 (Erickson, J., dissenting).

379. *Id.*

380. *Id.* at 1291; *see, e.g.,* Benton v. Maryland, 395 U.S. 784 (1969) (incorporating Fifth Amendment protection against double jeopardy); Gideon v. Wainwright, 372 U.S. 335 (1963) (incorporating Sixth Amendment right to counsel in criminal prosecution); Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating Fourth Amendment protection against unreasonable search and seizure); Gitlow v. New York, 268 U.S. 652 (1925) (incorporating First Amendment free speech protection). *But see* Hurtado v. California, 110 U.S. 516 (1884) (refusing to incorporate grand jury indictment guarantee of Fifth Amendment). The rights held applicable to the states through the Fourteenth Amendment are also considered fundamental rights for purposes of equal protection analysis. 3 ROTUNDA & NOWAK, *supra* note 161, § 18.39.

381. *Evans,* 854 P.2d at 1291 (Erickson, J., dissenting); *see* 4 JOHN E. ROTUNDA & RONALD D. NOWAK, CONSTITUTIONAL LAW §11.7, at 393 (4th ed. 1991) (discussing fundamental rights).

382. *Evans,* 854 P.2d at 1291 (Erickson, J., dissenting) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

383. *Id.* (quoting Moore v. Cleveland, 431 U.S. 494, 503 (1977)).

384. *Id.* at 1291-92 (Erickson, J., dissenting) (quoting Bowers v. Hardwick, 478 U.S. 186, 192 (1986)).

385. *Id.* at 1292 (quoting *Bowers,* 478 U.S. at 194).

In examining the majority's analysis of Supreme Court decisions, the dissent found that none of those decisions explicitly identified a fundamental right to equal political participation.[386] The dissent maintained that the cases cited by the majority involved either a suspect classification, the fundamental right to vote, or candidate eligibility.[387] Thus, the dissent concluded that the majority erred in its interpretation that a fundamental right to participate equally in the political process existed.[388]

2. *Rejection of the Cases Relied on By The Majority to Support the Fundamental Right*

The majority discussed Supreme Court decisions involving reapportionment,[389] direct restrictions on the exercise to vote,[390] and "candidate eligibility."[391] The dissent claimed that the cases involving reapportionment and restrictions on voting involved only the fundamental right to vote and did not create a fundamental right to participate equally in the political process.[392] As for the "candidate eligibility" — or what the dissent termed "ballot access" decisions — the dissent maintained that the Supreme Court applied only heightened, not strict judicial scrutiny on the basis of the fundamental right to vote and the First Amendment right of association.[393]

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386. *Id.* at 1294. The dissent found that the majority's fundamental right analysis was similar to that of the trial court in that nowhere in the Supreme Court decisions relied on was the fundamental right found by the majority and the trial court explicitly identified. *Id.*

387. *Id.*

388. *Id.* The dissent admitted that the right to vote included the right to participate in the electoral process by exercising the franchise, stating that "this Court has made clear that a citizen has a constitutionally protected *right to participate in elections* on an equal basis." *Id.* at 1294 n.12 (quoting Dunn v. Blumstein, 405 U.S. 330, 336 (1972)). However, the dissent stated that neither the appellees nor the majority contended that the right to participate in the electoral process was equivalent to "the much more expansive right" to participate in the political process. *Id.* at 1295 n.12.

389. *See supra* notes 297-306 and accompanying text (relating to the majority's analysis of the reapportionment cases).

390. *See supra* notes 286-96 and accompanying text (relating to the majority's discussion of the cases concerning the right to vote).

391. *See supra* notes 307-19 and accompanying text (relating to the majority's discussion of candidate eligibility).

392. *Evans*, 854 P.2d at 1295 (Erickson, J., dissenting). The dissent noted that even the majority recognized that these cases were distinguishable from the Amendment 2 issue presented in *Evans*. *Id.*

393. *Id.* at 1296. The dissent admitted that the Supreme Court has minimized the extent to which voting rights cases were distinguishable from ballot access cases and thus strict scrutiny had been applied in early decisions. *Id.* (citing Burdick v. Takushi, 112 S. Ct. 2059 (1992); Williams v. Rhodes, 393 U.S. 23 (1968)). However, the dissent maintained that the Supreme Court indi-

Furthermore, the dissent found that these cases involved entirely different questions and constitutional issues than Amendment 2.[394] Thus, the dissent concluded, the majority erred in relying on these cases to support the finding of a fundamental right to equal political participation and applying strict scrutiny.[395]

The majority specifically relied on Supreme Court cases concerning legislation which prevented a certain class from enacting desired legislation through the normal political process.[396] Specifically, the majority relied on *Hunter v. Erickson*,[397] *Washington v. Seattle School District No. 1*,[398] and *Gordon v. Lance*.[399] The dissent rejected the majority's analysis of these cases as fundamental right cases and instead found that these cases addressed possible equal protection violations based on traditional suspect classifications, "albeit in situations where the ordinary political process ha[d] been restructured."[400] For example, the dissent explained that the Court in *Hunter* characterized the amendment as placing " 'special burdens on racial minorities within the governmental process,' " and further stated that the Fourteenth Amendment prevented unjustified distinctions based on race, a constitutionally suspect class deserving a strict scrutiny standard of review.[401]

The dissent discussed *James v. Valtierra*[402] to further support his disagreement with the majority's reliance on cases concerning legislation preventing a certain class of voters from obtaining desired

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cated more recently that strict scrutiny did not apply to ballot access cases. *Id.* (citing *Burdick*, 112 S. Ct. at 2060, which involved the application of a balancing test instead of strict scrutiny).

394. *Id.*

395. *Id.*

396. *See supra* notes 319-57 and accompanying text (relating to the majority's discussion of cases involving voter-initiatives preventing voters from enacting desired legislation).

397. 393 U.S. 385 (1969).

398. 458 U.S. 457 (1982).

399. 403 U.S. 1 (1971).

400. Evans v. Romer, 854 P.2d 1270, 1297 (Colo.) (Erickson, J., dissenting), *cert. denied*, 114 S. Ct. 419 (1993). To support this proposition, the dissent cited Citizens for Responsible Behavior v. Superior Court, 1 Cal. App. 4th 1013 (1991) which asserted that *Hunter* involved a traditionally suspect class and therefore strict scrutiny was applied. *Evans*, 854 U.S. at 1297; *cf.* Robert H. Beinfield, Note, *The* Hunter *Doctrine: An Equal Protection Theory that Threatens Democracy*, 38 VAND. L. REV. 397, 405 (1985) (asserting that strict judicial scrutiny was applied in *Hunter* because it involved a racial classification).

