IV

In reviewing Amendment 2, we do so in light of its immediate objective, its ultimate effect, its historical context, and the conditions existing prior to its enactment. Reitman v. Mulkey, 387 U.S. 369, 373 (1967).

The immediate objective of Amendment 2 is, at a minimum,[25] to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation. See Aspen, Colo., Mun. Code § 13-98 (1977) (prohibiting discrimination in employment, housing and public accommodations on the basis of sexual orientation); Boulder, Colo. Rev. Code §§ 12-1-2 to -4 (1987) (same); Denver, Colo., Rev. Mun. Code art. IV, §§ 28-91 to -116 (1991) (same); Executive Order No. D0035 (December 10, 1990) (prohibiting employment discrimination for "all state employees, classified and exempt" on the basis of sexual orientation); Colorado Insurance Code, § 10-3-1104, 4A C.R.S. (1992 Supp.) (forbidding health insurance providers from determining insurability and premiums based on an applicant's, a beneficiary's, or an insured's sexual orientation); and various provisions prohibiting discrimination based on sexual orientation at state colleges.[26]

The "ultimate effect"[27] of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitutions is first amended to permit such measures. In the absence of such a constitutional amendment, any governmental entity would be acting contrary to the state constitution by "adopting, enacting, or enforcing" any such measure.

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

Amendment 2 expressly fences out an independently identifiable group. Like the laws that were invalidated in

Hunter, which singled out the class of persons "who would benefit from laws barring racial, religious, or ancestral discriminations," Hunter, 393 U.S. at 391, Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden -- no other group's ability to participate in the political process is restricted and encumbered in a like manner. Such a structuring of the political process undoubtedly is contrary to the notion that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." Gray v. Sanders, 372 U.S. 368, 379-80 (1963).

In short, gay men, lesbians, and bisexuals are left out of the political process through the denial of having an "effective voice in the governmental affairs which substantially affect their lives." Kramer, 395 U.S. at 627. Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them. By constitutionalizing the prescription that no branch or department, nor any agency or political subdivision of the state "shall enact, adopt, or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation . . . shall constitute or otherwise be the basis of . . . [a] claim of discrimination," Amendment 2 singles out and prohibits this class of persons from seeking governmental action favorable to it and thus, from participating equally in the political process.[28]

Prior to the passage of this amendment, gay men, lesbians, and bisexuals were, of course, free to appeal to state and local government for protection against discrimination based on their sexual orientation.[29] Thus, like any other members of the electorate, the political process was open to them to seek legislation or other enactments deemed beneficial in the same way it was open to all others. Were Amendment 2 in force, however, the sole political avenue by which this class could seek such protection would be through the constitutional amendment process. In short, Amendment 2, to a reasonable probability, infringes on a fundamental right protected by the Equal Protection Clause of the United States Constitution. Amendment 2 must be subject to strict judicial scrutiny in order to determine whether it is constitutionally valid under the Equal Protection Clause.

Because the defendants and their amici have not proffered any compelling sate interest to justify the enactment of Amendment 2 at this stage of the proceedings as required under the strict scrutiny standard of review, see Plyler v. Doe, 457 U.S. 202, 217 (1982); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985), we conclude that plaintiffs have met their burden under Rathke v. McFarlane, 648 P.2d 648, 653 (Colo. 1982).

V

That Amendment 2 was passed by a majority of voters through the initiative process as an expression of popular will mandates great deference. However, the facts remain that "[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections," West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943), and that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 736 (1964),

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

Order affirmed.

[25] The parties sharply disagree on the scope of Amendment 2's provisions. For example, defendants argue that Amendment 2 "does not prevent the enforcement of rights derived from other sources including federal law; it allows enforcement of rights from private contracts; and does not prevent private companies [from adopting policies prohibiting discrimination based on sexual orientation]," and conclude that Amendment 2 "prohibits only the recognition or enforcement of state or locally created civil rights protections above and beyond those required by federal law." Plaintiffs, in contrast, argue that "defendants' interpretation bears little resemblance to the language of Amendment 2," and conclude that, on its face, the amendment clearly limits the sort of redress that defendants argue it does not.

The precise scope of Amendment 2 need not be determined here, however, because neither the parties, nor their amici, have contended that Amendment 2 does not prohibit the enactment of antidiscrimination laws by state or local entities. Since all agree that Amendment 2 unambiguously attempts to do this, and since that restriction alone provides a sufficient basis for our conclusion, we need not determine what broader application Amendment 2 might have.

[26] Metropolitan State College of Denver prohibits college sponsored social clubs from discriminating in membership on the basis of sexual orientation and Colorado State University has an antidiscrimination policy which encompasses sexual orientation. See Legislative Council of the Colorado General Assembly, An Analysis of 1992 Ballot Proposals (Research Publ. No. 369, p. 10, 1992).

[27] See supra note 25.

[28] As for the State's contention that "[t]he plaintiffs continue to have the ability to participate fully in all of Colorado's political processes; what they do not have is a right to successful participation in the process," we think this misconstrues the nature of plaintiffs' participatory rights. While the State is quite right that the plaintiff class, like any other members of society, has no right to successful participation in the political process, the fact remains that its unsuccessful participation is mandated by the provisions of Amendment 2. In contrast to all other members of the electorate whose successful or unsuccessful participation in the process cannot be determined until ballots, votes, charters etc., have been counted or voted upon, with the exception of a state constitutional amendment, gay men, lesbians, and bisexuals are told that "you can appeal to government on those issues of concern to you, but you will, by virtue of Amendment 2, lose -- irrespective of your ability to summon the support of others, or carry a majority in an election."

[29] Indeed, this class of persons had done precisely this with some measure of success. See supra at 33-34.