STATES AS LABORATORIES: COLORADO CONSTITUTION (REACTANTS) + INDEPENDENT STATE CONSTITUTIONALISM (CATALYST) = CONSTITUTIONAL LGBTQ+ PROTECTIONS (PRODUCTS)*

PELECANOS†

ABSTRACT

This Article began as a research project on the current state of LGBTQ+ rights under the Constitution of the State of Colorado during an internship at the American Civil Liberties Union of Colorado. It quickly became an extensive examination of state constitutionalism, Colorado history, and queer theory. Ultimately, this Article imagines how the Colorado Supreme Court might interpret Colorado constitutional provisions to create more protections for LGBTQ+ people.

TABLE OF CONTENTS

---

* Chemistry is fun. Catalysts lower the activation energy of chemical reactions, which is analogous to using an independent state constitutionalism theory to lower the activation energy required to achieve LGBTQ+ protections.

† Pelecanos is a Juris Doctor with a certificate in Constitutional Rights and Remedies from the University of Denver Sturm College of Law. Currently, they are the Renberg Fellow at Lambda Legal, the nation's oldest and largest legal organization working for full recognition of the civil rights of lesbian, gay, bisexual, and transgender people through impact litigation, education, and policy advocacy. They would like to thank Annie Kurtz and the ACLU of Colorado for their guidance and support in crafting this Article, both during and after Pelecanos's internship. They would also like to thank Professor Alan Chen, Trevor Klein, and the *Denver Law Review* staff for their intellectual contributions, painstaking hours of editing, and thoughtful critiques. And lastly, Pelecanos acknowledges that none of this would have been possible without the unwavering support of their family and friends.

INTRODUCTION

This Article starts by examining the theory of states as laboratories and the relationship between state and federal constitutions through American legal history. Then, it turns to the Constitution of the State of Colorado (Colorado Constitution) and its textually unique equal protection provisions. Next, it analyzes the limited caselaw regarding LGBTQ+ rights under the Colorado Constitution. At this point the Article dives into the compelling details of why the federal framework is not appropriate for equal protection analysis under the Colorado Constitution. The Article details out Colorado's history of invidious discrimination dating back to its indigenous origins, the current state of political powerlessness for LGBTQ+ people, the incongruous questioning of immutable characteristics, and the harmful dialogue around a community's contribution to society. After rejecting the federal framework, the Article advocates for a combined sexual orientation and gender identity test and concludes by suggesting a specific test for LGBTQ+ protections under the Colorado Constitution's equal protection provisions. Finally, the Article wraps up with a proposal that LGBTQ+ people also have a fundamental right to self-determination and expression of sexual orientation and gender identity under the Colorado Constitution.

I. STATE CONSTITUTIONS AND THE PROTECTION OF INDIVIDUAL RIGHTS

During the first 150 years of American history, state courts used their own constitutions, not the United States Constitution (federal Constitution), to frame and justify individual rights.[1] Then, the pursuit of civil rights shifted to the federal arena after the states ratified the Fourteenth Amendment in 1868 during the first reconstruction.[2] Litigators spent the next 100 years finding creative ways to build federal civil rights protections and expand civil liberties. In the 1950s and 1960s, during the second reconstruction (often referred to as the civil rights era), Congress codified many new laws defining and protecting civil rights after the people

1. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 17–21 (2018).

2. *Landmark Legislation: The Fourteenth Amendment*, U.S. SENATE, https://www.senate.gov/about/origins-foundations/senate-and-constitution/14th-amendment.htm (last visited Feb. 6, 2024).

demanded the federal government correct ongoing civil rights abuses.[3] At this time, the Warren Court also expanded federal protection for individual rights by interpreting old protections in new contexts, defining the newly codified laws, and ascertaining implied protections. As individual rights became increasingly federalized, American citizens relied on those federal protections and remedies to vindicate their rights.[4] Unfortunately, the expansion of the American people's rights led to a cultural and political backlash, and the Supreme Court ebbed in prioritizing individual rights.[5] In turn, people began looking back to state constitutions for support and protection of their rights.[6]