401. *Evans*, 854 P.2d at 1297 (Erickson, J., dissenting) (quoting *Hunter*, 393 U.S. at 391). The dissent pointed out that other federal cases have addressed *Hunter* as involving an unconstitutional suspect classification. *Id.* at 1297 n.14 (citing Tyler v. Vickery, 517 F.2d 1089, 1099 (5th Cir. 1975); Lee v. Nyquist, 318 F. Supp. 710, 718-20 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971)).

402. 402 U.S. 137 (1971).

legislation through normal political processes.[403] In *James*, the Supreme Court upheld a state constitutional provision requiring any low-rent housing project to be approved by a majority of the voters.[404] The dissent in *Evans* pointed out that this measure "involve[d] legislation which prevented the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters (i.e., poor people who would qualify for low-rent housing)."[405] Therefore, the dissent maintained that according to the majority's reading of *Hunter*, this type of legislation should be unconstitutional under the strict scrutiny standard because it singled out the poor — "an identifiable group of voters."[406] The dissent supported this proposition by referring to the majority's conclusion that similar to the amendment in *Hunter*, which singled out an identifiable group based on race, "Amendment 2 expressly fence[d] out the identifiable group of gay men, lesbians, and bisexuals."[407] The dissent pointed out that the Supreme Court did not apply strict scrutiny in *James* and further distinguished the application of strict scrutiny in *Hunter* on the basis that *Hunter* involved a traditionally suspect class.[408] Therefore, the dissent explained that although, in *James*, an identifiable group was "fenced out" from the normal political processes, the Supreme Court declined to apply strict scrutiny, rejecting the assertion that the restructuring of the political process involved did not violate the equal protection clause.[409]

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403. *Evans*, 854 P.2d at 1297.

404. 402 U.S. 137 (1971). The article approved by the voters in *James* provided that "no low-rent housing project should 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." *Id.* at 139.

405. *Evans*, 854 P.2d at 1297-98 (Erickson, J., dissenting).

406. *Id.* at 1298. The dissent found that the majority limited application of its fundamental right to "an identifiable group of voters." *Id; see supra* note 355 (analyzing the majority's discussion of *James*).

407. *Evans*, 854 P.2d at 1298 (Erickson, J., dissenting) (referring to Maj. Op., 854 P.2d at 1285).

408. *Id.* The dissent cited a reference in *James* that described *Hunter* as a case involving a law which denied equal protection by placing "*special burdens on racial minorities* within the governmental process" and that the article in *James* was unlike *Hunter* because it made no distinctions based on race. *Id.* (quoting *James*, 402 U.S. at 140-41). Therefore, the *James* Court declined to extend *Hunter* to its case. *Id.*

409. *Id.* at 1299 (Erickson, J., dissenting). The appellees in *James* argued that the mandatory referendum required by the amendment "hamper[ed] persons desiring public housing from achieving their objective when no such roadblock face[d] other groups seeking to influence other public decisions to their advantage." *James*, 402 U.S. at 142.

The dissent found that *Gordon v. Lance*,[410] cited by the majority, was similar to *James*.[411] The dissent pointed out that the Supreme Court in *Gordon* distinguished *Hunter* on the grounds that *Hunter* applied strict scrutiny because it involved a traditionally suspect class.[412] The legislation in *Gordon* concerned a requirement for 60% voter approval for any bonded indebtedness or tax increase incurred by political subdivisions of the state.[413] The dissent maintained that as in *James*, the strict scrutiny standard of review did not apply in *Gordon* because the group challenging the measure could not establish itself as a traditionally suspect class.[414] Thus, the dissent concluded that *Gordon* was best understood, not as a fundamental right case, but as a case where strict scrutiny did not apply because no suspect classification was involved.[415] The dissent also limited *Washington v. Seattle School District No. 1*,[416] the third case relied on by the majority, to a case applying strict scrutiny because a suspect classification was involved, rather than a fundamental right.[417]

Based on its analysis of *Hunter* and the cases relied on by the majority, the dissent concluded that the Supreme Court "never focused on the fundamental right of an independently identifiable group . . . to participate equally in the political process."[418] Rather, the dissent argued that these cases analyzed the legislation at issue based on whether "special burdens [were placed] on racial minorities within the governmental process."[419] The dissent maintained that strict scrutiny was applied based on the presence of a suspect classification of which gays were not included.[420] Therefore, the dissent found, "the fact that the regulations at issue in each occurred

410. 403 U.S. 1 (1971).

411. 402 U.S. 137 (1971).

412. *Evans*, 854 P.2d at 1299 (Erickson, J., dissenting).

413. *Gordon*, 403 U.S. at 2-3.

414. *Evans*, 854 P.2d at 1299 (Erickson, J., dissenting).

415. *Id.*

416. 458 U.S. 457 (1982); *see supra* notes 222-25 and accompanying text (discussing *Washington*). The dissent relied on language in *Washington* that the state action burdened racial minorities within the governmental process by explicitly using race to determine the decisionmaking process. *Evans*, 854 P.2d at 1300 (Erickson, J., dissenting) (citing *Washington*, 458 U.S. at 470 which stated that state action "places *special* burdens on racial minorities within the governmental process").

417. *Evans*, 854 P.2d at 1300 (Erickson, J., dissenting).

418. *Id.*

419. *Id.* (citing *Washington*, 458 U.S. at 458; Gordon v. Lance, 403 U.S. 1, 5 (1971); Hunter v. Erickson, 393 U.S. 385, 391 (1969)).

420. *Id.*

within the context of the political process was not dispositive."[421]

Based on the foregoing analysis, the dissent reiterated its proposition that the Supreme Court has never explicitly stated that a fundamental right to equal political participation exists implicitly within the Constitution, nor has it found such a fundamental right directly within the Constitution.[422] Therefore, the dissent objected to the majority's recognition of such a fundamental right and the application of strict scrutiny since neither a fundamental right nor a suspect classification was involved.[423] The dissent considered that in the future, the Supreme Court may agree with the majority's underlying legal premise and recognize a fundamental right to participate equally in the political process.[424] However, the dissent found that since the Supreme Court has not done so, the majority should take caution in extrapolating such a right from the cases it relied on to support its decision.[425] Therefore, because Supreme Court precedent was non-existent regarding a fundamental right to participate equally in the political process and thus did not support evaluating Amendment 2 under the strict scrutiny standard of review, Justice Erickson would reverse and discharge the issuance of the preliminary injunction, and remand for trial on the permanent injunction.[426]

III. ANALYSIS

The development, passage, and denial of enforcement of Amendment 2 involved tremendous controversy and debate between the supporters and opponents of the amendment, with focus on whether homosexuality should be a protected lifestyle. The group known as Colorado for Family Values (CFV) was able to win over a slim majority of the votes to pass Amendment 2.[427] However, the Amendment 2 advocates faced defeat when the Colorado district court,[428]

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421. *Id.*

422. *Id.* at 1301.

