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Commentary: Evans v. Romer: An Old Right Comes Out

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EVANS V. ROMER: AN "OLD" RIGHT COMES OUT

It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part.[1]

INTRODUCTION

The timing of the decision was, at the very least, interesting. On October 11, 1994, National Coming Out Day,[2] the justices of the Supreme Court of Colorado announced the death of Amendment 2.[3] Almost two years earlier, Colorado voters had passed an initiative that amended the state constitution.[4] Amendment 2 rescinded existing laws and policies that prohibited discrimination against persons of "homosexual, lesbian or bisexual" orientation.[5] It fur-

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1. THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1982). Madison opposed allowing constitutional questions to be influenced by changing "public passions" repeatedly put "to the decision of the whole society." Id. NO. 49, at 340.

2. Michael Booth, *The Battle is Far from Over*, DENV. POST, Oct. 12, 1994, at A10. "Coming out . . . refers to a process by which individuals who's [sic] gay, lesbian, or bisexual eventually comes to understand their same-sex interests and to take action to find a way to accommodate that and come to understanding and perhaps express it." Record vol. 3 at 85, Evans v. Romer, No. 92-CV7223, 1993 WL 19678 (D. Colo. Jan. 15, 1993) (*Bayless I*) (testimony of John C. Gonziorek at the trial requesting a preliminary injunction). One of the plaintiffs at the same trial testified:

> Coming out of the closet is a series of steps that you take. For me, the first step was to come out socially. That is, to identify with other gays and lesbians and go to places where gays and lesbians congregate. The second step for me was to come out to my family, all of my family, and let them know what my sexual orientation was. And the third stage was to come out professionally and identify myself as an openly gay man.

Record vol. 4 at 47-48 (testimony of Richard Evans).

3. Evans v. Romer, 882 P.2d 1335 (Colo. 1994) (en banc), *cert. granted*, 115 S. Ct. 1092 (1995) (*Evans II*). Amendment 2 provides:

> No Protected Status Based On Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. II, § 30 (as it would read if amended by Amendment 2).

4. Evans v. Romer, 854 P.2d 1270, 1272 (Colo. 1993) (en banc) (upholding the preliminary injunction issued by the district court) (*Evans I*). On November 3, 1992, Amendment 2 passed by a margin of 53.4% to 46.6%. *Id.*

5. Amendment 2 rescinded laws and policies affecting homosexuals, lesbians, and bisexuals. *Supra* note 3. In 1977, Aspen passed an ordinance prohibiting discrimination in employment, housing, public services, and public accommodations based on numerous classifications, including sexual orientation. ASPEN, COLO., CODE § 13-98 (1977). Boulder enacted a similar measure in 1987. BOULDER, COLO., CODE § 12-1 (1981). *See* Record vol. 5 at 46-47 (testimony of Leslie Durgin, the Mayor of Boulder, noting that 51% of the people in Boulder voted in favor of adding sexual orientation to the Human Rights Ordinance). Denver's anti-discriminatory policy was

ther mandated that voters could only attain such a law or policy in the future by reamending the constitution.[6]

Gay rights proponents challenged the measure in court.[7] They advanced primarily on the theory that Amendment 2 violated the fundamental right of gays, lesbians, and bisexuals to participate equally in the political process.[8] Following a lengthy legal battle, the Colorado Supreme Court agreed.[9]

Gay rights activists could celebrate victory over intolerance only briefly.[10] On February 21, 1995, the United States Supreme Court granted the

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passed in October of 1990. DENVER, COLO., CODE art. IV, § 28-91 (1990). In 1990, Governor Roy Romer also issued an executive order prohibiting discriminatory practices in state employment. Executive Order in Celebration of Human Rights, Roy Romer, Governor (Dec. 10, 1990). Insurance companies were prevented from determining insurability on the basis of sexual orientation. COLO. REV. STAT. § 10-3-1104(1)(f)(vi) (1987 & Supp. 1992).

At trial, plaintiffs noted repeatedly that because Amendment 2 applied only to laws and policies affecting homosexuals, lesbians, and bisexuals, heterosexuals would have a remedy under law that was denied to those of other sexual orientations. Record vol. 4 at 154, *Bayless I* (No. 92-CV7223) (testimony of John Bennett, Mayor of Aspen); Record vol. 4 at 208-09 (testimony of Richard Evans, the Denver official who handles complaints concerning gay and lesbian discrimination); Record vol. 5 at 38 (testimony of Dani Newsum, the Director of Boulder's Office of Human Rights). Plaintiffs also asserted that even if private companies chose to extend protection to those groups, no remedy existed unless provided by the private entity itself because of Amendment 2. Record vol. 5 at 57-59 (testimony of Leslie Durgin).

6. *Supra* note 3.

7. Opponents challenged the measure in state district court (*Bayless I*). Judge Bayless granted a preliminary injunction. *Bayless I*, 1993 WL 19678 at *12.

8. Plaintiff's Brief in Support of Preliminary Injunction at 28-33, *Bayless I* (No. 92-CV7223). Plaintiffs charged Amendment 2 violated other constitutional rights: (1) the First Amendment right to freedom of association and expression; (2) the First Amendment right to petition the government for redress of grievances; (3) the Establishment Clause by advancing a particular religious view; (4) the guarantee of a republican form of government; (5) the Supremacy Clause by preventing state courts from hearing federal claims of discrimination; and (6) the plaintiffs claimed Amendment 2 was impermissibly vague. They also raised several state constitutional claims: (1) an initiative cannot place legislation out of the reach of the general assembly; and (2) the home rule provisions grant power to municipalities to enact such laws. Complaint at 6-11, *Bayless I* (No. 92-CV7223).

9. *Evans I*, 854 P.2d at 1282. The Colorado Supreme Court recognized the existence of the right to participate in the political process when they upheld the preliminary injunction issued by the district court. *Id.* The state appealed the second district court's decision granting a permanent injunction in *Evans II*. In that decision, the court found no compelling state interest, narrowly tailored to serve that interest, and upheld the permanent injunction. *Evans II*, 882 P.2d at 1350.

Cincinnati, Ohio voters had enacted a similar measure at the city level one year after the passage of Amendment 2. Equality Found. v. City of Cincinnati, 54 F.3d 261, 263-64 (6th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3122 (U.S. Aug. 10, 1995) (No. 95-239). Issue 3 was a city charter amendment which prohibited the city from enacting any law or policy which gave rise to a claim of discrimination based on sexual orientation. *Id.* Gay rights proponents challenged the measure in federal district court and won on a variety of issues, including the right to equal political participation. Equality Found. v. City of Cincinnati, 860 F. Supp. 417, 433-34 (S.D. Ohio), *aff'd in part, vacated in part*, 54 F.3d 261 (1995), *petition for cert. filed*, 64 U.S.L.W. 3122 (U.S. Aug. 10, 1995) (No. 95-239). The Sixth Circuit subsequently reversed and petition for certiorari has been filed. This commentary will not address the Cincinnati case because of the pending Supreme Court action on Amendment 2.

10. *See generally* Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905 (1993) (discussing the increasing use of legislation to protect against discriminatory actions based on sexual orientation) [hereinafter *Constitutional Limits*]. Over the last several decades, at least 139 jurisdictions have enacted legislation protecting gays, lesbians, and bisexuals. *Id.* at 1905. The increased visibility of gay rights activism produced a movement led by fundamentalist religious groups to repeal those anti-discrimination measures. Valerie Richardson, *Amendment Two, Act Two; Gay-Rights Foe Builds on Colorado Victory*, WASH. TIMES, June 2,

state's writ of certiorari.[11] Fear rippled through the gay community, though publicly, leaders painted brave faces.[12] Review of the Colorado decision justifiably produced waves of apprehension because the current conservative Court frowns on the birth of "new" fundamental rights.[13]

This commentary proposes that the fundamental right exposed by *Evans v. Romer*[14] saw the light of day long before the Colorado Supreme Court took up its inquiry. When the nation's Founders debated the structure of our government, protecting the rights of minorities emerged as one of their primary concerns.[15] While bestowing the right to vote created a democratic society, the Framers worried that the power of the ballot box could stifle minority rights.[16] Zealous majorities could override and trample any minority at the polls. When the Supreme Court examines the constitutionality of Amendment 2, the Justices need look no farther than the Founder's words to uphold the fundamental right to participate in the political process.[17]

1993, at A1; *see also* George de Lama, *Colorado Springs Showdown: Gays Facing Fundamentalists*, CHI. TRIB., Apr. 27, 1993, "News" Section, at 1.

11. Evans v. Romer, 882 P.2d 1335 (Colo. 1994) (en banc), *cert. granted*, 115 S. Ct. 1092 (1995) (*Evans II*). An increasing reluctance by the Court to grant certiorari made the decision more significant. Last year, the Court accepted only 99 cases from the nearly 7,700 petitioned. Adriel Bettelheim, *High Court Breaks Silence, Steps into Gay-Rights Arena*, DENV. POST, Feb. 22, 1995, at A4.

12. *See* Jeffrey A. Roberts, *Gays Equate Court Battle to Brown vs. Board of Ed.*, DENV. POST, Feb. 22, 1995, at A4. One of the plaintiffs worried that review would put their lives on the line, "jeopardizing their jobs and safety." *Id.* "This is our Brown." *Id.* (quoting Richard Evans, one of the plaintiffs). But John Miller asserted that the developing middle ground in the Court would provide a fair hearing. *Id. See* Howard Pankratz, *Amendment 2 Showdown*, DENV. POST, Feb. 22, 1995, at A1. Rabbi Steve Foster maintained that a ruling by the Supreme Court will "give us some clarity." *Id.*

13. "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973) (holding that public education is not a fundamental right); *see also* Bowers v. Hardwick, 478 U.S. 186, 195 (1986) ("There should be, therefore, great resistance to expand the substantive reach of the [Due Process Clauses], particularly if it requires redefining the category of rights deemed to be fundamental."); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (declaring that there is no constitutional right to minimal housing).

Some Justices have used a broader method and found a fundamental right if it was "deeply rooted in this Nation's history and tradition." Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503 (1977). An unenumerated fundamental right is a right not explicity granted in the Constitution, but is so basic as to be "implicity in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937). Ronald Dworkin concludes that "unenumerated" fundamental rights differ from enumerated rights only in their level of abstraction. They both are derived from the text of the Constitution. Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 386-90 (1992).

14. *Evans I*, 854 P.2d at 1282.

15. *See infra* notes 113-15 and accompanying text.

16. *See infra* notes 111-12 and accompanying text.