In 1977, Justice Brennan argued that when the federal Constitution is not enough to guarantee equal protection, state courts should use their state constitutions to afford their citizens the full protections of individual rights.[7] Justice Brennan wrote, "more and more state courts are construing state constitutional counterparts . . . as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism."[8] Judge Sutton later echoed Justice Brennan's idea that litigators should bring cases under state constitutional provisions because "[s]tate courts have authority to construe their own constitutional provisions as they wish," even if the provision is analogous to the federal Constitution, as long as their interpretation does not violate a federal requirement.[9] Lastly, expanding individual rights under state constitutions is especially advantageous for trying out new legal theories: as Justice Brandeis put it, the states are laboratories, where "a single courageous State may, if its citizens

3. *Rights and Representation*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Civil-Rights-Movement/ (last visited Feb. 6, 2024). These protections were achieved through the hard work of protesters, movement leaders, civil rights attorneys, and progressive elected officials.

4. *See* SUTTON, *supra* note 1, at 13–15.

5. ROGER HEWITT, WHITE BACKLASH AND THE POLITICS OF MULTICULTURALISM 18–34 (2005).

6. SUTTON, *supra* note 1, at 30.

7. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

8. *Id.* at 495.

9. SUTTON, *supra* note 1, at 16. The state constitutional interpretation limitation is less likely to play out in this Article's proposed protections. The equality provisions of the Colorado Constitution apply to state actors, not individual citizens. To illustrate the difference, it is helpful to look at *303 Creative v. Elenis*, 143 S. Ct. 2298 (2023), and *Yates v. Davis*, No. 15–62–DLB–EBA, 2017 U.S. WL 4111419 (E.D. Ky. Sept. 15, 2017). The Court analyzed this limitation in *303 Creative LLC*, where an *individual citizen's* federal constitutional rights were supposedly violated by a Colorado statutory provision. 143 S. Ct. at 2307–08. The tension between free speech or free exercise and LGBTQ+ rights often exists under these circumstances. *See generally id.* at 2340–42. It is much more unusual for a state actor to claim free speech or free exercise rights under the federal Constitution in opposition to a state constitutional provision. However, it is possible to imagine this state constitutional interpretation limitation applying to a state actor. In *Yates*, a state actor refused to issue a same-sex marriage certificate based on a First Amendment Free Exercise Clause argument. 2017 WL 4111419, at *1, *2–4, *10. Still, this scenario is relatively rare and further restricted by the absolute and qualified immunities of state actors.

choose . . . try novel social and economic experiments without risk to the rest of the country."[10]

The justifications for trying out new theories and expanding individual rights through state constitutions are abundant. First, state courts can find their respective state constitution affords expanded protections beyond the federal analogue, or the state constitution may include an express and independent right not included in the federal Constitution.[11] Second, if a state court relies only on its own constitution for a decision, the Supreme Court lacks jurisdiction to overturn that decision.[12] Third, if individual rights created under a state constitution demonstrate the strength of a particular approach, that approach may eventually influence and help develop federal constitutional law.[13] Judge Sutton names a number of other justifications for using the states as laboratories: states are less constrained than the Supreme Court because they govern fewer people; one state's approach does not have a legal effect on all the other states, which would reduce the ability to compare methods; states are more primed to manage the relatively small effect of negative consequences; states can allow local conditions and traditions—like culture, geography, and history—to affect their interpretation; and states are more quickly able to remedy ill-conceived constitutional decisions through constitutional amendments.[14] Judge Sutton goes on to say that states are particularly primed to experiment with equal protection cases because the three levels of scrutiny classically used at the federal level are not required at the state level.[15] This leaves the states free to customize equal protection and civil rights according to the particular circumstances of that state.[16]