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.* at 1302. On October 11, 1994, the Colorado Supreme Court ruled the amendment unconstitutional and issued a permanent injunction enjoining its enforcement. Evans v. Romer, Nos. 94SA48, 94SA128, 1994 LEXIS 779 (Colo. Oct. 11, 1994).

427. For a discussion on CFV and the development of Amendment 2, see *supra* notes 45-63 and accompanying text.

428. Evans v. Romer, No. 92 CV 7223, 1993 WL 19678 (Colo. Dist. Ct. Jan. 15, 1993).

followed by the Colorado Supreme Court,[429] granted a preliminary injunction prohibiting the amendment's enforcement. Yet, in resolving the Amendment 2 issue, the Colorado Supreme Court focused its discussion not on the issue of homosexuality, but rather on the amendment's infringement on the right to political participation.[430] Although the case involved homosexuality, the effect of the court's holding extended to all classes of people.

The court held that the equal protection clause of the United States Constitution protected the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment infringing on that right by "fencing out" an "independently identifiable class of persons" would be subject to strict judicial scrutiny.[431] The amendment infringed on this fundamental right as it pertained to gays, lesbians, and bisexuals since it barred them from having an effective voice in governmental affairs by preventing them from seeking legislation prohibiting discrimination based on their sexual orientation;[432] yet, the court did not limit the fundamental right to only homosexuals.[433]

A. The Fundamental Right to Political Participation

When the Amendment 2 opponents challenged the initiative in court, they raised numerous claims ranging from the equal protection argument decided on by the *Evans* court, to first amendment claims, not addressed by the court.[434] When the case reached the Colorado Supreme Court, discussion focused on the plaintiff's claim that Amendment 2 violated their fundamental right of political participation.[435] The fundamental right issue came down to one question: Whether it was permissible under the equal protection clause of the Fourteenth Amendment for a state to take away a particular

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429. Evans v. Romer, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993). The Colorado Supreme court declared the amendment unconstitutional and issued a permanent injunction on October 11, 1994. Evans v. Romer, Nos. 94SA48, 94SA128, 1994 LEXIS 779 (Colo. Oct. 11, 1994).

430. *Evans*, 854 P.2d at 1285.

431. *Id.*

432. *Id.*

433. *Id.*

434. For a detailed list of the claims raised by the plaintiffs, see *supra* notes 32-34 and accompanying text.

435. *Evans*, 854 P.2d at 1274. Plaintiff's urged the Colorado Supreme Court to rely only on the equal protection arguments advanced at the trial level, which included a claim that there existed a fundamental right to equal participation in the political process. *Id.*

group's rights from the political and democratic processes of our representative government.[436] The court answered this question by finding that this type of discrimination was constitutionally impermissible absent a compelling interest justification by the state, a showing that was not made.[437] The *Evans* court correctly relied on prior United States Supreme Court precedent to develop a fundamental right to equal political participation.

1. The Right to Equal Political Participation

The right of citizens to participate in the governmental *process* — the right to vote, the right to representation in the government, the right to petition the government for redress of grievances — are core democratic values recognized under the United States Constitution.[438] Although the normal assumption underlying judicial review of legislation is that "even improvident decisions will be rectified by the democratic process,"[439] thus not warranting judicial intervention, the courts do not adhere to this assumption when burdensome legislation taints the political process itself.[440] Under these circumstances, the normal political safeguards may not be able to protect citizens from oppressive legislation, and the judiciary must

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436. Brief Amicus Curiae of the Colorado Bar Association, Evans v. Romer, 854 P.2d 1270 (Colo. 1993) (No. 93 SA 017), *cert. denied*, 114 S. Ct. 419 (1993). The effect of the Amendment made all existing laws, policies, and ordinances prohibiting discrimination based on an individual's homosexual, lesbian, or bisexual orientation unenforceable and unconstitutional. LEGISLATIVE COUNCIL, *supra* note 29, at 9.

437. *Evans*, 854 P.2d at 1285 (holding that "Amendment 2 single[d] out and prohibit[ed] [homosexuals, lesbians, and bisexuals] from seeking governmental action favorable to [them] and thus, from participating equally in the political process"). The *Evans* court stated that because the defendants did not offer a compelling interest to justify enactment of Amendment 2 under the strict scrutiny standard, the preliminary injunction remained in effect. *Id.* at 1286.

438. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 86-87 (1980) (stating that the Constitution concerns ensuring broad participation in the processes and distributions of government as well as fairness in settling disputes); *Developments in the Law, supra* note 194, at 1114 (stating that Americans have always relied on elections to "implement the fundamental principle that all sovereignty vests in the governed"); *see, e.g.*, Reynolds v. Sims, 377 U.S. 533, 562 (1964) (finding that the right to exercise the right to vote "in a free and unimpaired manner [was] preservative of other basic civil and political rights," and any alleged infringement of that right must be carefully scrutinized).

439. Vance v. Bradley, 440 U.S. 93, 97 (1979).

440. Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 736-37 (1964). A majority of the people cannot simply decide to infringe upon a citizen's constitutional rights. *Id.*; *see e.g.*, Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990) (stating that while it is a common belief that the legislature represents the majority's will, the courts will disregard that notion when the legislature has acted beyond the power delegated to them by the constitution).

intervene.[441] Since Amendment 2 hindered the rights of homosexuals, lesbians, and bisexuals to participate in the political process, the Colorado Supreme Court intervened.

The *Evans* court reasoned that a fundamental right to equal participation in the political process existed by examining case law concerning preconditions on the right to vote, reapportionment, candidate eligibility, and legislation which prevented political institutions and processes from enacting particular legislation desired by a certain class of voters.[442] Although none of these cases explicitly identified a fundamental right to equal political participation, that such a right exists becomes evident through the language used and in the circumstances involved in the prior United States Supreme Court cases. Combined, these cases demonstrate that the equal protection clause guarantees the fundamental right to equal participation in the political process.

2. *The Right to Vote*

The first line of cases discussed by the *Evans* court involved the right to vote.[443] In these cases, the Supreme Court consistently struck down as violating the equal protection clause, legislation placing preconditions on the exercise of the right to vote.[444] Although these cases involved the established fundamental right to vote, they cannot be limited strictly to a "voting" analysis as Justice Erickson argued in his dissent.[445] In fact, the right to vote and the right to participate equally in the political decision-making process cannot logically be distinguished. Protecting the right to vote serves

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441. *Reynolds*, 377 U.S. at 565; *see also* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467-70 (1982) (invalidating initiative that suspended the operation of an existing Ohio ordinance forbidding housing discrimination); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1936) (determining that prejudice against "discrete and insular minorities" was a special condition which seriously curtailed the political process relied on to protect minorities and called for judicial inquiry).