17. Many Justices place great weight on the intent of the Framers. *See* SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 28-30 (1989) (noting that Chief Justice Rehnquist believes that judges should not superimpose their beliefs and therefore should examine the intent of the Framers to determine constitutional questions); CHRISTOPHER E. SMITH, JUSTICE ANTONIN SCALIA AND THE SUPREME COURT'S CONSERVATIVE MOMENT 30-35 (1994) (explaining Scalia's approach to constitutional interpretation as "textualist and originalist"). Even less conservative Justices consider the intent of the Framers an important facet in clarifying constitutional issues. *See e.g.*, U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995) (the opinion of Justice Stevens emphasized and relied on the intent of the Framers to determine if states may set term limits on national representatives).

Additionally, the right to equal political participation has ridden silently with us throughout the ages as the Court has travelled down the evolving path of voting rights. As the Supreme Court examined our basic right to vote, a doctrine emerged that recognizes more substance to the right to vote than merely "one person, one vote."[18] The Court has acknowledged that the right to vote is hollow without the ability to elect a representative who in turn will have the ability to enact favorable legislation on the voter's behalf.[19]

Most importantly, however, the Court's examination of Amendment 2 must supplement precedent with the most rudimentary democratic ideal: equality. Whether Amendment 2 interferes with fundamental equality depends on two underlying questions. First, may a majority of a state's voters "fence out" a group from participation in a level of government? Second, may a group of citizens be denied the opportunity to ever elect a representative who can carry their voice into the legislative halls? The Colorado Supreme Court answered in the negative.[20]

While the right recognized by *Evans v. Romer* finds its roots in history, and is further granted legitimacy by democratic values, the court plowed new ground in the area of equal protection analysis. *Evans* announced that a fundamental right to political participation cannot be denied to an "identifiable group."[21] By necessity, examination of this right requires weaving the fundamental right strand of equal protection analysis[22] with group concepts borrowed from the suspect class strand.[23] The *Evans* decision implied that elements used by courts to measure suspect class status[24] are also useful to evaluate the identifiability of the group denied political participation.[25] This new "hybrid," if you will, of equal protection analysis could distract the Court from the fundamental harm imposed by Amendment 2. In particular, the current Court's aversion to breaking new ground[26] combined with the judiciary's historical reluctance to grant gays and lesbians suspect class status,[27] could cause the Court to resist the invitation to adapt its equal protection analysis,

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18. *See infra* notes 160-67 and accompanying text.

19. *See* Reynolds v. Sims, 377 U.S. 533, 567 (1964) (noting that the basic principle of represenative government requires non-dilution of the electorate's vote); *see also* Allen v. State Bd. of Elections, 393 U.S. 544, 565 (1969) (noting that voting restrictions can be subtle as well as obvious).

20. *Evans II*, 882 P.2d at 1350.

21. *Evans I*, 854 P.2d at 1285.

22. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-7 (2d ed. 1988).

23. *Id.* § 16-23.

24. *Id.* § 16-23, at 1545 (describing the criteria that the Supreme Court has used in its evaluation of a suspect class as: historical discrimination, immutability, and politically weak or unpopular).

25. *See Evans I*, 854 P.2d at 1284-85.

26. *See* Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 901 (1993) (advising attorneys litigating before the Supreme Court to get a good book on legal history).

27. *See, e.g.*, Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes."), *cert. denied*, 494 U.S. 1003 (1990); *see also* John F. Niblock, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153, 170-71 (1993) (summarizing the reasons courts have declined to apply suspect class status to sexual orientation).

and to leave Amendment 2's harm unremedied.

This commentary argues that the judiciary should focus primarily on the historical origin of the right identified by the *Evans* court, and not get sidetracked by the hybrid nature of the *Evans* court's equal protection analysis. The harm that Amendment 2 would impose on gays, lesbians, and bisexuals is exactly what the Framers intended to prevent when they chose a representational form of government.[28] That a doctrine may have to be modified to accomodate supporting that right should not preclude the Supreme Court of this land from granting redress for the underlying harm.

Part I traces the history of the Amendment 2 litigation and details the Colorado court's analysis from the viewpoints of both the majority and dissent. Part II proposes that the Constitution's Framers intended that the structure of our government should protect us from the very evil unleashed by Amendment 2.[29] Indeed, the fear of majority tyranny loomed large in the words of James Madison.[30] Part III suggests that political access may be understood in terms of vote dilution, and analogizes voting cases to Amendment 2's denial of effective participation.[31] Part IV concludes that while this "new" (old) fundamental right to political participation exists, it applies to groups singled out in some way for different treatment.[32] The proper review focuses on defining what kind of "group" is entitled to protection in the political process. In effect, this involves exploring the extent of a nexus between the harm and the group it impacts. This section explores the parameters of the right identified by *Evans* by using hypotheticals of other groups denied political participation.

PART I: BACKGROUND

A. *The Majority View*

1. Voting Embodies "Effective" Participation.

Following the passage of Amendment 2, opponents challenged the measure in state district court.[33] The district court granted a preliminary injunction, finding that Amendment 2 burdened "the right not to have the State endorse and give effect to private biases."[34] The Colorado Supreme Court upheld the district court's preliminary injunction, but found that the fundamental right burdened by Amendment 2 was instead the "right to participate equally in the political process."[35] The court first announced that it did not create this right.[36] At the inception of the Republic, "the right of citizens to participate

28. *See infra* notes 123-33 and accompanying text.
29. *Infra* notes 142-49 and accompanying text.
30. *Infra* notes 109-15 and accompanying text.
31. *Infra* notes 160-94 and accompanying text.
32. *Infra* notes 214-18 and accompanying text.
33. *Bayless I*, 1993 WL 19678 at *4. See *supra* note 8 for the various claims asserted.
34. *Bayless I*, 1993 WL 19678 at *11.
35. *Evans I*, 854 P.2d at 1282.
36. *Id.* at 1276.

in the process of government" existed as a core democratic value.[37] The court's analysis then wove together a series of cases to find that an identifiable group of people may not be "fenced out" of the political process.[38] Each of these cases supported the court's concern about denying "effective" participation, whether direct or indirect.

a. *Direct Burdens on Voting Preclude Effective Participation.*

First, the *Evans* court examined direct burdens on the right to vote, such as requiring payment of a poll tax[39] or ownership of property[40] before granting access to the ballot box.[41] These types of voting restrictions most directly violate the Equal Protection Clause and have been consistently struck down by the Supreme Court.[42] The *Evans* court identified the danger of such preconditions on voting rights as denying the electorate "any effective voice in the governmental affairs which substantially affect their lives."[43]

The court carefully distinguished *effective* participation from *successful* participation, holding that only the former is protected.[44] Although Amendment 2 does not deny gay rights proponents the actual ability to vote, it does deny them the right to effectively participate in every layer of representational government.[45] On the initial level, voters could not vote for representatives who have the power to work toward passage of anti-discrimination laws. At the next stage, any elected representatives who wanted to pass anti-discrimination laws could cast their vote for every gay rights measure proposed, but Amendment 2 would prevent the enactment of any favorable legislation. While this distinction of successful versus effective seems subtle, the court relied on three other categories of cases to flesh out the differences.[46]

b. *Indirect Burdens Similarly Deny Effective Participation.*

Limitations and conditions sometimes burden voters only indirectly. First, the *Evans* court noted that reapportionment cases held that "meaningful" participation requires equality of voting rights.[47] *Reynolds v. Sims*[48] announced that "the overriding objective must be substantial equality of population among the various districts, so that the *vote of any citizen is approximately equal in*

37. *Id.*
38. *Id.* at 1285.
39. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) ("[W]ealth or fee paying has, in our view, no relation to voting qualifications . . . . ").
40. Kramer v. Union Free Sch. Dist., 395 U.S. 621, 633 (1969) (limiting franchise to owners of taxable property violates equal protection).
41. *Evans I*, 854 P.2d at 1277.
42. *Id.*
43. *Id.* (quoting *Kramer*, 395 U.S. at 627).
44. *Id.*
45. Amendment 2 would prevent the enactment of any "statute, regulation, ordinance or policy" that provided protection from discrimination to homosexuals, lesbians, or bisexuals. See *supra* note 3 for the exact language of the amendment.
46. *Evans I*, 854 P.2d at 1277-79.
47. *Id.* at 1278.
48. 377 U.S. 533 (1964).

weight to that of any other citizen in the State."[49] The *Evans* court relied on *Reynolds* to conclude that the Constitution requires not only participation at the ballot box, but *equal* participation.[50]

Similarly, the *Evans* court found that candidate eligibility and ballot access cases supported the right of effective participation.[51] In those cases, the Supreme Court held that restricting access to the ballot to only candidates affiliated with one of the two major political parties indirectly burdened the rights of voters to effectively exercise their franchise.[52] The mere right to cast a ballot was insufficient if voters could use their vote only in a limited fashion.[53] The proper inquiry in ballot access cases is whether the challenged restriction unfairly or unnecessarily burdens the "availability of political *opportunity*."[54] A court must implicitly recognize the potential fluidity of American political life, and ensure that the state does not freeze the status quo by denying access to independent candidates.[55]

2. Groups Have a Right to Effective Participation in the Political Process.

Relying on another line of cases, the *Evans* majority rejected the argument that only individuals enjoy the right to effective participation.[56] The court held instead that groups of citizens have an analogous right of effective participation.[57] The court examined cases dealing with communities that had placed extra burdens on particular laws for successful passage.[58] All of the laws attempted to limit the normal political processes available to a group that desired to enact favorable legislation. The *Evans* court reasoned that these cases, woven together, implicitly recognized that government may not deny equal participation to a "independently identifiable group" any more than to an individual citizen.[59] Viewed together, they gave substance to the right identified by the *Evans* majority.

a. *A Focus on Unfair Treatment*: Hunter v. Erickson[60]

The most troubling factor for the *Evans* court was the unfair treatment

49. *Id.* at 579 (emphasis added).
50. *Evans I*, 854 P.2d at 1276 (emphasis added).
51. *Id.* at 1278 (citing Williams v. Rhodes, 393 U.S. 23, 31 (1968)).
52. "By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences." Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979).
53. *See Evans I*, 854 P.2d at 1278. "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." *Williams*, 393 U.S. at 31.
54. Clements v. Fashing, 457 U.S. 957, 964 (1982) (quoting Lubin v. Parish, 415 U.S. 709, 716 (1974)) (emphasis added).
55. *See* Anderson v. Celebrezze, 460 U.S. 780, 817 (1983).
56. *Evans I*, 854 P.2d at 1279-82.
57. *Id.* at 1279.
58. *See infra* notes 60-84 and accompanying text.
59. *See Evans I*, 854 P.2d at 1285.
60. 393 U.S. 385 (1969).

accorded to one group by the challenged measure. They first pointed to *Hunter*, in which the Supreme Court invalidated a city charter amendment in Akron, Ohio that required any fair housing legislation to be ratified by a public referendum.[61] Other ordinances could be enacted directly by the city council, with no submission to a popular vote.[62] The *Evans* court found it significant that, according to Justice White's opinion, Akron could require a city-wide vote for *all* of its legislation, but could not single out one type for different treatment.[63] Requiring more only for fair housing legislation imposed unconstitutional special burdens on those who would benefit from such legislation.[64]

Critics (including the *Evans* dissent) asserted that the racial classifications at issue in *Hunter* formed the basis for the decision.[65] The *Evans* majority spent much of its opinion answering this limited reading of *Hunter*. They charged that the *Hunter* Court's use of voting cases, rather than a suspect class analysis based on race, demonstrated the race context was neither a necessary nor sufficient basis for striking down the amendment.[66] If the *Hunter* Court had intended the decision to turn on racial discrimination, then it could easily have relied on racial precedents.

b. *A Discriminatory Purpose*: Washington v. Seattle School District No. 1[67]

To bolster the argument that the *Hunter* decision was not simply based on race, the *Evans* court utilized another case which expanded the concept of unfairness to a particular group.[68] In *Washington*, the Supreme Court invalidated a statewide voter initiative that prohibited local school boards from busing students to achieve racial desegregation.[69] The measure allowed busing for other purposes, however, such as special educational programs, overcrowded or unsafe conditions, or inadequate physical facilities.[70] The school board, therefore, could assign students to other schools for various reasons, but not to achieve integration.[71] The Court noted that if the voter initiative had

61. *Evans I*, 854 P.2d at 1279 (citing *Hunter*, 393 U.S. at 387). Significantly, just like Amendment 2, the ordinance not only suspended the existing ordinance forbidding housing discrimination, but required the approval of the voters before any future ordinance could take effect. *Hunter*, 393 U.S. at 389-90.