In Colorado, the state supreme court has weighed in on the advantages of independent state constitutionalism. In the 1992 case *Lujan v. Colorado State Board of Education*,[17] the Colorado Supreme Court addressed the issue of differentiating the Colorado Constitution from the federal Constitution.[18] The court pointed out that the Tenth Amendment and other principles of restricted authority and delegated powers confine the federal Constitution,[19] whereas "the Colorado Constitution is not one of limited powers where the state's authority is restricted to the four-corners of the document."[20] More recently in 2020, the Colorado Supreme Court

10. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

11. *See generally* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (explaining that state courts may expand citizens' rights under state constitutions beyond the federal constitutional minimum, as long as one's state constitutional rights do not infringe upon another's federal constitutional rights).

12. Michigan v. Long, 463 U.S. 1032, 1039–41 (1983) (explaining Adequate and Independent State Grounds theory).

13. SUTTON, *supra* note 1, at 16–18.

14. SUTTON, *supra* note 1, at 16–18.

15. *Id.* at 18–19.

16. *Id.* at 19.

17. 649 P.2d 1005 (Colo. 1982).

18. *Id.* at 1017.

19. *Id.*

20. *Id.*

articulated, in *Rocky Mountain Gun Owners v. Polis*,[21] its authority to interpret state constitutional provisions that are similar to provisions in the federal Constitution however it sees fit.[22] The court held that it has a "responsibility to engage in an independent analysis of [its] own state constitutional provision in resolving a state constitutional question."[23] Moreover, the court held that a state constitutional provision, whether it parallels or is distinct from federal constitutional provisions, will be interpreted with an independent meaning because it does not stand on the federal floor; it is in its own house.[24] However, in some situations, borrowing from federal constitutional reasoning might have merit.[25] For example, the court might "lean on" federal reasoning if plaintiffs claim rights under textually identical state and federal provisions; the Colorado Supreme Court's express goal was to maintain consistency between state and federal provisions; the federal reasoning is sound; or, no party has argued for a distinct interpretation.[26] But if none of those conditions are present, the state interpretation should be independent of federal interpretations.[27] As evidenced by Colorado caselaw, the Colorado Supreme Court has enjoyed the freedom of independent state constitutionalism and acted as a laboratory to experiment with new or federally contentious rights.

II. COLORADO CONSTITUTIONAL PROVISIONS GUARANTEEING EQUAL PROTECTIONS

The Colorado Constitution has at least two provisions that guarantee equal protections: the "Due Process Provision"[28] and the "Equality of the Sexes Provision."[29] Both provisions protect against discrimination on the basis of sex and should be applied to address instances of discrimination based on sexual orientation and gender identity.[30]

The Colorado Constitution does not contain a separate equal protection provision or clause identical to the Fourteenth Amendment.[31] Instead, the Colorado Supreme Court held that the state constitution's due process

21. 467 P.3d 314 (Colo. 2020).

22. *Id.* at 324. Although many attorneys have learned that the federal Constitution is the floor of state constitutional interpretation, this is not always the case. Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 227 (2008). There is no tension between the theory that the federal Constitution is "the floor" and *Rocky Mountain Gun Owners v. Polis* because the *Rocky Mountain Gun Owners* decision only relied on a state constitutional provision since the plaintiffs did not plead a Second Amendment violation.

23. *Rocky Mountain Gun Owners*, 467 P.3d at 324.

24. *Id.*

25. *Id.*

26. *Id.* at 324–25.

27. *Id.* at 325.

28. COLO. CONST. art. II, § 25.

29. *Id.* at § 29.

30. *See* Ross v. Denver Dep't of Health & Hosps., 883 P.2d 516, 521 (Colo. App. 1994); Musso v. Musso (*In re* Estate of Musso), 932 P.2d 853, 855 (Colo. App. 1997).