442. *See supra* text accompanying notes 280-85 (relating to the majority's discussion of these four categories of cases).

443. Evans v. Romer, 854 P.2d 1270, 1277 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993); *see supra* text accompanying notes 286-96 (relating to the majority's discussion of the cases involving the right to vote).

444. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (invalidating a restriction which required voters to own property or have children); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (invalidating a restriction which required voters to pay a poll tax); Carrington v. Rash, 380 U.S. 89 (1965) (invalidating a restriction which required the voters to be civilians).

445. *Evans*, 854 P.2d at 1295 (Erickson, J., dissenting).

to ensure effective representative government.[446]

The basis of these decisions centered on the fact that legislation "fenced out"[447] certain classes of voters by requiring them to fulfill a condition in order to vote, such as paying a poll tax.[448] However, more than a restriction on voting was at stake. Inhibiting a particular group's ability to enact legislation in its interest undermines our system of representative government just as effectively as diluting the votes of that group.[449] Through its language in *Kramer v. Union Free School District No. 1*,[450] the Court demonstrated that these voting cases extend protection to a fundamental right to equal political participation.

The Court in *Kramer* held that statutes which selectively grant the right to vote "always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives."[451] Thus, the legislation infringed on a fundamental right to equal political participation since it impaired a group's ability to effectively participate in the governmental process. The Court similarly recognized this fundamental right in *Dunn v. Blumstein*[452] by illustrating that when states deny some citizens the right to vote, those citizens are essentially deprived of a " 'a fundamental political right . . . preservative of all rights.' "[453] It is anomalous to argue that there can be no prohibition on the right of a particular group of citizens to vote for state and local legislators who enact legislation to protect them from discrimination, yet those elected

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446. *See Kramer*, 395 U.S. at 626 ("Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government."); Reynolds v. Sims, 377 U.S. 533, 562-66 (1964) (delineating the one-man-one-vote rule).

447. *Carrington*, 380 U.S. at 94 (finding that " '[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible").

448. *Harper*, 383 U.S. at 680.

449. *See* Hunter v. Erickson, 393 U.S. 385, 393 (1969) (finding that "the 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").

450. *Kramer*, 395 U.S. at 626-27 ("Any unjustified discrimination in determining who may participate in political affairs . . . undermines the legitimacy of representative government. . . . Statutes granting the [right to vote] to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives.").

451. *Id.* at 627.

452. 405 U.S. 330 (1972).

453. *Id.* at 336 (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)). In *Dunn*, the Court struck down durational residency requirements imposed by the states as a precondition to voting. *Id.* at 360.

legislators can be deprived of their power to enact such legislation.[454] The cases involving preconditions on the right to vote involved a fundamental right to equal political participation by maintaining an equal opportunity for citizens to effectively voice their opinions in affairs directly affecting them.

3. *Reapportionment*

The second line of cases discussed by the *Evans* court in their analysis of a fundamental right to equal political participation concerned reapportionment.[455] These cases are analogous to the precondition on voting cases in that some citizens were denied the right to vote in a free and unimpaired manner by having their votes diluted in the political process.[456] The argument proposed by the dissent that the reapportionment cases, like the restrictions on voting decisions, are limited to an analysis regarding the fundamental right to vote and not to a fundamental right to political participation, can be easily discarded for similar reasons discussed earlier.[457]

The right to equal participation in the political process is so essential to effective representative government that any measures which restrict a group's ability to bring about change through the ordinary political processes are highly suspect under the equal protection clause.[458] The reapportionment cases encompass a fundamental right to equal political participation on the basis that dilution of the vote violates the equal protection clause.[459] For example, in *Reynolds v. Sims*,[460] the Court noted that no one was precluded, or even

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454. Reply Brief in Support of Plaintiffs' Preliminary Injunction Motion at 13, Evans v. Romer, 1993 WL 19678 (Colo. Dist. Ct. Jan. 15, 1993) (No. 92 CV 7223), *aff'd on other grounds*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

455. Evans v. Romer, 854 P.2d 1270, 1277-78 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

456. Equal protection requires that voters exercise the right to vote on an even footing with others. *See* Gray v. Sanders, 372 U.S. 368, 379-80 (1963) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."). Under the equal protection clause, "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds*, 377 U.S. at 579.

457. *See supra* text accompanying notes 358-71 (discussing these reasons).

458. *Reynolds*, 377 U.S. at 565; *see* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467-70 (1982) (discussing the equal protection clause guarantee of racial minorities' right to full participation in the political life of the community); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1936) (determining that prejudice against "discrete and insular minorities" was a special condition which seriously curtailed the political process relied on to protect minorities and called for judicial inquiry).

459. Reynolds v. Sims, 377 U.S. 533 (1964).

460. 377 U.S. 533 (1964).

impeded, from voting.[461] Rather, at issue was the right to have one's vote count as the same as the votes of others, thus reflecting that the Constitution insures not simply the right to vote and participate in the governmental process, but the right to do so in a meaningful and effective manner.[462] This proposition can be analogized to cases regarding candidate eligibility, discussed in the next section.

4. *Candidate Eligibility*

The requirement that voters be able to exercise the right to vote on an equal basis with others is also applied in the context of cases regarding candidate eligibility, the third group of cases relied on by the *Evans* court.[463] These cases involve more than a fundamental right to vote and a First Amendment right to association, as the dissent argued.[464] The Court's analysis in such cases reflects a fundamental right to equal political participation by recognizing that statutes which make it virtually impossible for new political parties with widespread support, or an old party with little support, to be placed on the state ballot significantly burden a voter's right to cast their vote effectively.[465] Thus, the right to equal participation in the political process involves the right of an individual of a minority party to be placed on the ballot and the right of the voter to enjoy exercising the right to vote based on an equal opportunity ballot.

Although the candidate eligibility cases as well as the restriction on voting and reapportionment cases provide reasoning and language demonstrating a fundamental right to equal participation in the political process, admittedly, they are not dispositive of or directly controlling on the issue of whether such a fundamental right actually exists.[466] The issue becomes more complicated when the voter's themselves pass a state constitutional amendment preventing the normal political institutions and processes from enacting partic-

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461. *Id.* at 537-38.

462. "[E]ach and every citizen has an inalienable right to full and effective participation in the political processes . . . ." *Id.* at 565.

463. *See supra* notes 307-18 and accompanying text (discussing candidate eligibility).