62. *Hunter*, 393 U.S. at 389-90. The amendment "drew a distinction between those groups who sought the law's protection against racial . . . discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends." *Id.* at 390.

63. *Evans I*, 854 P.2d at 1279 (emphasis added).

64. *Id.* at 1279-80.

65. *See infra* notes 87-94 and accompanying text.

66. *Evans I*, 854 P.2d at 1279-80. The *Hunter* Court cited Reynolds v. Sims, 377 U.S. 533 (1964) and Avery v. Midland County, 390 U.S. 474 (1968), both of which involved reapportionment and not discrimination based on race. *Hunter*, 393 U.S. at 391.

67. 458 U.S. 457 (1982).

68. *Evans I*, 854 P.2d at 1280-81.

69. *Washington*, 458 U.S. at 470.

70. *Id.* at 462.

71. *Id.*

placed "obstacles in the path of everyone," it would have withstood the constitutional challenge.[72]

The *Washington* Court clarified the *Hunter* decision. They identified the "simple but central principle" underlying *Hunter* as Justice Harlan's "neutral principles" doctrine.[73] Harlan, in his concurring opinion in *Hunter*, asserted that facially discriminatory statutes that do not allocate power on the basis of a neutral principle should be invalidated.[74] The focus of the *Washington* Court on power allocation moved the holding of *Hunter* outside the narrow bounds of racial discrimination.[75]

Not only was the burden placed on one particular issue, but it removed a level of government participation from a certain interested group. Prior to the state vote on the issue, local school boards had the ability to decide whether busing was in the best interests of their district.[76] Under the voter initiative, busing advocates could no longer seek their remedy from local school boards. A statewide vote would be required to change the busing policy, rather than a local school board decision.[77] The *Washington* Court noted that the initiative burdened all future attempts to integrate Washington schools in districts throughout the state, by lodging the decisionmaking authority over the question at a new and remote level of government.[78]

c. *No Issue Singled Out*: Gordon v. Lance[79]

The *Evans* majority cited one additional case to lend support to the argument that the two prior decisions (*Hunter* and *Washington*) were not racially based, but instead turned on the fairness to any identifiable group of voters.[80] In *Gordon*, the Supreme Court upheld a West Virginia statute that required an increased percentage of voters to approve any bond indebtedness.[81] The Court distinguished *Hunter* because the required three-fifths majority applied to *all* bond issues, and did not single out issues relating to a particular purpose, such as school funding.[82] Only fair housing legislation was subject to public refer-

72. *Id.* at 470.
73. *Id.* at 469-70.
74. *Hunter*, 393 U.S. at 393 (Harlan J., concurring). Harlan identified two classes of statutes. Statutes which "have the clear purpose of making it more difficult for racial and religious minorities to further their political aims" should be struck down. *Id.* The other category of statutes were only enacted to provide a "just framework within which the diverse political groups in our society may fairly compete and are not enacted with the purpose of assisting one particular group in its struggle with its political opponents." *Id.* Clearly, Justice Harlan's neutral principle extended beyond racial classifications. The key factor in his analysis was if the statute disadvantaged (or protected, to the detriment of others) one group. *Id.*
75. *Evans I*, 854 P.2d at 1281.
76. *Washington*, 458 U.S. at 479-80.
77. *Id.* While the *Evans* court did not specifically mention this diversion factor, the Supreme Court in *Washington* found it significant. They noted that small communities who had operated successful desegregational busing programs for years would find it difficult to garner the necessary statewide support. *Id.* at 484 n.27.
78. *Id.* at 483.
79. 403 U.S. 1 (1971).
80. *Evans I*, 854 P.2d at 1281-82.
81. *Gordon*, 403 U.S. at 2.
82. *Id.* at 5.

endum in *Hunter*.[83] Moreover, *Gordon* involved no racial classification, and relied on *Hunter* without placing significance on the fact that the class discriminated against in *Hunter* was a racial minority.[84]

3. Amendment 2 Denies Effective Participation by Denying the Opportunity to Enact Favorable Legislation.

Like the burdens placed on special groups that the *Evans* court examined, Amendment 2 would restrict the ability of gays, lesbians, and bisexuals to ever participate equally in Colorado's political process. While they could cast their vote, it would be an empty exercise because their elected representative could represent in name only. Any favorable proposal would be doomed before the legislative process began.

The language of the amendment itself violates the *Hunter* principle that governmental power must be allocated based on neutral principles.[85] Amendment 2 would erect near-total barriers only for those interested in passage of legislation that prohibited discrimination based on sexual orientation. Other types of anti-discrimination ordinances could be passed at the local level. All other groups could carry their concerns to their representatives and request action. Only gay rights proponents must resort to the electorate for passage of favorable laws.

Before the passage of Amendment 2, local communities had enacted legislation protecting citizens from discrimination based on their sexual orientation.[86] Amendment 2 would remove this level of governmental protection from those local citizens and provide the opportunity for remedy only by amending the state constitution. All other citizens pursuing legislative goals could elect representatives to lobby for their interests, pass local ordinances, and adopt state statutes, but gay rights proponents could only take their issues to a statewide vote.

B. *The Dissenting View*

The lone dissenting justice in *Evans* took the majority to task in its analysis of, in his view, these "race" cases.[87] He argued that the laws struck down in *Hunter* and *Washington* violated racial principles.[88] Justice Erickson added another case into the mix, *James v. Valtierra*,[89] which he concluded was dispositive.[90] The *James* Court upheld a newly-approved provision of the California Constitution that mandated a voter referendum before approval of low-rent housing projects.[91] Prior to the constitutional amendment, each county

83. *Id.*
84. *Id.*
85. *See supra* note 3.
86. *Supra* note 5.
87. *Evans I*, 854 P.2d at 1293-1300 (Erickson J., dissenting).
88. *Id.*
89. 402 U.S. 137 (1971).
90. *Evans I*, 854 P.2d at 1298 (Erickson, J., dissenting).
91. *James*, 402 U.S. at 139.

and city had a public housing authority to take advantage of federal financing opportunities.[92] Significantly for Justice Erickson, the Supreme Court in *James* distinguished *Hunter* by noting that the California provision under examination did not rest on "distinctions based on race."[93] The Court further explicity stated that they would not extend *Hunter*.[94]

The *Evans* majority addressed the criticism of Justice Erickson by focusing on the dissent in *James*.[95] The three dissenters had argued that the constitutional provision at issue discriminated on the basis of wealth.[96] They ignored the majority's use of *Hunter*, discussing instead the invidious discrimination against poor people on the face of the measure.[97] The majority had characterized the provision as only a benign economic classification.[98] For the dissenters in *James*, the issue did not fall into the narrower framework of who warranted the protection given by *Hunter*. They instead examined the broader question of who deserved suspect class status under the Fourteenth Amendment.[99] The *Evans* court concluded that *James*, therefore, was best understood as a case declining to apply suspect class status to the poor, rather than making race a threshold requirement for the application of *Hunter*.[100]

To bolster this view, the *Evans* court further noted that the *James* majority had all joined the later *Gordon* opinion.[101] The *Gordon* Court refused to strike down a measure that required an increased number of voters to pass any bond-indebtedness issues.[102] The West Virginia statute at issue involved no racial classification.[103] The *Gordon* opinion did not mention *James*.[104] Presumably, if the question turned on whether race was a prerequisite for the

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92. *Id.* at 138.

93. *Id.* at 141 (quoting *Hunter*, 393 U.S. at 391).

94. *Id.* Professor Derrick Bell observed that it was only Justice Black's devotion to the referendum that could explain the *James* decision. Justice Black had written the majority opinion in *James*, and was the lone dissenter in *Hunter*. Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L.R. 1, 3-7 (1978). "[D]evotion to the referendum presents a serious danger to the civil rights of minority groups." *Id.* at 6. The *James* decision was also criticized by zoning and planning experts who thought the voter referendum requirements "were not imposed out of devotion to abstract principles of direct democracy. They were imposed to raise difficult, and frequently insuperable, barriers to the provision of needed lower income housing or to change in the municipality's existing land-use regulations." ABA ADVISORY COMMISSION ON HOUSING AND URBAN GROWTH, HOUSING FOR ALL UNDER LAW 93 (Richard P. Fishman ed., 1978).

95. *Evans I*, 854 P.2d at 1282 n.21.

96. *James*, 402 U.S. at 144-45 (Marshall, J., dissenting).

97. *Id.* at 143-44. The provision at issue, section 1 of California Article XXXIV provided:

No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

CAL. CONST. art. XXXIV, § 1.

98. *James*, 402 U.S. at 143 (Marshall, J., dissenting).

99. *Id.* at 144-45.

100. *Evans I*, 854 P.2d at 1282 n.21.

101. *Id.*

102. *Gordon*, 403 U.S. at 8.

103. *Id.* at 2.

104. *Evans I*, 854 P.2d at 1282 n.21.

application of *Hunter*, the Court would have mentioned *James*, where the protection of *Hunter* had been denied.

C. *Basic Values: A Representational Government*

While both the majority and dissent in *Evans* articulate arguably supportable positions, the initial declaration by the majority concerning the importance of citizen participation may be the most revealing of all.[105] The extended discussions in both opinions may be missing the forest (the essential nature and value of equal political participation in the structure of our government), to concentrate on naming the individual trees (citing case law to reach a conclusion that has been inherent in our government since the founding fathers created it).