31. Although most state constitutions contain explicit equal protection clauses, some states like Colorado, New Jersey, and Alabama use a penumbra approach to derive equal protection rights. *See* COLO. CONST. art. II; Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985); City of Hueytown v. Jiffy Chek Co., 342 So.2d 761, 762 (Ala. 1977).

provision implicitly includes a right to equal protection of the law, a "similar guarantee" to the federal Equal Protection Clause.[32] The text of Colorado's Due Process Provision is substantially different from its federal counterpart and merits a different interpretation. The Due Process Provision reads, "No person shall be deprived of life, liberty or property, without due process of law."[33] In 1921, the Colorado Supreme Court examined a law under the Colorado Constitution's Due Process Provision and reasoned, "The contention that [the law] abridges the privileges and immunities of citizens and denies equal protection of the law is included within the objection that it denies 'due process.' They stand or fall together."[34] Since then, Colorado has developed an equal protection doctrine, including equal protection on the basis of sex, under the Due Process Provision.[35]

The second Colorado equal protection provision—the Equality of the Sexes Provision—is a unique constitutional provision that guarantees "[e]quality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex."[36] This amendment was created in response to the proposed federal Equal Rights Amendment and the hard work of many women in Colorado.[37] In a 1972 analysis of ballot proposals,[38] the Colorado General Assembly Legislative Council listed the popular arguments for and against the constitutional amendment.[39] One popular argument in support of the amendment was to protect people "in the event the federal [equal rights] amendment is not ratified."[40] Supporters of the amendment argued that the amendment is necessary to overcome discrimination based on "old customs, traditions, and attitudes" perpetuated by differentiating the sexes.[41] One of the arguments against the amendment was that "[w]omen's rights were already protected by the Fourteenth Amendment."[42] That same year, Colorado

32. COLO. CONST. art. II § 25; W. Metal Lath, v. Acoustical & Constr. Supply, Inc., 851 P.2d 875, 880 (Colo. 1993); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1014 (Colo. 1982) ("Although the Colorado constitution does not contain an identical provision [to the Fourteenth Amendment], it is well-established that a like guarantee exists within the constitution's due process clause."); Dean v. People, 366 P.3d 593, 596 (Colo. 2016).

33. COLO. CONST. art. II, § 25.

34. People v. Max, 198 P. 150, 156 (Colo. 1921).

35. *See* People v. Wilhelm, 676 P.2d 702, 704 (Colo. 1984).

36. COLO. CONST. art. II, § 29; LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY: AN ANALYSIS OF 1972 BALLOT PROPOSALS 5 (1972) [hereinafter 1972 LEGISLATIVE COUNCIL] (available at https://www.law.du.edu/images/uploads/library/CLC/185.pdf).

37. The Equal Rights Amendment is a proposed amendment to the United States Constitution that guarantees equality of rights under the law for all persons regardless of sex. Sadly, and to the dismay of many, the federal Equal Rights Amendment has still not been properly ratified by the states more than 100 years after it was initially proposed. Alex Cohen & Wilfred U. Codrington, III, *The Equal Rights Amendment Explained*, THE BRENNAN CTR. FOR JUST. (Jan. 23, 2020), https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained.

38. 1972 LEGISLATIVE COUNCIL, *supra* note 36, at 1.

39. *Id.* at 5–6.

40. *Id.* at 6.

41. *Id.* at 5.

42. *Id.* at 6.

citizens voted to enact the Equality of the Sexes Provision,[43] and they did so to provide protections beyond the scope of the federal Fourteenth Amendment's guarantee, acknowledging that the current federal protections were not sufficient.[44]