464. Evans v. Romer, 854 P.2d 1270, 1296 (Colo.) (Erickson, J., dissenting), *cert. denied*, 114 S. Ct. 419 (1993).

465. Williams v. Rhodes, 393 U.S. 23 (1968). The vote lost effectiveness because a "vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." *Id.* at 31.

466. The *Evans* court stated that the " 'precondition', reapportionment, and 'candidate eligibility' cases are not dispositive of, or directly controlling on, our decision here, as Amendment 2 falls within none of those three categories of cases." *Evans*, 854 P.2d at 1278.

ular legislation, such as what occurred with Amendment 2. However, when these three categories of cases are combined with Supreme Court cases concerning legislation effecting a particular group similar to how Amendment 2 effected gays, lesbians, and bisexuals, the recognition of a fundamental right to participate on an equal basis in the political process gains prominence. The *Evans* court relied on this fourth and last type of case to fully support its view that such a fundamental right exists.[467] This fourth category of cases is discussed in the following section.

5. Voter Initiatives Preventing Enactment of Particular Legislation

Cases concerning voter initiated amendments preventing a political institution from enacting a certain type of legislation, most closely analogize the Amendment 2 issue and provide a convincing basis for declaring that a fundamental right to equal political participation exists. The Supreme Court held such voter initiated amendments or measures invalid under the equal protection clause because they placed special burdens on a class of persons[468] and interfered with the political process.[469] Such legislation burdened the right to participate in the political process because it prevented the normal political institutions from acting on legislation desired by a particular group of voters.[470] By withdrawing the power of the legislature or other political institution to vote on issues of special importance to a certain group of voters, such laws hinder that group's ability to cast a meaningful vote.

The state does not violate any fundamental right of political participation when it restructures the political process evenhandedly, making it more difficult for anyone to seek a certain type of governmental action.[471] However, because the right to equal participation

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467. *Id.* at 1279-84.

468. *See* Hunter v. Erickson, 393 U.S. 385, 391 (1969) (holding that the amendment violated equal protection because it "place[d] special burdens on racial minorities within the governmental process").

469. *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) (holding that voter initiative interfered with the political process because it restricted minority group's ability to secure public benefits).

470. *Id.*

471. *Washington*, 458 U.S. at 467-70 (holding that a statute which allowed busing of children to schools outside the child's geographic area for non-racial reasons, but not for racial reasons, violated the equal protection clause); Gordon v. Lance, 403 U.S. 1 (1971) (holding that West Virginia's 60% voter approval requirement for political subdivisions to avoid increased tax rates

in the political process is intertwined with the existence of an effective representative government, measures that restrict any group's ability to bring about change through the usual political processes are highly suspect under the equal protection clause.[472] Even if individuals in the group can elect their local or state legislators, their vote is less meaningful if the legislative body is prevented from acting on the issues important to that group of voters. As the court noted in *Citizens for Responsible Behavior v. Superior Court*,[473] when a law removes the power of the normal political institutions "to grant redress of the subject grievance," then "the right [to petition the government] becomes a hollow exercise."[474]

Creating such an anomaly and bias against a particular group in the political process, therefore, violates the equal protection clause of the Fourteenth Amendment. For example, in *Hunter v. Erickson*,[475] the Court held that "the State may no more disadvantage *any* particular group by making it more difficult to enact legislation on its behalf than it may dilute any person's vote or give any group smaller representation than another of comparable size."[476] While there was no constitutional mandate requiring the city to prohibit private discrimination by enacting a fair housing ordinance, the city could not prevent a certain group from encouraging the city council to enact such an ordinance. *Hunter* held that such an encumbrance to the particular group's political participation was subject to strict scrutiny.[477]

Relying on the equal protection principles announced in *Hunter*, the Supreme Court in *Washington v. Seattle School District No. 1*[478] accentuated the principle that laws which integrate bias into the

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or bonded indebtedness did not violate the equal protection clause because the requirement did not discriminate against or authorize discrimination against an identifiable class).

472. *See supra* notes 319-57 and accompanying text (discussing voter-initiatives preventing enactment of desired legislation).

473. 1 Cal. App. 4th 1013 (1991); *see supra* note 114 (discussing this case).

474. *Citizens for Responsible Behavior*, 1 Cal. App. 4th at 1027 n.9.

475. 393 U.S. 385 (1969); *see supra* notes 214-21 and accompanying text (discussing *Hunter*).

476. *Hunter*, 393 U.S. at 393 (emphasis added); *cf.* Avery v. Midland County, 390 U.S. 474 (1968) (holding the constitution "permits no substantial variation from equal population in drawing districts for units of local government having general government powers over entire geographic area served by such body"); Reynolds v. Sims, 377 U.S. 533 (1964) (striking down Alabama's plan for apportionment of seats in the two houses of the Alabama legislature because the apportionment was not based on population).

477. *Hunter*, 393 U.S. at 392.

478. 450 U.S. 457 (1982); *see supra* notes 222-25 and accompanying text (discussing *Washington*).

political structure or allocation of political power, thus burdening the ability of certain minorities to achieve beneficial legislation, are just as impermissible as denying those minority groups the right to vote.[479] The *Hunter* amendment removed the city council's power to eliminate housing discrimination and transferred it to the city electorate,[480] and the *Washington* initiative shifted the authority to remedy racial segregation in the schools from the school district to the state voters.[481] In both cases, access to the normal political process was limited for a particular group, in violation of the equal protection clause.

Reitman v. Mulkey[482] presented another situation in which a state constitutional amendment extracted a minority issue from consideration in the normal political process in violation of the equal protection clause. The effect of the amendment in *Reitman,* which protected property owners' right to discriminate in the sale or rental of their property,[483] was to repeal existing legislation prohibiting housing discrimination based on race and to prevent similar measures from passing in the future. The Court held that the amendment violated the equal protection clause because it made "[t]he right to discriminate . . . on racial grounds . . . immune from legislative, executive, or judicial regulation at any level of the state government."[484] The effect of Amendment 2 had the same consequences except that the right to discriminate pertained to homosexuality rather than race. Nevertheless, it is evident that the Court recognized that this type of legislation interferes with the fundamental right to participate in the political process on an equal basis since it bars a particular group from enacting beneficial legislation to protect itself from discrimination.