What is more basic to the values of our republic than the ability of voters to cast their ballots to pass favorable measures? The existence of the right to equally participate lies at the very heart of our representative government.[106] While Amendment 2 does not foreclose the opportunity to vote, it denies the opportunity to pass favorable legislation. Gays, lesbians, and bisexuals, or simply people who believe in equal access to government and a constitutional right to non-discrimination, would have to go to the highest level of government to advance beneficial legislation.

The denial of an opportunity to enact favorable legislative measures to an unpopular (or any) identifiable group of voters violates the very notion of equality upon which this country was established. As the Framers built the foundations of our government, they sought to ensure that the power of a majority could not usurp the rights of a minority. Their answer lay in choosing a representative form of government, which is exactly what Amendment 2 threatens to destroy.

PART II: THE FOUNDERS' DESIGN

A. *The Framers' Intent*

When the colonies pulled free of Great Britain's yoke, the Founders searched for tools to protect the fledgling nation. The ballot box offered the greatest hope.[107] They believed the constant threat of removal by the governed served to keep the hearts of the elected representatives pure.[108] This in no way implied that the Framers placed any great faith in the judgment of the people. On the contrary, James Madison greatly feared the "passions" of "factions."[109] Madison defined a faction as "a number of citizens whether amounting to a majority or minority of the whole, who are united and actuated

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105. *Id.* at 1276.

106. *See* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1716-17 (1993) (arguing that voting constitutes the concept of governance, which does not end when the voter pulls the lever).

107. JOHN H. ELY, DEMOCRACY AND DISTRUST 78 (1980).

108. *See id.* at 77.

109. THE FEDERALIST NO. 10, at 56-57 (James Madison) (Jacob E. Cooke ed., 1982).

by some common impulse of passion or of interest, *adverse to the rights of other citizens. . . .*"[110]

Madison recognized that unbridled freedom at the ballot box ensured only that majority would rule. Voting constrains the "sinister views" of minority factions by defeat at the polls.[111] The danger, however, lies in the sacrifice of minority rights to the will of the majority. If the faction is a majority, then the power of the ballot box "enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens."[112]

Madison emphasized the preservation of minority rights throughout *The Federalist*. "If a majority be united by a common interest, the rights of the minority will be insecure."[113] "[T]he majority, having such coexistent passion or interest, must be rendered . . . unable to concert and carry into effect schemes of passion."[114] "In a society . . . [in] which the stronger faction can readily unite and oppress the weaker, anarchy may be truly said to reign. . . ."[115] As Robert Bork explained, there are "some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule."[116]

Some commentators have argued that the Framers' concerns centered on property rights, not a sense of justice for the "poor" minorities.[117] Following that logic, unless the dispute involved property, the Framers' worries about majoritarian tyranny would not apply. Others, however, have contended that Madison's concerns extended not only to materialistic special interests (factions), but also included a fear of religious "factions."[118] Madison believed that religion could inspire individuals to acts that would otherwise revolt their consciences.[119] He observed that religion "[e]ven in its coolest state . . . has been much oftener a motive to oppression than a restraint from it."[120]

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110. *Id.* at 57 (emphasis added).

111. *Id.* at 60. "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote . . . ." *Id.*

112. *Id.* at 60-61 (describing a "pure" democracy).

113. *Id.* NO. 51, at 351. Madison intended a moral dimension to the term "faction." *See* MORTON G. WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION 57 (1987).

114. THE FEDERALIST NO. 10, at 61 (James Madison) (Jacob E. Cooke ed., 1982).

115. *Id.* NO. 51, at 352. Madison implies that "oppression" is when "measures are . . . decided, not according to the rules of justice, and the rights of the minor party; but by the superior force of an interested and over-bearing majority." *Id.* NO. 10, at 57.

116. ROBERT H. BORK, THE TEMPTING OF AMERICA 139 (1990).

117. *See* Gordon S. Wood, *Democracy and the Constitution, in* HOW DEMOCRATIC IS THE CONSTITUTION 1-17 (Robert A. Goldwin & William A. Schambra eds., 1980).

118. *See* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 n.16 (1984); *see also* DAVID F. EPSTEIN, THE POLITICAL THEORY OF *THE FEDERALIST* 76 (1984) ("It is clear from Madison's previous versions of *Federalist* 10's argument that religious factions were his primary concern among opinionated parties."); Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 32 (1993) (noting that at the time of the Constitution, while "interest" had a specific economic meaning, "passion" included envy and revenge directed against other persons (citing David Hume's TREATISE ON HUMAN NATURE) (citation omitted)). Linde observed that the U.S. Supreme Court had linked the guarantee of a republican government with protections against "the sudden impulses of mere majorities." *Id.* at 33 (quoting *In re* Duncan, 139 U.S. 449, 461 (1891)).

119. WHITE, *supra* note 113, at 133.

120. *Id.* at 133-34 (quoting 10 PAPERS OF JAMES MADISON 213-14 (Robert A. Rutland et al.

Whether motivated by religion or property, Madison's concerns focused on protecting minority factions from the power of the majority.[121] Undeniably, gays provide the best example in today's society of the kind of minority that the Framers were trying to protect: historically unpopular, and arousing passion in those who oppose them.[122]

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eds., 1973)). Madison had considered the possibility that religious motives could help control a factious majority. *Id.* Richardson, *supra* note 10, at A1; *see also* Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 216 (noting that many religious groups in America condemn homosexuality).

Few could argue that the motivation and drive behind Amendment 2 was not religiously based. Colorado For Family Values (CFV) sponsored the drive to gather signatures to place Amendment 2 on the ballot. The mission statement for CFV provides that "Colorado For Family Values is a non-profit coalition of Colorado citizens whose mission is to amend, through the initiative process, the Colorado State Constitution so as to prevent homosexual, bisexual and lesbian orientation from being used as bases for the granting of protected class status or special rights." The organization is based in Colorado Springs. Fundraising letter from Colorado For Family Values (on file with the author). Anti-gay advocates frequently recite the Bible to justify their opposition to homosexuality. Claire Martin, *Many See Basic Values Under Siege*, DENV. POST, Sept. 19, 1993, at D14. Evidence presented at the trial for the preliminary injunction against Amendment 2 characterized religious views toward homosexuality as "very black and white and simplistic." Record vol. 3 at 102, *Bayless I* (No. 92-CV7223) (testimony of John C. Gonziorek). Describing some of the CFV literature, Mr. Gonziorek explained, "Well, one of the articles particularly at the end talks about after stating how horrible gay men and lesbians are, if they give up their homosexuality and embrace certain religious beliefs, they would be redeemed and good people." Record vol. 3 at 103.

One particularly venonomous organization is named S.T.R.A.I.G.H.T. (Society To Remove All Immoral Godless Homosexual Trash). Its publications include articles reprinted from other sources, such as a Cal Thomas column equating the homosexual lifestyle with pedophilia. Cal Thomas, *Gay Rights? A Sign of American Decline?*, S.T.R.A.I.G.H.T. (S.T.R.A.I.G.H.T., Denver, Colo.), Vol. 1, Issue 4, at 1.

121. *See supra* notes 109-16 and accompanying text.

122. *See Constitutional Limits*, *supra* note 10, at 1906 (referring to the historical discrimination suffered by lesbians and gay men). Reported hate crimes have more than doubled from 1988 to 1993 in five major cities keeping consistent statistics. Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, HARV. C.R.-C.L. L. REV. 387, 409 (1994). Much of the victimization goes unreported because of the fear of increased discrimination. *Id.* at 413. Violence against gay men in particular is often gruesome and brutal. *Id.* at 410-11.

For only a few of the more recent discriminatory actions suffered by lesbians or gays, *see, e.g.*, Cheryl Clark, *Action by S.D. Fails to Stem Hate Crimes*, SAN DIEGO UNION-TRIBUNE, July 4, 1995, at A1 (listing various incidents, including: the murder of a young man whose attackers had shouted "faggot," the whipping of one man by skinheads, and the stabbing of another man, whose attacker had said he was "robbing queers"); Kevin Duchschere, *Gay Man Alleges Abuse, Sues Hennepin County*, STAR-TRIBUNE (Minneapolis-St. Paul), June 2, 1995, at B5 (relating story of gay man who claimed two guards physically assaulted him); Mike Folks & Stephanie Smith, *Knight Found Guilty*, SUN-SENTINEL (Ft. Lauderdale), Sept. 30, 1995, at 1B (describing the defendant's reaction to a guilty verdict for murdering a gay man after setting out to "roll a faggot"); Ernie Hoffman, *Witness Says Killing Suspect Kicked Victim*, PITTSBURGH POST-GAZETTE, July 13, 1995, at B4 (relating the account of a witness who said that the defendant had said he planned to kill a homosexual a few days before he beat a man to death); Gabriel Rotello, *Busted Heads and Twisted Minds*, NEWSDAY, July 13, 1995, at A31 (describing an attack by skinheads); Scott W. Wright, *Car Dealer Sued for Not Selling to Man with Aids*, NEW ORLEANS TIMES-PICAYUNE, July 21, 1995, at A10 (reporting a lawsuit filed by an AIDS victim who had been called faggot and denied the purchase of a car).

B. *Representative Government as a Control*

The Framers intended representative government to curb the excesses of "factions."[123] They believed that the individual nature of people prevents the removal of the *causes* of factions.[124] The Founders sought instead to limit its *effects*.[125] Madison did not trust the motives of the people to limit factions, but thought that the government should instead provide no opportunity for oppression.[126] Hamilton wrote that a representative government "will be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill humors, or temporary prejudices and propensities, which . . . beget injustice . . . ."[127] Madison believed that representative government offered the best cure for the control of factions by "passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of *justice* will be least likely to sacrifice it to temporary or partial consideration."[128] Decisionmakers, removed from the heat of the moment, could reflect on rash motives, and diffuse the possible effects of prejudice.[129]

Representative government encompasses cooperation, coalition, and compromise. While individual voters may not persuade opponents to listen, legisla-

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123. THE FEDERALIST NO. 10, at 62 (James Madison) (Jacob E. Cooke ed., 1982). "[T]he majority . . . must be rendered . . . unable to concert and carry into effect schemes of oppression. . . . A Republic, by which I mean a Government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking." *Id.* Without a representative government, a majority faction is permitted to "mask its violence under the forms of the Constitution." *Id.* at 60.

124. *Id.*

125. *Id.* "[I]t is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government." *Id.* NO. 49, at 343.

126. *See* WHITE, *supra* note 113, at 135.

127. THE FEDERALIST NO. 27, at 172 (Alexander Hamilton) (Jacob E. Cooke ed., 1982). Hamilton noted:

> The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests.

Id. NO. 71, at 482.