Four years later, in 1976, Colorado citizens ran a ballot initiative to repeal the Equality of the Sexes Provision.[45] Once again, analysis of the ballot proposals explained supporting and opposing arguments for the repeal. Those who wanted the Equality of the Sexes Provision repealed argued that it interfered with the "traditional way of thinking" and social expectations in marriage, the family, and church.[46] Additionally, supporters of the repeal argued the provision could lead to changes in government policy, including "undesirable" sex-integration in public facilities and publicly supported schools, particularly athletic programs.[47] Those who opposed the repeal argued, "Only a specific constitutional statement of equality of the sexes will provide for continued elimination of sex discrimination" because "the application of the [Equal Protection] clause to sex discrimination has never been as complete as in cases of race discrimination."[48] Another argument against the repeal stated that the Equality of the Sexes Provision provides an essential moral and ethical statement that rights and privileges before the law are not to be denied on the basis of sex.[49] Colorado voters overwhelmingly rejected the repeal, voting to keep the Equality of the Sexes Provision.[50] Coloradoans twice voted in favor of the Equality of the Sexes Provision based on the understanding that the protections guaranteed by the provision would go beyond the Equal Protection Clause. In doing so, Coloradoans rejected the notion that traditional societal expectations about the sexes were sufficient justifications to deny equality. As a result, Colorado has a special constitutional provision affording equal protections based on sex.

III. CASELAW REGARDING LGBTQ+ PROTECTIONS UNDER THE COLORADO CONSTITUTION

The Colorado Supreme Court has never set forth a test for equal protection issues involving sexual orientation or gender identity (SOGI) discrimination under the Due Process Provision or the Equality of the Sexes

43. *Colorado Amendment No. 3, Equality of Sexes Amendment (1972)*, BALLOTPEDIA, https://ballotpedia.org/Colorado_Amendment_No._3,_Equality_of_Sexes_Amendment_(1972) (last visited Feb. 7, 2024).

44. 1972 LEGISLATIVE COUNCIL, *supra* note 36, at 5–6.

45. LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY: AN ANALYSIS OF 1976 BALLOT PROPOSALS 22 (1976) [hereinafter 1976 LEGISLATIVE COUNCIL] (available at https://www.sos.state.co.us/pubs/elections/Results/BlueBooks/1976BlueBook.pdf).

46. 1976 LEGISLATIVE COUNCIL, *supra* note 45, at 23–24.

47. *Id.* at 23.

48. *Id.* at 23–24.

49. *Id.* at 24.

50. *Colorado Amendment No. 6, Removal of the Gender Equality Provisions Initiative (1976)*, BALLOTPEDIA, https://ballotpedia.org/Colorado_Amendment_No._6,_Removal_of_the_Gender_Equality_Provisions_Initiative_(1976) (last visited Feb. 7, 2024).

Provision.[51] In fact, no one has brought a SOGI discrimination case under the Equality of the Sexes Provision in any Colorado court despite affirmation from the Supreme Court that discrimination based on sex includes SOGI discrimination.[52]

In *Evans v. Romer* (*Evans I*),[53] the Colorado Supreme Court evaluated whether Amendment 2 to the Colorado Constitution, which prohibited Coloradans from enacting discrimination protections for LGBTQ+ people, violated equal protections rights under the federal Constitution and the Colorado Constitution.[54] In *Evans I*, the Colorado Supreme Court based its decision on the federal Equal Protection Clause, ignoring the individual plaintiffs' claim under the Colorado Due Process provision.[55] The court stated that because the plaintiffs, LGBTQ+ people, did not claim they constituted a suspect class, the court would not apply strict scrutiny on the basis of their identities.[56] In *Evans v. Romer* (*Evans II*),[57] the court found that the amendment infringed on the fundamental right to participation in the political process.[58] Because the case involved a fundamental right, the court applied a strict scrutiny analysis under the federal Constitution's Equal Protection Clause and found that the amendment was unconstitutional.[59] The court did not articulate how to determine if there was an equal protection violation under the Colorado Constitution on the basis of sexual orientation.

The Colorado Court of Appeals has heard one case advocating for LGBTQ+ protections under the Colorado Constitution. The same year the Colorado Supreme Court heard *Evans II*, the Colorado Court of Appeals heard an administrative board appeal from Mary Ross, who was denied family sick leave benefits while caring for her same-sex partner.[60] Similarly, the court of appeals held that the rule did not classify or differentiate on the basis of sexual orientation because the rule applied equally to

---

51. This conclusion was the result of searching an online legal research database, Westlaw, for all Colorado Supreme Court cases that cited Colo. Const. Art. II, § 25, 29 and cross-referencing key words such as "sexual orientation," "gender identity," "gay," "transgender," etc.

52. Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731, 1757 (2020).

53. 854 P.2d 1270 (Colo. 1993) [hereinafter *Evans I*].

54. *Id.* at 1275. The enactment challenged in this case, Amendment 2, is an amendment to the Colorado Constitution, adopted in a 1992 statewide referendum. Amendment 2 read:

> 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.

Romer v. Evans, 517 U.S. 620, 624 (1996).

55. *Evans I*, 854 P.2d at 1272 n.2.

56. *Evans I*, 854 P.2d at 1275.

57. 882 P.2d 1335 (Colo. 1994) [hereinafter *Evans II*].

58. *Id.* at 1343.

59. *Id.*

60. Ross v. Denver Dept. of Health & Hosps., 883 P.2d 516, 518 (Colo. App. 1994).

same-sex and different-sex relationships, differentiating only by an employee's marital status.[61] Because the court did not find the condition precedent of differential treatment based on sexual orientation, it did not articulate a test for finding whether the state discriminated based on sexual orientation.[62]

Overall, the lack of sexual orientation and gender identity cases in Colorado claiming discrimination under the equal protection provisions is both concerning and comforting. It is concerning because it implies that some laws and state actions that probably should be challenged, go unchallenged; and that lawyers in Colorado have not been very creative in advocating for their clients. Yet, it is comforting because the Colorado Supreme Court and lower courts remain free to interpret the constitutional provisions in a way that is protective of LGBTQ+ people without needing to overcome burdensome negative precedent. In fact, this clean slate indicates that the courts may create any test they deem appropriate for analyzing state action that discriminates on the basis of sexual orientation or gender identity.

IV. DEVELOPING A SOGI DISCRIMINATION TEST IN COLORADO

As detailed above, independent state constitutionalism means that Colorado can develop whatever test it finds most appropriate in determining whether a state action constitutes impermissible discrimination under the Colorado Constitution's Due Process Provision or Equality of the Sexes Provision.[63] The Colorado Supreme Court suggested it might adopt federal reasoning if it finds the federal reasoning is sound.[64] In contrast, the Colorado Supreme Court might not adopt federal reasoning if there are distinct historical, textual, or cultural considerations.[65]

Therefore, the analysis for determining an appropriate test under the Colorado Constitution starts with an examination of the existing federal framework. First, this Part IV will explain the federal framework and how it can be applied to Colorado's unique LGBTQ+ circumstances. Next, this Part will provide an explanation of why the traditional federal framework is not tenable for Colorado; because the reasoning is not sound and because Colorado has distinct historical, textual, and cultural considerations that require a unique framework. After discarding the traditional federal framework, this Part questions whether a separate or inclusive sexual orientation and gender identity test is more suitable, and then reimagines the framework. Ultimately, it suggests a particular Colorado test for LGBTQ+

61. *Id.* at 519. In 1994, same-sex partners could not be legally married.
62. *Id.* at 522.
63. As long as that test adheres to its own state constitutional requirements and limitations. *See* Brennan, *supra* note 7, at 502.
64. Rocky Mountain Gun Owners v. Polis, 467 P.3d 314, 325 (2020).
65. *Id.* at 323–25.

people under the Due Process Provision and Equality of the Sexes Provision to create stronger protections against SOGI discrimination.