Overall, the cases concerning the preconditions on voting, reapportionment, candidate eligibility, and legislation which prevents certain voters from enacting desired legislation, combine to establish the existence of a fundamental right to equal political participation. Although the Supreme Court has not explicitly recognized such a fundamental right and has demonstrated reluctance in expanding

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479. *Washington,* 450 U.S. at 470.
480. *Hunter,* 393 U.S. at 387.
481. *Washington,* 450 U.S. at 463.
482. 387 U.S. 369 (1967).
483. *Id.* at 370; *see supra* notes 226-31 and accompanying text (discussing *Reitman*).
484. *Reitman,* 387 U.S. at 377.

the list of fundamental rights beyond those already defined,[485] the right exists within Court precedent. It appears that the Court has all but declared such a fundamental right to exist.[486] Since the United States Supreme Court chose not to take the case, the Colorado Supreme Court's decision stands and thus, there is a fundamental right to participate on an equal basis in the political process.

B. Protective Legislation Not Limited to Suspect Classes

Although *Hunter, Washington,* and *Reitman* all involved schemes which inhibited a group's ability to procure protective legislation on the basis of race, the principle articulated in the cases clearly was not one that can logically be limited to the "race" context alone.[487] Furthermore, the right of equal political participation applies beyond the suspect classifications to a broader range of discrimination.[488]

Cases concerning political participation do not depend upon the presence of any "suspect" or "protected" class. Rather, the focus is on the participation itself; this is what is protected against discrimination by requiring a standard of strict judicial scrutiny overcome only by a compelling interest.[489] The Supreme Court has continuously emphasized in its case law that the right of meaningful political participation is a core democratic value supporting other rights and, as such, deserves the strongest possible constitutional protection.[490]

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485. *See supra* note 157 (detailing list of cases establishing existing fundamental rights); *see also supra* text accompanying note 158 (discussing the Supreme Court's reluctance to expand the list).

486. "[E]ach and every citizen has an inalienable right to full and effective participation in the political processes of [their] State's legislative bodies." Reynolds v. Sims, 377 U.S. 533, 565 (1964).

487. *See* Evans v. Romer, 854 P.2d 1270, 1281-84 (Colo.) (arguing successfully this position), *cert. denied,* 114 S. Ct. 419 (1993); *see supra* notes 331-42 and accompanying text (relating to the majority's discussion that these cases were not limited to race).

488. The Supreme Court has recognized three classifications as suspect: race, national origin, and ancestry. Illegitimacy and gender are deemed "quasi-suspect" classifications. For further discussion on suspect classifications, see *supra* notes 147-54 and accompanying text.

489. *See* TRIBE, *supra* note 151, §13-10, at 1085 (stating that equal protection "ordinarily . . . requires that a franchise restriction be shown necessary to serve a compelling state interest").

490. *Reynolds*, 377 U.S. at 562 ("[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which . . . we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.").

Many of the first voting rights cases did not involve discrimination against any suspect class at all,[491] but rather involved discrimination against non-suspect groups such as non-property owners,[492] military personnel,[493] and urban residents.[494] The Court invalidated the state laws at issue in those cases not because they discriminated against a racial group or other suspect class, but because they restricted the ability of a certain group to further its interests by diluting or inhibiting that group's right to vote.[495] *Hunter* supports this proposition.

Recall that *Hunter* involved a charter amendment passed by the voters of Akron, Ohio, requiring a majority vote to approve fair housing legislation, whereas other municipal ordinances could be approved by the city council.[496] The Supreme Court held that the amendment deprived minority groups of equal protection because it "place[d] special burdens on racial minorities within the governmental process."[497] In reaching that conclusion, the Court obviously was concerned with the fact that the amendment was aimed at minority racial groups. However, the Court's opinion articulated a broader concept.

In particular, the *Hunter* court stated that the state may not discriminate against "*any* particular group by making it more difficult to enact legislation in its behalf [any more] than it may dilute *any person's* vote or give *any group* a smaller representation than another of comparable size."[498] It is significant that the Court cited *Reynolds v. Sims*[499] and *Avery v. Midland County*[500] to support this proposition because those cases did not involve a suspect classification.[501] Therefore, *Hunter* expressly extended its principle to cases that did not involve race or any other suspect class; a state could not

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491. *See supra* notes 147-54 (listing the traditionally recognized suspect classifications).

492. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 631 (1969).

493. Carrington v. Rash, 380 U.S. 89, 94 (1965).

494. Avery v. Midland County, 390 U.S. 474, 484-86 (1968) (noting that "the powers of the Commissioners Court include the authority to make a substantial number of decisions that affect all citizens, whether they reside inside or outside the city limits"); *Reynolds*, 377 U.S. at 568 ("A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm.").

495. *See supra* notes 169-89 and accompanying text (discussing voting cases generally).

496. Hunter v. Erickson, 393 U.S. 385, 387 (1969).

497. *Id.* at 391.

498. *Id.* at 392-93 (emphasis added) (quoted later in Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 468 (1982)).

499. 377 U.S. 533 (1964).

500. 390 U.S. 474 (1968).

501. The schemes in *Reynolds* and *Avery* involved the classification of urban residents.

burden *any* particular group's ability to enact legislation in its behalf.[502]

The Court invalidated a similar measure thirteen years later, in *Washington v. Seattle School District No. 1*.[503] The Court relied on *Hunter* to hold that the voters wrongfully interfered with the political process and unlawfully oppressed the efforts of minority groups to secure public benefits by denying the minorities the right to obtain racial integration through a remedy enacted by the district school boards, the entity that administered practically all local school programs.[504]

In reaching this holding, the majority in *Washington* did not merely follow *Hunter*, but specifically addressed and adhered to Justice Harlan's "neutral principles" formulation pronounced in *Hunter* as the "central principle."[505] In particular, the Court noted that laws would not be found unconstitutional just because they warranted general requirements affecting the legislative process, even if they burdened minority groups' ability "to achieve favorable legislation."[506] It was the fact that these "laws make it more difficult for *every* group in the community to enact comparable laws, they provid[e] a just framework within which the diverse political groups in our society may fairly compete."[507] The initiatives in both *Hunter* and *Washington*, on the other hand, did not attempt "to allocate governmental power on the basis of any general principle," but, rather, unlawfully burdened the rights of a particular group.[508] The state did not neutrally allocate its power, making such a structuring of the political process as prohibitive as denying equal voting

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502. It is noteworthy that of the two Justices who dissented in Reitman v. Mulkey, 387 U.S. 369 (1967), Justices Harlan and Stewart, concurred separately to the majority opinion in *Hunter*. *See* Evans v. Romer, 854 P.2d 1270, 1280 (Colo.) (noting this fact), *cert. denied* 114 S. Ct. 419 (1993). After recognizing their dissent in *Reitman*, they observed that, in contrast to the initiative in *Reitman*, "the City of Akron ha[d] not attempted to allocate governmental power on the basis of any general principle." Hunter v. Erickson, 393 U.S. 385, 395 (1969) (Harlan, J., concurring). Rather, the Akron voters acted with the "clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that [was] in their interest." *Id.* Justices Harlan and Stewart concluded that this was constitutionally impermissible. *Id.* at 395-96.