William Adams commented that voters, who are not subjected to a public process, are much less likely to put personal prejudices aside in the privacy of a voting booth rather than the legislator subjected to public scrutiny. *See* William E. Adams, Jr., *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 OHIO ST. L.J. 583, 596-97 (1994).

128. THE FEDERALIST NO. 10, at 62 (James Madison) (Jacob E. Cooke ed., 1982) (emphasis added). Julian Eule referred to this as one aspect of "filtering" the majority will. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1526-27 (1990). He noted that the Founders had an inherent distrust of democracies. *Id.* at 1522. At the Constitutional Convention, Edmund Randolph "complained of the 'turbulence and follies of democracy.' Elbridge Gerry spoke of 'democracy as the worst of all political evils,' while Roger Sherman hop[ed] that 'the people . . . have as little to do as may be about the government.'" *See* Jules Lobel, *The Meaning of Democracy: Representative and Participatory Democracy in the New Nicaraguan Constitution*, 49 U. PITT. L.R. 823, 827-28 (1988).

129. Madison noted: "[T]here are particular moments in public affairs, when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament." THE FEDERALIST NO. 63, at 425 (James Madison).

tors meet over differing issues each day.[130] Alliances shift, and "[n]o one is always in the majority; therefore, no one can afford to turn a deaf ear to the needs of competing interests."[131] But if a competing interest is robbed of the opportunity to enact favorable legislation, then participation is squelched just as surely as if a barricade had been erected at the voting booth.[132] Disempowered legislators would no longer possess the same ability to bargain. They could still give their votes to other issues, but would be prevented from lobbying other groups to gain votes for successful passage of their interests.[133] Participation in the elective process would be a hollow exercise because legislation may not ever be enacted on their behalf.

Amendment 2 robs gays, lesbians, bisexuals, and anti-discrimination advocates of this right to representative government. Gays may elect representatives who propose statute after statute to prohibit discrimination. The representatives may form coalitions, and enact favorable legislation. Yet Amendment 2 prevents "gay rights" bills from becoming law.[134] Amendment 2 forecloses an avenue to equality, removes any check on the power of the majority, and closes the normal avenues of government to gay rights proponents.

Proponents of the Amendment argue that gay rights advocates are not robbed of their government: they may still vote, may still participate.[135] Examination of the functional meaning of a "representative" refutes this argument. *Webster's* defines "represent" in the context of a legislative body as "to serve by delegated or deputed authority."[136] Further definitions include: (1)

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130. Eule, *supra* note 128, at 1527.

131. *Id.* Bruce Ackerman has observed:

> It was this invention of modern political science, not any increase in the quantity of human virtue, which permitted the rational hope that Americans might succeed where both ancients and moderns had failed before them. Representative institutions permit us to establish a regime encompassing millions of people with different religious and economic interests. Although each faction would gladly use political power to tyrannize over the others, their multiplicity permits the constitutional architect a new kind of political freedom. Rather than suppressing faction at the cost of individual liberty, the successful revolutionaries may hope to neutralize the worst consequences of faction by playing each interest off against the others.

Ackerman, *supra* note 118, at 1025.

132. Matthew Coles, *Equal Protection and the Anti-Civil-Rights Initiatives: Protecting the Ability of Lesbians and Gay Men to Bargain in the Pluralist Bazaar*, 55 OHIO ST. L.J. 563, 574-75 (1994) ("There are two ways to take away a group's power to participate in self-government in a representative system. One would be to take away votes. The other would be to go to the legislature and take away its power to ever enact legislation on the group's behalf.").

133. *See* Kathryn Abrams, *Relationships of Representation in Voting Rights Acts Jurisprudence*, 71 TEX. L. REV. 1409, 1417 (1993) (arguing that the political process entails more than access to the ballot because a voter has a continuing interest in implementation of their preferences through the efforts of the elected representatives). Participation in the process involves both quantitative elements, such as election procedures, and qualitative measures that pertain to the authority of elected officials. *Id.* at 1418.

134. *See supra* note 3 for the text of the amendment.

135. Brief for Petitioners at *26, Romer v. Evans, No. 94-1039, 1995 WL 310026 (U.S. Apr. 21, 1995).

136. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1926 (1986). Madison explained the difference between a democracy and republic: "It is, that in a democracy, the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives and agents." THE FEDERALIST NO. 14, at 84 (James Madison) (Jacob E. Cooke ed., 1982).

"to bring clearly before the mind"; (2) "to exercise the rights of."[137] All of these terms imply an element of performance. "Bring" is defined as to convey, carry or advance.[138] "Exercise" is the act of bringing into play or realizing in action.[139] Even more persuasive is the definition of "representation": "a statement of account especially made to convey a particular view or impression of something *with the intention of influencing opinion or action.*"[140] "Representative" government connotes the power to bring to action, while Amendment 2 erects a barrier to movement.

The Justices who embrace plain meaning can hardly ignore the definition set forth by WEBSTER'S, and conclude that a representative could still "perform" his duties of representation by his impotent presence.[141] A sterile stand-in for gay advocates eliminates all opportunities for consummation in the political process.

C. *Checks and Balances as a Control*

The separation of powers provides another buttress to contain majoritarian bullies.[142] Every reader of American history knows of the legislative, executive, and judicial checks designed to create a balance of power. Madison wrote that the legislative, executive, and judicial branches of government should each have a will of its own.[143] Each branch should have the ability to direct its own course.[144]

Not only was *government* oppression feared, but the threat of the masses weighed on the Framers' minds. "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[145] "The divisions of power were designed to check both the people's agents and the people themselves."[146]

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137. WEBSTERS, *supra* note 136, at 1926.

138. *Id.* at 278.

139. *Id.* at 795.

140. *Id.* (emphasis added). Proponents of the representation afforded gays and lesbians after the passage of Amendment 2 would have enjoyed life before our Revolution. History buffs recall that the colonists were "virtually represented" at that time, and King George never did understand what all the strife was about. *See* ELY, *supra* note 107, at 82. Gays and lesbians are "virtually represented" under the passage of Amendment 2. No matter that their "representatives" have no voice.

141. *See* Alex Kozinski, *My Pizza With Nino*, 12 CARDOZO L. REV. 1583, 1586 (1991) (describing Scalia's desire to defend the plain meaning of the Constitution: "Just as sure as AV's pizza means AV's pizza, confront [in the Sixth Amendment] means confront").

Chief Justice Rehnquist believes that the source of fundamental rights must be the text or the Framers' intentions. *See* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976). The Court recently affirmed its approval of adherence to the Framers' intent in U.S. Term Limits, Inc. v. Thornton, Nos. 93-1456, 93-1828, 1995 WL 306517, at *10 (U.S. 1995).

142. In a republic, "usurpations are guarded against by a division of the government into distinct and separate departments." THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1982).

143. *Id.* at 348.

144. WHITE, *supra* note 113, at 161.

145. THE FEDERALIST NO. 51, at 349 (James Madison).

146. Eule, *supra* note 128, at 1528. Even conservative commentators acknowledge the tension between minority and majority rights. As Robert Bork observed, "The dilemma is that neither

The Framers believed the same divide and weaken strategy could help contain the excesses of the citizenry.[147] They did not intend for the majority to have the power to vote this separation of powers away. Because of the multiplicity of interests in the public, no clear majority could establish dominance.[148] "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or *elective*, may justly be pronounced the very definition of tyranny."[149]

The system of government created by our founding fathers relied on representation and separation of powers to insure protection for minority factions. Without those shields, minorities stand naked in the political process. Amendment 2 effectively denies representation and an entire level of government to gays, lesbians, and bisexuals. They have no voice in their government, except at the highest level; they may only attempt to amend their constitution. In short, Amendment 2 places all control into the hands of the electorate, a prospect that may well cause the Framers to spin in their graves. While commentators argue about the "factions" that troubled the Founders, Amendment 2 embraces all that the republican form of government was designed to prevent.

PART III: ACCESS TO POLITICAL PARTICIPATION

Evans v. Romer uncloaked a fundamental value, supported by a network of cases.[150] Critics will allege that this "new" right to political participation deserves no legitimacy because our founding fathers did not precisely define it.[151] Conservatives frequently deny the existence of protection to any value not explicitly stated in the Constitution, unless it is one they prefer.[152]

Even the hallowed right to vote itself did not appear enumerated until the franchise was extended to include racial minorities by the Fifteenth Amend-

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majorities nor minorities can be trusted to define the proper spheres of democratic authority and individual liberty." BORK, *supra* note 116, at 139. He noted that there is "more to the Court's constitutional function than defining in so direct a fashion the rights of the individual against the state. There is the related task of maintaining the system of government the Constitution creates." *Id.* at 140.

147. Eule, *supra* note 128, at 1528.

148. *Id.*

149. THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1982) (emphasis added).

150. *Evans I*, 854 P.2d at 1282.

151. *See* Reply Brief of Petitioners at *5, Romer v. Evans, No. 94-1039, 1995 WL 466395 (U.S. Aug. 4, 1995).

152. *See e.g.*, United States v. Carlton, 114 S. Ct. 2018, 2027 (1994) (Scalia, J., concurring) (noting an individual's right to retain their property); Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 24 (1990) (O'Connor, J., concurring) (holding compensation is required for taking of property); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 487 (1974) ("[A] most fundamental human right, that of privacy, is threatened when industrial espionage is condoned or is made profitable.").

Yet many values have been implicitly derived from the Constitution: the freedom of association is not mentioned in the text, but it is recognized as a derivative safeguard of an individual's First Amendment rights of free speech and assembly. NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449 (1958). The right to travel was considered implicit in the concept of a Union. Shapiro v. Thompson, 394 U.S. 618, 630 (1968).

ment.[153] Previously the right was *implicitly* derived from constitutional provisions that detail the qualifications for elected officials.[154] But whether found in explicit terms via the Fifteenth Amendment, or divined in the shadows of the term qualifications clauses, the right to vote would be barren without the accompanying entitlement to effective participation.[155]

The U.S. Supreme Court affirmed the fundamental character of the right to vote in *Wesberry v. Sanders*.[156] "No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[157] Even in the preceding century, the Court characterized "the political franchise of voting" as a "fundamental political right, because [it is] preservative of all rights."[158] The Court reiterated that notion in *Reynolds v. Sims*:

> [U]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the

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153. "The right of citizens of the United States to vote shall not be 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. The Supreme Court noted many years after ratification of the Constitution: "[T]he Constitution of the United States does not confer the right of suffrage upon any one." Minor v. Happersett, 88 U.S. (21 Wall) 162, 178 (1875). Nearly half the amendments to the Constitution concern the franchise and election procedures. *See* U.S. CONST. amend. XII (procedures for election of President and Vice President); U.S. CONST. amend. XIV (apportionment rules and limiting eligibility of Confederate officials for Congress); U.S. CONST. amend XV (vote not to be denied because of race); U.S. CONST. amend. XVII (governing election of Senators); U.S. CONST. amend. XIX (vote not to be denied because of sex); U.S. CONST. amend. XXII (no more than two terms for President); U.S. CONST. amend. XXIV (no poll taxes); U.S. CONST. amend. XXVI (must be eighteen to vote).

154. Article I, § 2 established that the House of Representatives would be composed of "Members chosen . . . by the People of the several States." U.S CONST. art. I, § 2. Article I, § 4 gave the states the ability to regulate the "Times, Places and Manner of holding Elections" with congressional oversight. U.S. CONST. art. I, § 4. Article II, § 1 established the procedure to select the members of the Electoral College. U.S. CONST. art. II, § 1.

"The Supreme Court has used these provisions to support the proposition that the states, because of this inherent constitutional authority to control the electoral process, can require persons to meet certain reasonable requirements before they vote in state or national elections." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.31, at 816 (1991). The Court has consistently recognized the right to vote, while noting that a state has a legitimate interest in regulation. Courts have upheld, for example, the right to restrict the franchise to convicted felons, even though they served their sentences. Richardson v. Ramirez, 418 U.S. 24, 43 (1974). The Court has upheld reasonable residency requirements. *See* Marston v. Lewis, 410 U.S. 679, 681 (1973) (upholding 50 day residency requirements for voting in local elections). The Court did not allow Tennessee to proscribe a residency of one year. Dunn v. Blumstein, 405 U.S. 330 (1972).

155. The Court has used the Fourteenth Amendment to construct the fundamental right to vote. It has recognized that the right to vote "is preservative of other basic civil and political rights." Reynolds v. Sims, 377 U.S. 533, 562 (1964).

Kenneth Karst defined equal citizenship as an individual's right to be "presumptively entitled to be treated by the organized society as a respected, responsible, and participating member. Stated negatively, the principle forbids the organized society to treat an individual as a member of an inferior or dependent caste or as a nonparticipant." KENNETH L. KARST, BELONGING TO AMERICA 3 (1989).

156. 376 U.S. 1, 17 (1964).

157. *Id.* Courts examine laws that restrict voting under an equal protection analysis because the classification separates persons "who may or may not vote in an election or that dilutes the voting power of a particular classification of persons." NOWAK & ROTUNDA, *supra* note 154, § 14.31, at 818.

158. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

> 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.[159]

A. *Vote Dilution*

Voting rights have evolved to recognize that voting encompasses more than simply the casting of ballots.[160] The individual right of ability to vote exists together with the group right of process.[161] If the governing body has drawn the lines of a district such that a group will always be in the minority, they have denied that group the opportunity to elect a representative or pass favorable legislation.[162] That minority vote has been "diluted" to less, and in most cases, meaningless, weight. The U.S. Supreme Court's examination of vote dilution cases supports the assertion that the right to vote carries with it the right of effective participation.

The "one person, one vote" standard of *Reynolds*[163] established districts of equal population, but this did not negate the possibility of gerrymandering.[164] Justice Harlan noted:

> The fact of the matter is that the rule of absolute equality is perfectly compatible with "gerrymandering" of the worst sort. . . . The legislature must *do more* than satisfy one man, one vote; it must create a structure which will in fact as well as theory be responsive to the sentiments of the community.[165]

Two varieties of apportionment cases have plagued the courts in recent times. Both involve drawing boundaries to influence the outcome of elections, one on racial grounds,[166] the other on a political basis.[167] While Amendment 2 obviously does not fall within the scope of racial discrimination as such, it does involve the removal of a political voice. Both varieties of apportionment cases serve to delineate the important principles.

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159. Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

160. *See* Abrams, *supra* note 133, at 1417-18.

161. *See* Samuel Issacharoff, *Poliarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1857 (1992) (observing that the early cases tried to avoid the inherent difficulties of assessing election outcomes by focusing on the individual nature of the right). Vote dilution cases forced the Court to turn to a group-based inquiry. *Id.* at 1859.

162. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969) ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casing a ballot.").

163. *Reynolds*, 377 U.S. at 558.

164. The term "gerrymander" is derived from the combination of the last name of Massachusetts Governor Elbridge Gerry with the word salamander, which was the shape of a voting district created in Massachusetts. Davis v. Bandemer, 478 U.S. 109, 164 n.3 (Powell, J., dissenting).

165. Wells v. Rockefeller, 394 U.S. 542, 549 (1969) (Harlan, J., dissenting) (emphasis added).

166. *See* Thornburg v. Gingles, 478 U.S. 30 (1986); City of Mobile v. Bolden, 446 U.S. 55 (1980); White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

167. *See* Davis v. Bandemer, 478 U.S. 109 (1986); Gaffney v. Cummings, 412 U.S. 735 (1973); Baker v. Carr, 369 U.S. 186 (1962); Colegrove v. Green, 328 U.S. 549 (1946).

1. Racial Districting

The Court faced *invidious* racial gerrymandering head on when the Alabama legislature passed a law that changed the city limits of Tuskegee from a square to "an uncouth twenty-eight-sided figure."[168] The new boundaries severed almost all of the black residents from the city.[169] This action deprived these residents and no others of the benefits of voting in municipal elections.[170] The reapportionment diminished the strength of the minority votes to practically invisible levels.[171] The Court invalidated the redistricting plan, concluding that discrimination against a racial minority was a violation of the Fifteenth Amendment.[172] The Voting Rights Act of 1965 was subsequently amended to handle the same issues that confronted the Court in *Gomillion*.[173] Congress specifically added that a redistricting plan may not dilute the voting strength of a minority.[174]

But what if the districting was done to benefit the racial minority? The Court wrestled with the issue of "benign" racial gerrymandering in *Shaw v. Reno*.[175] In *Shaw*, white voters challenged a redistricting scheme drawn to specifically create two majority black districts.[176] One district was "approximately 160 miles long and, for much of its length, no wider than the I-85 corridor."[177] One legislator described it as so "bizarre" that most of the new district's voters could be murdered by a car driving with both doors open down the interstate.[178] Unlike earlier decisions, the *Shaw* Court focused on the equal protection rights of the *white* voters, finding a claim of an unconstitutional racial gerrymander.[179] While the purpose of the redistricting was benevolent, the Court concluded that drawing boundaries based solely on race prolonged racial tensions and stereotypes.[180] The *Shaw* opinion, written by Justice O'Connor, explained that such practices would "undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group *rather than their constituency as a whole*."[181]

Justice O'Connor's concerns apply equally to the representatives of gay proponents. As elected officials, our representatives theoretically carry all of our voices to the legislative halls. Under Amendment 2, a representative

168. Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960).
169. *Id.* at 341.
170. *Id.*
171. *Id.*
172. *Id.* at 346-47.
173. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. § 1971, §§ 1973 to 1973 bb-1 (1988)).
174. 42 U.S.C. § 1973 (1988).
175. 113 S. Ct. 2816 (1993).
176. *Id.* at 2819.
177. *Id.* at 2820-21.
178. *Id.* at 2821.
179. *Id.* at 2822, 2832.
180. *Id.* at 2827.
181. *Id.* (emphasis added). A recent Supreme Court decision attempted to clarify the *Shaw* decision by explaining that it was "analytically distinct" from a vote dilution claim. Miller v. Johnson, 115 S. Ct. 2475, 2485 (1995). Justice Kennedy explained that the reapportionment scheme in *Shaw* separated voters strictly on the basis of race. *Id.*

whose constituency includes gays, lesbians, bisexuals, or anti-discrimination advocates would work only for a limited number of voters. Because Amendment 2 would limit the action of a respresentative on anti-discrimination issues, it would effectively reduce the constituency of that representative. Amendment 2 would restrict the interests represented and undermine the system of representative democracy.

2. Political Districting

The Supreme Court has tread cautiously down the road of reviewing voting boundary disputes based solely on political inequities. The danger of entering the "political thicket"[182] restricted examination of gerrymandering claims to those based on race because of the political question doctrine.[183] Courts use caution when examining claims that involve the separation of powers.[184] The Court finally declared purely political reapportionment claims justiciable in *Davis v. Bandemer*.[185]

Davis focused on the rights of groups of ideologically similar people to cast a "meaningful" vote.[186] Republicans, who controlled the state legislature, passed a redistricting plan.[187] Democrats did not receive a majority of the legislative seats available in the 1982 elections, even though they received a majority of the statewide vote.[188] Justice White, writing for the Court, concluded that a claim "submitted by a political group, rather than a racial group,

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182. Colegrove v. Green, 328 U.S. 549, 556 (1946).

183. The political question doctrine forbids judicial determinations of legislative actions involving separation of powers. 13A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 2D, § 3534.1 (1984).

184. *Id.* § 3534.

185. 478 U.S. 109 (1986). The Court had been reluctant to assert itself into the "political thicket." 13A WRIGHT, *supra* note 183, § 3534. In a recent case involving racial gerrymandering, the Court did not allow a vote dilution claim under § 2 of the Voting Rights Act. Holder v. Hall, 114 S. Ct. 2581, 2587-88 (1994). In a lengthy dissent, Justice Thomas voiced his opinion that gerrymandering claims required the judiciary to delve into political theory. *Id.* at 2596 (Thomas, J., dissenting). The *Holder* plaintiffs challenged the single commissioner form of government, which exercised both legislative and executive authority. *Id.* at 2584. Justice Thomas maintained that there was no workable standard for choosing the proper *size* of the government body. *Id.* at 2596 (Thomas, J., dissenting) (emphasis added). He further extended that reasoning to preclude judicial interpretation of "effective suffrage, representation, and the proper apportionment of political power in a representative democracy . . . ." *Id.* He noted that the Court's decisions have "immersed the federal courts in a hopeless project of weighing questions of political theory." *Id.* at 2592. But Justice Stevens rejected Justice Thomas' narrow reading of the Voting Rights Act and his apparent inclination to overturn a long line of previous decisions. He explained:

> There is no question that the Voting Rights Act has required the courts to resolve difficult questions, but that is no reason to deviate from an interpretation that Congress has thrice approved. Statutes frequently require courts to make policy judgments. The Sherman Act, for example, requires courts to delve deeply into the theory of economic orgainization. Similarly, Title VII of the Civil Rights Act has required the courts to formulate a theory of equal opportunity. Our work would cerainly be much easier if every case could be resolved by consulting a dictionary, but when Congress has legislated in general terms, judges may not invoke judicial modesty to avoid difficult questions.

Id. at 2629 (Stevens, J., dissenting).

186. *See Davis*, 478 U.S. at 123-24.

187. Both the state senate and the general assembly had Republican majorities and the governor was a Republican. *Id.* at 113-14.