503. 458 U.S. 457 (1982); *see supra* notes 222-25 and accompanying text (discussing *Washington*).

504. *Washington*, 458 U.S. at 467-70 (developing the principle that the Equal Protection Clause of the Fourteenth Amendment guarantees the right to full participation in the political life of the community).

505. *Id.* at 469-70.

506. *Id.* at 470 (quoting *Hunter*, 393 U.S. at 394 (Harlan, J. concurring)).

507. *Id.* (quoting *Hunter*, 393 U.S. at 393 (Harlan, J. concurring)).

508. *Id.* (quoting *Hunter*, 393 U.S. at 395 (Harlan, J. concurring)).

rights.[509] The *Washington* Court's reliance on the "general principle" underlying Harlan's analysis in *Hunter* signifies the Court's extension of *Hunter* and *Washington* to constitutional principles beyond suspect classifications.

That political participation cases do not depend upon the presence of any "suspect" or "protected" classes is also evident in *Gordon v. Lance*.[510] In upholding a West Virginia statute, the Court responded to the proposition that the requirement in *Gordon* diluted voting power, and reaffirmed the principle that "an individual may not be denied access to the ballot because of some extraneous condition, such as race, wealth, tax status, or military status."[511] However, the Court distinguished *Hunter* based on the effect of the measures at issue: in *Gordon*, the statute applied equally to all bond issues for any purpose, while in *Hunter*, the ordinance subjected "fair housing legislation *alone* . . . to an automatic referendum requirement."[512] Furthermore, in *Hunter*, an identifiable class was singled out, whereas the *Gordon* Court could "discern no independently identifiable group or category that favor[ed] bonded indebtedness over other forms of financing. Consequently no sector of the population [would] be 'fenced out' from the franchise because of the way they [would] vote."[513]

The Court in *Gordon* further supported the right of equal protection in the political process by indicating that although the West Virginia statute did not restrict any group's right to vote, it hindered the ability to take certain governmental action.[514] The Court concluded that "*so long as such provisions [did] not discriminate against* or authorize discrimination against any identifiable class they [did] not violate the Equal Protection Clause."[515]

The *Gordon* Court's discussion of *Hunter* is significant in two respects. First, the fact that the Court mentioned *Hunter* at all is considerable because the issue in *Gordon* did not involve race or any other suspect class.[516] Second, although the Court acknowledged

509. *Id.*

510. 403 U.S. 1 (1971); *see supra* notes 343-53 and accompanying text (discussing *Gordon*).

511. *Gordon*, 403 U.S. at 5.

512. *Id.* (emphasis added).

513. *Id.* (citing Carrington v. Rash, 380 U.S. 89, 94 (1965)).

514. *Id.* at 5-6.

515. *Id.* at 7 (emphasis added).

516. Brief Amicus Curiae of the Colorado Bar Association at 18, Evans v. Romer, 854 P.2d 1270 (Colo.) (No. 93SA17), *cert. denied*, 114 S. Ct. 419 (1993).

that the ordinance in *Hunter* "singled out" "those who would benefit from laws barring racial, religious or ancestral discriminations,"[517] the Court did not address the racial aspect or identity of the particular class discriminated against in *Hunter* as a distinguishing factor in its analysis. Instead, the *Gordon* Court considered important the fact that there was an identifiable class, whatever its nature.[518] For example, the Court suggested that it would have invalidated the statute if there was some "independently identifiable group" that "favor[ed] bonded indebtedness,"[519] thus implying that constitutional analysis focuses on whether there is discrimination against a particular group, not whether the specific group discriminated against was entitled to protection because of its status as a suspect class.[520]

Both *Gordon* and *Washington* establish the fact that *Hunter* is not a case limited in application to race. By recognizing this fact, *Washington* proves its own analysis to extend beyond race. These cases articulate the vital importance of political participation in our democratic society and the right to do so on an equal basis. These cases involve race, but the underlying theme in the holding concerns the development of a fundamental right to participate equally in the political process. Not just participation, but *effective and meaningful* participation, is a constitutional value deserving independent protection. When a particular group is singled out, regardless of whether or not it is considered a suspect class, meaningful political participation is impeded, causing an impermissible violation of the equal protection clause. The Constitution extends beyond protecting a group of individuals; it ensures that the value of effective participation is not undermined.

Overall, it is evident that the cases relied on by the majority support the existence of a fundamental right to political participation on an equal basis.[521] Within the fundamental right to vote lies the concept that the political process cannot be inhibited under any circumstances. The cases involving candidate eligibility illustrate that the right to have equal access to the ballot encompasses values un-

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517. *Gordon*, 403 U.S. at 5 (quoting Hunter v. Erickson, 393 U.S. 385, 391 (1969)).

518. *Id.* at 7.

519. *Id.* at 5.

520. *See id.* at 7; Brief Amicus Curiae of the Colorado Bar Association at 18, *Evans* (No. 93SA17).

521. Evans v. Romer, 854 P.2d 1270, 1285 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

derlying the democratic process.[522] The reapportionment cases demonstrate the paramount importance of political participation as one's vote cannot be diluted and every person's vote must count equally.[523] Voter-initiated measures which prevent a certain class of voters from enacting desired legislation are held invalid on the basis that they prevent the group of voters from obtaining effective and meaningful participation in the political process.[524] Thus, for purposes of equal political participation, it is irrelevant whether the group involved is a "suspect class." The issue turns on one's ability to participate in the governmental process. The *Evans* court only reiterated, in a direct manner, what the U.S. Supreme Court has previously identified — namely, a fundamental right to participate on an equal basis in the political process.

IV. IMPACT

The Colorado Supreme Court declared in *Evans v. Romer*[525] that there is a fundamental right to participate on an equal basis in the political process. Although the case was decided with regard to the infringement of this right for homosexuals, lesbians, and bisexuals, the court's holding extends to all classes of people. Thus, the obvious impact of the court's holding is that the fundamental rights "list" is extended to include the right to equal political participation for everyone.

The United States Supreme Court has demonstrated resistance to expanding what it considers to qualify as a fundamental right.[526] The Court had the opportunity to uphold that pattern of resistance when Amendment 2 supporters appealed *Evans* to the Court;[527] however, the Court declined to review the case. Thus, the Colorado Supreme Court's explicit recognition of this fundamental right stands as is. The Colorado court's analysis has already been recognized by the United States District Court in *Equality Foundation*

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522. For a discussion of these cases, see *supra* notes 190-96 and accompanying text.