188. *Id.* at 115.

does not distinguish it in terms of justiciability."[189] He explained that a group must exhibit a "lack of political power and the denial of fair representation" so that they had "*essentially been shut out* of the political process."[190] Mere suffering at the polls was insufficient to lodge a successful claim.[191] Rather, a group of voters had to show they were *purposefully* being denied access to the political system.[192]

The Court placed a high burden on political gerrymandering claims. "In this context, such a finding of unconstitutionality must be supported by evidence of continual frustration of the will of a majority of the voters or *effective denial to a minority of voters of a fair chance to influence the political process.*"[193] The challenged statute must demonstrate not only a discriminatory effect, but also a discriminatory purpose.[194]

The analysis of political apportionment claims applies as well to Amendment 2. Denial of fair representation presents an easy hurdle for Amendment 2 opponents. Representatives must have some ability to enact legislation on behalf of the citizens they represent. Amendment 2 forecloses that possibility. It denies one group of voters the right to representation and the opportunity to enact favorable legislation. Amendment 2 mandates unresponsiveness in the legislature. Amendment 2 denies gays, lesbians, bisexuals, and anti-discrimination proponents the opportunity to influence the political process.[195] The legislation they seek to pass is forever placed out of their reach. Opportunity for effective participation comes only by amending the state constitution.[196] This presupposes that a historically unpopular group may in some way garner enough votes to overturn Amendment 2.[197] Meanwhile, although they may still access the polls, they are denied access to the accompanying right of effective participation.

The *Davis* Court mandated that a group must show not only a discrimina-

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189. *Id.* at 125. "[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole . . . ." *Id.* at 132.

190. *Id.* at 139 (emphasis added).

191. *Shaw*, 113 S. Ct. at 2835. The Court has judged a redistricting plan unconstitutional because of historic and present discrimination, together with the legislature's unresponsiveness to the group's interests. White v. Regester, 412 U.S. 755, 767-69 (1973).

192. *Shaw*, 113 S. Ct. at 2834-35 (emphasis added). Demonstration of discriminatory intention was required to strike down a multimember district in Rogers v. Lodge, 458 U.S. 613, 625 (1982). A multimember district restricts the ability of a minority to elect representatives. *Id.* at 616. "Past discrimination had prevented blacks from effectively participating in Democratic Party affairs and in primary elecions . . . ." The District Court thus concluded that historical discrimination had restricted the present opportunity of blacks effectively to particpate in the political process. *Id.* at 625. The Court defined a minority as a racial, ethnic, economic, or *political group*. *Id.* at 616 (emphasis added).

193. *Davis*, 478 U.S. at 133 (emphasis added). Some commentators have called for relaxation of the court's usual rule of requiring a discriminatory purpose, considering the "legislators' keen awareness of patterns of ethnic voting." KARST, *supra* note 155, at 94.

194. *Davis*, 478 U.S. at 133.

195. *Evans I*, 854 P.2d at 1285.

196. See *supra* note 3 for text of amendment.

197. *See generally* JONATHAN KATZ, GAY AMERICAN HISTORY (1976) (providing a history of discrimination against gays in America); *see also supra* note 122.

tory effect, but also a discriminatory purpose.[198] Amendment 2 opponents may easily prove the discriminatory intent behind the initiative. Although most legislation fails to overcome that normally high burden, the volumes of venomous literature and video tapes circulated by the proponents of Amendment 2 should suffice to demonstrate the required discriminatory purpose.[199] The position paper submitted by Colorado For Family Values[200] (CFV) which promoted Amendment 2 made it clear that one of the Amendment's purposes was to curtail the potential success of the gay rights movement.[201] The semantics of "special rights" drew on the insecurities and fears of the majority.[202] Displaced by decades of civil rights, the majoritarian middle contained an ugly element that the religious zealots tapped.[203] The Conservative Right knew how to play on these fears of affirmative action, and mustered up enough hatred to pass a clearly discriminatory initiative.[204]

The mere fact that "the people" initiated the discriminatory action does not insulate it from violating constitutional principles. The Court concluded long ago that "'one's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.'"[205] When Colorado voters attempted to apportion legislative districts without due regard for proportional population, the Court held that con-

198. *Davis*, 478 U.S. at 127.

199. *See* David Colker, *Anti-Gay Video Highlights Church's Agenda*, L.A. TIMES, Feb. 22, 1993, at A1 (describing a video tape produced by Bill Horn, who spliced outrageous segments of amateur tape together); *see also* David Colker, *Statistics in Gay Agenda Questioned*, L.A. TIMES, Feb. 22, 1993, at A16 (describing brochures distributed throughout Colorado).

200. Colorado For Family Values is a non-profit organization that is responsible for drafting and promoting Amendment 2. Brief in Support of Plaintiffs' Motion for Preliminary Injunction at *4, Evans v. Romer, No. 92-CV7223, 1993 WL 19678 (D. Colo. Jan. 15, 1993). Pat Robertson's National Legal Foundation assisted Colorado for Family Values in drafting the amendment. *Id.*

201. Record vol. 6 at 72-75, Evans v. Romer, No. 92-CV7223, 1993 WL 19678 (D. Colo. Jan. 15, 1993) (*Bayless I*) (testimony of Paul Talmey).

202. The distributed videos and brochures played on people's fears about homosexuality. The videos focused on gay parades and suggested that all homosexuals acted out sexual practices in public. Additionally, a public perception exists that homosexuals are more likely to molest children. Record vol. 3 at 109, *Bayless I*, (No. 92-CV7223) (testimony of John C. Gonziorek at the trial requesting a preliminary injunction). A number of studies confirm there is no relationship between sexual orientation and child molestation. *Id.*

203. *See* Adams, *supra* note 127, at 588 (describing ititiative proposals which avoid hostile epithets, but make reference to "special rights," "affirmative action," or "quotas"); *see also* Suzanne B. Goldberg, *Facing the Challenge: A Lawyer's Response to Anti-Gay Initiatives*, 55 OHIO ST. L.J. 665, 669-70 (1994) (describing the appeal to prejudice that anti-gay initiatives exhibit). "[T]he inititative supporters appeal to the notion, popular in some sectors of American society, that minority groups are the beneficiaries of special privileges." *Id.* at 670. Amendment 2 played heavily on the "special rights" theme. "Anti-gay organizers argue that gay civil rights laws afford 'special rights' to homosexuals, giving them claims to job quotas and other reparations previously reserved for blacks, Hispanics and other minorities." *See* Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 293 (1994) (quoting Michael Booth, *Colorado: Gay-Rights Battlefield*, DENV. POST, Sept. 27, 1992, at A1).

204. *See* Adams, *supra* note 127, at 606.

205. Hall v. St. Helena Parish Sch. Bd., 197 F. Supp. 649, 659, *aff'd per curiam*, 368 U.S. 515 (1961) (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (holding public school system could not sell or lease its buildings to alleged private school, but maintain extensive control because purpose was segregation)).

stitutional rules still controlled citizens' actions.[206] *Lucas v. Forty-Fourth General Assembly* held that an amendment to the state constitution "is not valid just because the people voted for it."[207] "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate."[208]

PART IV: ANALYSIS OF THE FUNDAMENTAL RIGHT TO POLITICAL PARTICIPATION

The Founders' words and the principles underlying voting rights make clear that a fundamental right to political participation exists. The *Evans* case focused on an "identifiable" minority being unable to effectively exercise their franchise.[209] The nature of the right recognized by the *Evans* court, however, depends on the proper definition of the group deserving protection.

A. *What Is a "Group"?*

The right identified by the *Evans* court cannot extend to every group who merely supports a cause and loses at the polls. The language on the face of Amendment 2 precludes the enactment of any anti-discrimination legislation protecting gays, lesbians, or bisexuals except by a statewide vote to reamend the constitution.[210] Amendment 2 affects two groups, however: the group who is denied the protective legislation and the group who supports anti-discrimination and voted against Amendment 2. Any ballot measure creates winners and losers. The right cannot be so broad as to "fence out" all of the losers. Otherwise, every referendum and initiative could be declared invalid because *some* "identifiable group" (all the people who supported the losing position) would be denied access to nearly all levels of government participation.

Many provisions in Colorado's Constitution that require referendums would violate the right to political participation if its application only required a losing "group." Voters have enacted provisions in the Colorado Constitution requiring that some groups/issues face governmental hurdles: direct voter approval must be gained to relocate the state capitol,[211] or to detonate a nuclear device.[212] By dictating a statewide vote on those issues, the majority of the state's voters have mandated that the minority sacrifice their right to representation on that issue. Clearly, some restrictions[213] on "representation" make most Colorado residents feel good. They are happy to have the decision to detonate in the hands of the electorate. What is it about Amendment 2 that has

206. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964).
207. *Id.* at 720 n.6.
208. *Id.* at 736.
209. *Evans I*, 854 P.2d at 1285.
210. *Supra* note 3.
211. COLO. CONST. art. VIII, § 3.
212. COLO. CONST. art. XXVI, § 2.
213. Some Colorado residents are certainly "fenced out" of political participation at the local level, or denied representation because they really want to pass local ordinances that allow nuclear detonation.

produced the opposite reaction of outrage? The element of discrimination creates this bad feeling, and serves as the touchstone for application of the right to political participation.

B. *Is One Group Treated Differently?*

When analyzing the challenged measure, the determination that a "group" has been fenced out should begin with the question of fairness.[214] Has an "identifiable group" been treated differently?[215] If all groups are treated equally, then the only "fenced out" group would be those who voted against the proposition. This group is not entitled to the right identified by the *Evans* court. They have been treated evenhandedly, and are "identifiable" only in the sense that they all supported the losing interest. Requiring a two-thirds majority in a statewide vote to approve nuclear detonation is such an issue. That amendment does not identify a particular group, such as those living west of the Continental Divide, and mandate that they alone should be denied the opportunity to pass nuclear detonation legislation. While courts have identified the importance of this unbiased treatment of groups, the language of the opinions sometimes clouds the important considerations.

1. Case Precedent Identifies the Fairness Factor.

While the substantive consideration in cases like *Hunter* is the fairness accorded to the group in question, commentators on Amendment 2, like the *Evans* court itself, have concentrated on defending the applicability of three cases (*Hunter*, *Washington*, and *Gordon*) to the right identified by the *Evans* majority.[216] This preoccupation with justifying the use of *Hunter* muddies the water. The first question is: Are all groups treated equally? The inquiry of who would benefit from a particular action serves to illuminate the discriminatory purpose behind the restrictive law or amendment. When the *Hunter* Court identified that the city charter amendment would impose burdens on "those who would benefit" from fair housing legislation, it was using that group to illustrate that the unconstitutional amendment unfairly treated one group differently.[217]

The *Evans* court's use of *Gordon*, the bond-indebtedness case, supports this analysis. The *Evans* majority noted that the Supreme Court could find no identifiable group that favored "bonded indebtedness over other forms of financing," unlike *Hunter*, where the class singled out was clear.[218] The

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214. See discussion of *Hunter v. Erickson*, *supra* notes 60-66 and accompanying text.

215. See discussion of *Gordon v. Lance*, *supra* notes 79-84 and accompanying text.

216. *See* Craig C. Burke, *Fencing Out Politically Unpopular Groups from the Normal Political Processes: The Equal Protection Concerns of Colorado Amendment Two*, 69 IND. L.J. 275, 289-93 (1993) (noting that the right to participate in the democratic process was implicitly acknowledged in *Gordon*); Niblock, *supra* note 27, at 180-87 (1993) (noting that one would be hard pressed to deny that gays were a "politically identifiable group"); Lori J. Rankin, *Ballot Initiatives and Gay Rights: Equal Protection Challenges to the Right's Campaign Against Lesbians and Gay Men*, 62 U. CIN. L. REV. 1055, 1097-1101 (1994) (observing that the explicit rights of free speech and redress of grievances rest on the value of participation in the political process).

217. *Hunter*, 393 U.S. at 391.

218. *Evans I*, 854 P.2d at 1279. The class singled out in *Hunter* were those who "would bene-

"group" in *Gordon* consisted only of those who lost at the polls.

2. An Identifiable Group Is Different than a Suspect Class.

When evaluating the group impacted by the challenged measure, the "identifiable group" criterion should not be confused with the "suspect" class criterion used to identify "discrete and insular" minorities.[219] Traditional equal protection analysis protects all people from discrimination, especially through the fundamental rights strand.[220] That strand operates independently from the suspect class strand, which provides heightened judicial scrutiny for discrete and insular minority groups.[221] If the "identifiable group" language of *Evans* suggests a suspect class rather than a fundamental rights analysis under equal protection, then it obscures the real concern. The proper inquiry is whether one group or issue is singled out and treated differently. The dispositive factor in *Gordon* was that all election matters involving bond indebtedness required the three-fifths vote for passage. No issue, interest, or cause had been "singled out."[222]

The *Evans* court's entire discussion justifying the use of *Hunter* only directs the inquiry away from what is truly significant.[223] Gays, lesbians, and bisexuals are treated differently from any other group desiring passage of anti-discrimination ordinances. Communities may initiate anti-discrimination policies and ordinances and the state may enact legislation protecting all other groups. But gay rights advocates must clear a higher hurdle: statewide voter approval. They are prohibited from seeking protection except by amending the state constitution.[224]

C. *The Nature of the Harm*

Under fundamental rights analysis, this singling out an "identifiable" group for different treatment requires the court to apply strict scrutiny to the challenged measure.[225] To survive strict scrutiny, the state must show a com-

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fit from laws barring racial, religious, or ancestral discriminations." *Hunter*, 393 U.S. at 391.

219. *See* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). Factors which courts use to determine if a group is a suspect class include historical discrimination, political powerlessness, and immutability. TRIBE, *supra* note 22, § 16-23, at 1545.

> Evidence presented in the first trial defined the nature of a minority group:
> A minority group is generally considered to be any group of individuals who have some characteristic which is viewed as highly salient by the majority group and usually negatively valued, and that one characteristic or cluster of characteristics is viewed to confer similarity and it's believed that all people are of the same group, and that there is generally some consistency to the way the majority group treats the minority group, and there's ususally some consistency in the way the minority group responds to that treatment.

Record vol. 3 at 99, Evans v. Romer, No. 92-CV7223, 1993 WL 19678 (D. Colo. Jan. 15, 1993) (testimony of John C. Gonziorek).

220. NOWAK & ROTUNDA, *supra* note 154, § 14.3, at 575.

221. *Id.*

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

223. *Evans I*, 854 P.2d at 1280-82.

224. *Supra* note 3.

225. NOWAK & ROTUNDA, *supra* note 154, § 14.3, at 575.

pelling interest.[226] The court balances the asserted state interest against the nature of the harm inflicted by denying the identifiable group the opportunity to enact favorable legislation. Examination of the harm, therefore, can help illuminate the right identified by the *Evans* court.

Consider the following hypothetical scenarios. First scenario: Colorado voters pass a constitutional amendment that prevents the enactment of any ordinance, policy, or statute that would restrict smoking in any way. In the future, anti-smokers will have to reamend the constitution to gain protective legislation. Second scenario: While health advocates desperately gasp for breath, another constitutional amendment is passed by Colorado voters preventing the enactment of any anti-discrimination legislation that protects blue-eyed citizens. Are these groups entitled to the same protection under the right identified under *Evans*? A *fundamental* right to political participation should apply to everyone, right? Wrong.

The groups harmed by these laws (anti-smokers, people who have blue eyes) are fundamentally different. Are anti-smokers and blue-eyed people similarly situated to gays, lesbians, and bisexuals? If not, what is it about Amendment 2 that makes its application so onerous? I suggest that it is the nature of harm that is inflicted on the group by the denial of representation and the resulting inability to pass favorable legislation. Prevention of the detonation of a nuclear device except by a popular referendum sits at one end of a continuum of harm. The risk of less representation to proponents of nuclear power provides fewer nuclear blasts. Denial of civil rights reposes at the other because the harm infringes on the very foundations of the government. The guarantee of liberty and equality formed the basis of our Constitution. Somewhere in between on the continuum lies the prohibition of anti-smoking laws. The risk of *more* smoke in our environment seems more injurious than the possibility of a *fewer* number of nuclear detonations. At the same time, the increased possibility of inhaling smoke does not rise to the same level of injury as the denial of civil rights. Granted, the non-smoker may not breathe deeply in a restaurant of his/her choice. While there may be some long-term health implications from second-hand smoke, the harm inflicted on that non-smoker is simply not as burdensome as preventing an entire group of people from attaining equal civil rights. Non-smokers can seek smoke-free-environments, but groups denied civil rights cannot seek a different government.

D. *Nature of the Group*

If the harm is the prevention of civil rights legislation, whether of blue-eyed people or gays, does that always entitle the group to survive strict scrutiny? I suggest another continuum. In this analysis, the harm is inextricably linked with the nature of the group. The likelihood that blue eyed people suffer or have suffered discrimination is small.[227] While they have no control

226. *Id.*

227. *See* Winer, *supra* note 122, at 432 (advocating that conservative Justices examine reality when they begin "slippery slope" arguments). "Could one not have argued in 1964 that the [Civil

over the color of their eyes, eye color does not make them politically powerless. Some Republicans even have blue eyes. Gays, lesbians, and bisexuals fall near the other end of the spectrum. Gays, lesbians, and bisexuals have been historically discriminated against[228] and have little political power.[229] It is arguable whether gays, lesbians, or bisexuals have any choice in their sexual orientation preference.[230]

It is no accident that this sounds like a suspect class analysis. The proper analysis consists of a nexus between fundamental right and suspect class analysis, a nexus between the harm and the group. Perhaps a referendum or initiative should be subjected to heightened scrutiny if it denies opportunities for governmental participation to a singled out "group," but only if the prohibited law, ordinance, or policy directs a harm at a group who has been historically discriminated against and who are politically less powerful. In this sense, both the majority and dissent in *Evans* were correct. The majority identified that a fundamental right existed,[231] and the dissent pointed to the distinguishing characteristic of the *Hunter*, *Washington*, and *Gordon* cases as involving *something* more than just denying the participation.[232]

As the Court examines the right identified by *Evans*, rigid adherence to

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Rights] Act was inadvisable because if we protect African-Americans and Jews against discrimination, the next thing you know ozone and earth-orbit believers, Democrats and Republicans, will claim the same protection?" *Id.* at 433. Winer argues in reality, hate crimes are inflicted against homosexuals, not earth-orbit believers. *Id.* at 432.

228. *See* KATZ, *supra* note 197; *supra* note 122 (listing only a few of the more current discriminatory actions against homosexuals); *see also* Niblock, *supra* note 27, at 159 (describing the isolation that society has inflicted on gays and lesbians).

One of the plaintiffs at the *Evans* trial gave a first hand accounts of the feeling of isolation that discrimination produces:

> I never was able to learn how to be spontaneous. I know that I strike many people, coworkers, other people with whom I have contact as very stiff, very distant. And certainly it isn't that I mean to. . . . When I went into seventh grade, we rode the school bus into Castle Rock, and I would hear the senior high school boys at the back of the bus talking about queers, and I'm not even sure how but somehow I came to understand that they were talking about people like me. And obviously, I mean the way they spoke about them it was clear that they were not people with whom it was safe to be identified.

Record vol. 4 at 83, *Bayless I* (No. 92-CV7223) (testimony of Paul Brown).

229. *See* Niblock, *supra* note 27, at 169. According to most courts, this does not entitle them to any suspect class status. They have struggled, therefore, to pass local anti-discrimination measures protecting them when they search for jobs and housing.

230. *See* Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209, 237 (studies show a majority of homosexuals knew they were interested in the same sex at a very early age, before sexual development). One of the plaintiffs testified about his early knowledge in the *Evans* trial:

> I knew that I was somehow different even before I entered puberty before things take on any sort of sexual connotations. I would say, I don't know, I would say probably I was probably like six or seven when I first really started to become aware that somehow I was different, but I didn't know why or what, you know.

Record vol. 4 at 79 (testimony of Paul Brown). Brown said he wanted to change:

> And I was frustrated too because I would pray earnestly, you know, that I would change, that I wouldn't be gay anymore, or I think possibly at the time I still even thought of the word "queer," but I was very fervently hopeful that a change would happen, and it didn't.

Record vol. 4 at 84.

231. *Evans I*, 854 P.2d at 1282.

232. *See id.* at 1301 (Erickson, J., dissenting).

the separate strands of equal protection analysis will only impede the effort to give redress for the harm created by initiatives like Amendment 2. Admittedly, scrutiny of the right to political participation may require the Court to forge some aspects of the two strands together. This hybrid nature of analysis should not deter the Court from focusing on the historical nature of the right. The purpose of constitutional doctrines is to provide remedies for harms. When a doctrine stands in the way of redress, then it becomes a tool that no longer fits.

CONCLUSION

The founders of this country identified the problems inherent in a democracy over 200 years ago: Pure devotion to the ballot box exalted only the majority; minorities faced prospects of eternal damnation. By constructing a representative government, the Framers attempted to ensure everyone received absolution, by giving minorities protection against the majority.

Representation is built upon the principle that the elected official is an agent for the citizen. Amendment 2 robs gays, lesbians, and bisexuals by forever placing nearly every level of government out of reach. They may not have any voice except by reamending the state constitution, an onerous burden for a historically unpopular group. The *Evans* court correctly recognized that this right to political participation had existed from the onset of the Republic. At the same time, that old right blazes a new trail in analysis. Because of the "group" nature of the right, aspects of suspect class are impossible to avoid.

No matter the label, the Justices of the Supreme Court have an opportunity to follow the road built by the Framers. Surely, even the most conservative Justice will not sacrifice the principles upon which this country was founded to surrender to factional prejudice.

Sue Chrisman