523. For a discussion of the reapportionment cases, see *supra* notes 197-211 and accompanying text.

524. For a discussion of these cases, see *supra* notes 212-34 and accompanying text.

525. 854 P.2d at 1270.

526. *See supra* note 158 and accompanying text (referring to Supreme Court's reluctance to expand the fundamental rights list); *see also supra* note 157 (listing the fundamental rights).

527. The U.S. Supreme Court denied certiorari on November 1, 1993. Romer v. Evans, 114 S. Ct. 419 (1993).

of Greater Cincinnati v. City of Cincinnati.[528]

In this case, the court granted a preliminary injunction to prevent the enforcement of a voter initiated amendment that mirrored the one in Colorado.[529] On November 2, 1993, the voters in Cincinnati passed an amendment to the Cincinnati charter that prohibited the city and its various boards and commissions from enacting, adopting, enforcing, or administering any ordinance, regulation, rule, or policy which provided that homosexuals, lesbians, or bisexuals, were entitled to or had a claim of minority or protected status, quota preference or other preferential treatment.[530] Any existing provision that contradicted this amendment was deemed null and void by the amendment.[531] Plaintiffs claimed, among other things, that the amendment infringed on their fundamental right to participate equally in the political process.[532] Although the court demonstrated reluctance in finding that such a fundamental right existed, the court concluded that there was a "strong likelihood that such [a] right exists, and that the Defendant has violated it."[533] The United States district court relied on the Colorado Supreme Court's analysis in *Evans*.[534] Thus, the court recognized that "all people have the right to be free from restrictions which would 'pose the danger of denying some citizens any effective voice in the governmental affairs which would substantially affect their lives.' "[535]

The district court further upheld the proposition that the holdings in *Hunter* and *Gordon* are not limited to cases involving racial discrimination.[536] Rather, the court concluded that those cases "stand for the broader proposition that states may not disadvantage any identifiable group, whether a suspect category or not, by making it more difficult to enact legislation on its behalf."[537] Thus, another impact of the *Evans* holding is its recognition of extending cases such as *Hunter* beyond an analysis based solely on a suspect classification. These cases instead identify, although not expressly stated, a fundamental right to equal political participation.

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528. 838 F. Supp. 1235 (S.D. Ohio 1993).
529. *Id.* at 1243.
530. *Id.* at 1236.
531. *Id.*
532. *Id.* at 1238.
533. *Id.*
534. *Id.*
535. *Id.* at 1239 (quoting Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969)).
536. *Id.* at 1241.
537. *Id.*

The effect such a right has on the political process enables political institutions to maintain their ability to enact protective legislation when necessary without fear of religiously or otherwise motivated, voter initiatives draining them of their power. For example, there was existing legislation in Colorado which prevented discrimination based on an individual's sexual orientation in public accommodations, employment, and education.[538] When Colorado for Family Values campaigned against such legislation, motivated by religious reasons,[539] it successfully convinced voters to pass Amendment 2. If enacted, Amendment 2 would make all the pre-existing legislation prohibiting such discrimination unenforceable and unconstitutional.[540] Thus, Amendment 2 did not merely burden gay men, lesbians, and bisexuals right's to political participation, it effectively abrogated those rights in the context of protective legislation.

By repealing a number of laws and ordinances previously enacted for the benefit of gay men, lesbians, and bisexuals, Amendment 2 effectively removed this combined group of individuals from the political structure of the State of Colorado and rendered them politically powerless with regard to protection of their rights and interests. Without the legislation prohibiting discrimination based on sexual orientation, the only redress for homosexuals, lesbians, and bisexuals was a constitutional amendment, basically repealing Amendment 2. Since Amendment 2 itself was a constitutional amendment passed by a majority vote, gays, lesbians, and bisexuals basically had no means of preventing others from discriminating against them. By recognizing that such a voter-initiated amendment encumbers homosexuals, lesbians, and bisexuals access to the political process, the *Evans* court found that there is a fundamental right to political participation on an equal basis.[541] This fundamental right thus protects existing legislation from injurious attack.

By protecting existing anti-discrimination laws and policies, the recognition of such a fundamental right also furthers gay rights in that it allows homosexuals to have not merely a voice in government, but an effective voice. Further, existing legislation which provides homosexuals equal access to necessities, such as housing and

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538. *See supra* notes 246-49 and accompanying text (discussing the legislation).

539. *See supra* notes 45-63 and accompanying text (discussing CFV's purposes underlying its development of Amendment 2).

540. LEGISLATIVE COUNCIL, *supra* note 29, at 9.

541. Evans v. Romer, 854 P.2d 1270, 1282 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

employment, by prohibiting discrimination, enables homosexuals to feel somewhat relieved in knowing that the law does not exclude them from deserving the same opportunities as everyone else.

The fundamental right thus far has only received recognition in the area of legislation concerning homosexuals, lesbians, and bisexuals. However, a fundamental right to equal political participation does exist and has been explicitly adopted by the Colorado Supreme Court and the United States District Court for the Southern District of Ohio as well as implicitly adopted by the United States Supreme Court through case precedent. The impact of such a fundamental right may increase as more "Amendment 2" issues arise.

CONCLUSION

The Colorado Supreme Court in *Evans v. Romer* boldly declared that there exists a fundamental right to equal participation in the political process. Although such a right has not explicitly been identified or recognized by the United States Supreme Court, prior case law concerning preconditions on the right to vote, reapportionment, candidate eligibility, and voter initiated amendments preventing enactment of a particular type of legislation, combine to demonstrate that such a right is embraced in these types of cases and can be extrapolated from them without upsetting the majoritarian and political system enveloped in our government.

Through the cases concerning preconditions on the right to vote, the Supreme Court has expressed a view that the ability to have one's voice expressed freely and uninhibited is of paramount importance in our democratic society. The reapportionment cases uphold the same principle, extending it one step further by invalidating any scheme which dilutes a person's or group's vote, thus reinforcing the idea that everyone's vote must count equally. The cases regarding candidate eligibility go to the heart of our system of government by safeguarding equal access to the ballot for minority parties and furthering the importance of political participation by providing unrestricted choice for voters. Cases involving voter-initiatives preventing a certain group from enacting desired legislation most closely resemble the Amendment 2 issue. These types of cases are injurious not only to the group of voters who are shut off from the political process due to the measure, but also to the democratic process itself as the normal political institutions are prevented from enacting legislation beneficial to society.

All these categories of cases combined demonstrate the essential value equal political participation holds in our society. It is the right to participate for *everyone* that must be protected, not just those who are deemed to qualify as a "suspect class." Therefore, it may be said that the United States Supreme Court, as well as society as a whole, have already adopted the principle that the Colorado Supreme Court explicitly identified, that there is a fundamental right for all to participate on an equal basis in the political process.

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