A. Federal Framework

To determine whether the government has violated a person's equal protection rights under the federal Constitution, state courts apply a balancing test.[66] This balancing test, visualized as Lady Justice's scale, places the government's interests on one side of the fulcrum and the individual's interests on the other side.[67] However, the unweighted scale—the scale's position before the relevant interests are added—is not always in a neutral position. The court chooses the unweighted starting point, referred to as the level of scrutiny.[68]

Most constitutional law professors propagate the fiction that there are three levels of scrutiny: strict scrutiny, which biases the scale in favor of the individual; intermediate scrutiny, which allows the scale to rest somewhere near a balance point; and rational basis scrutiny, which biases the scale in favor of the government.[69] To choose the correct scrutiny level, courts determine what type of right the government violated (e.g. access to education, parental rights, medical decision making) and the classification of the individual whose rights were violated (e.g. methadone users, single-parent children, Cubanos).[70] Courts use strict scrutiny for violations concerning fundamental rights and "suspect classes."[71] Courts use intermediate scrutiny for "quasi-suspect classes."[72] Courts use rational basis scrutiny as a default balancing test for any classification that is not suspect, quasi-suspect, or does not affect a fundamental right.[73]

For decades, the Supreme Court has considered four factors in determining whether a class of people is "suspect": (1) whether the group has experienced a history of invidious discrimination; (2) whether the group

66. Although the Constitution promises that no person shall be denied equal protection of the law, practical application allows some denial of equal protection if there is a good enough justification for that denial. PAUL GOWDER, 14TH AMENDMENT COURSE § 2.2.2 (2019).

67. The visualization is a particularized symbology for this Article. The underlying concept of the balancing tests run throughout nearly a century of equal protection jurisprudence.

68. *See* GOWDER, *supra* note 66, at § 2.2.2.

69. *See id.* Many law schools and practicing attorneys preach that there are three levels of scrutiny. *See id.* However, R. Randall Kelso accurately points out that the Supreme Court has used many varying levels of scrutiny in well-known equal protection cases. R. Randall Kelso, *Justifying the Supreme Court's Standards of Review*, 52 ST. MARY'S L.J. 973, 999–1011 (2021) [hereinafter Kelso 2021]. Kelso refers to all levels above a "base" level as heightened scrutiny, which is consistent with Due Process and First Amendment analyses. Kelso's articles give a full run down of all the levels of scrutiny. *E.g.*, R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 225–26 (2002) [hereinafter Kelso 2002].

70. Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 948–49 (2004).

71. *Id.* at 949.

72. Quasi-suspect classes tend to either make up a majority of the population indicating a potential for more political power or individuals who were historically subjected to somewhat less severe discrimination. Intermediate scrutiny is most often used to evaluate discrimination against women. *See id.* at 950.

73. *See* Massey, *supra* note 70, at 951.

can effectively protect itself against discrimination through the political process; (3) whether an individual has immutable characterizations or can, without sacrificing a core aspect of their identity, effectively opt out of the group; and (4) whether the defining characteristic of the group is relevant to one's ability to contribute to society.[74] Under the federal test, LGBTQ+ people fit the definition of a suspect class and should receive the benefit of strict scrutiny.[75]

1. History of Invidious Discrimination

One of the most important factors in identifying a suspect class is whether the class has experienced a history of invidious discrimination.[76] Invidious discrimination refers to the act of treating a class of persons unequally in a manner that is malicious, hostile, or damaging.[77] Courts can reference any type of discrimination in their historical analysis, including state sponsored invidious discrimination, private parties' invidious discrimination, and co-equal branch's opinions on discrimination.[78] This Section reviews several historical events indicating a long and offensive history of SOGI discrimination in Colorado.

a. Invidious Discrimination by State Actors

Colorado's history of SOGI discrimination pre-dates the founding of the state. Before colonization, many indigenous nations within the borders of what is now Colorado, including, but not limited to, the Arapahoe, Cheyenne, Ute, Pueblo, Shoshone, Apache, and Comanche.[79] The Arapahoe, Cheyenne, and Ute, some of the most populous nations in Colorado from the 1600–1800s, recognized a variety of gender expressions, identities, and sexualities.[80]

---

74. Brief for Constitutional Law Scholars Ashutosh Bhagwat et al. as Amici Curiae in Support of Petitioners at 6, Obergefell v. Hodges, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, & 14-574), 2015 WL 1022689, at *6.

75. *See id.*

76. *See id.*

77. *Invidious Discrimination*, L. INFO. INST., https://www.law.cornell.edu/wex/invidious_discrimination (last visited Feb. 7, 2024).

78. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 685–86 (1973); Obergefell v. Hodges, 576 U.S. 644, 660–61 (2015); *see also* United States v. Windsor, 570 U.S. 744, 769–71 (2013); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 597 (4th Cir. 2020), *as amended* (Aug. 28, 2020).

79. Please note that the names colonizers and their descendants call Native people may not be the preferred name or what the Native people call themselves. *See* COLO. DEP'T OF EDUC., NATIVE AMERICAN TRIBES OF COLORADO, https://www.cde.state.co.us/sites/default/files/documents/cdereval/download/pdf/race-ethnicity/nativeamericantribesofcolorado.pdf.

80. Also note that it is not appropriate to portray Native people of the past as having identities created by colonizers, such as transgender or gay. Therefore, it is best to just say there was variance from the colonizers' understanding of gender and sexual orientation. The Arapahoe had Haxu'xan people, who appeared male bodied, lived as women, and sometimes married men. ALFRED LOUIS KROEBER, THE ARAPAHO: 1, GENERAL DESCRIPTION, 2, DECORATIVE ART AND SYMBOLISM: 1902, 19 (2009). Ute had Tuwasawits, which means something like "wears other sex's clothes." Harlan Pruden, Presentation on LGBTQ2 Well-Being Education: *Two-Spirit People: Then and Now: Sex, Gender and Sexuality in Historical & Contemporary Native America* (Feb. 14, 2014),

When colonizers and missionaries first arrived in what would eventually become the State of Colorado, they enforced heterosexual and binary gender norms, negatively influencing the sexual orientation and gender diversity of the native peoples living there.[81] Starting in 1851, the United States regulated intercourse over Native people living in this region.[82] When Colorado became a territory in 1861, it adopted British common-law, including its sodomy prohibitions.[83] However, for nearly a year, it was legally ambiguous whether sodomy was actually prohibited in the territory and if the law carried a life sentence or the death penalty.[84] To resolve the uncertainty, one of the first acts of the Colorado territorial legislature was to establish a code that explicitly prohibited sodomy and carried a life sentence.[85]

---

https://www.ihs.gov/sites/lgbt/themes/responsive2017/display_objects/documents/lgbttwospirithistory.pdf. And the Cheyenne had the He'eman & Hetaneman. *Berdache*, ENCYCLOPEDIA OF THE GREAT PLAINS, http://plainshumanities.unl.edu/encyclopedia/doc/egp.gen.004 (last visited Feb. 7, 2024). Cheyenne He'eman directed the tribe's most important ceremony, the scalp dance, and arranged marriages. *Id.* He'eman were assigned male at birth but performed women's work and cross-dressed or combined male and female clothing. *Id.* Hetaneman were assigned female at birth and wore male clothing. WILL ROSCOE, CHANGING ONES: THIRD AND FOURTH GENDERS IN NATIVE NORTH AMERICA, ii, 75 (1998); Steven G. Baker, *Spanish Exploration in Western Colorado*, COLO. ENCYCLOPEDIA (July 28, 2015) https://coloradoencyclopedia.org/article/spanish-exploration-western-colorado.

81. Queer Indigenous scholars analyze race, gender, and sexuality as logics of colonial power and violence meant to enforce heteropatriarchy and heteronormativity. Chris Finley, *Decolonizing the Queer Native Body (and Recovering the Native Bull-Dyke)*, *in* QUEER INDIGENOUS STUDIES: CRITICAL INTERVENTIONS IN THEORY, POLITICS, AND LITERATURE 31, 33 (Qwo-Li Driskill, Chris Finley, Brian Joseph Gilley, & Scott Lauria Morgensen eds., 2011). Furthermore, *The Impact of Colonial Legacies in the Lives of LGBTQI+ and Other Ancestral Sexual and Gender Diverse Persons*, addresses postcolonial laws that regulated the gender and sex of colonized people. It states that "the rigid understandings of the male/female binary as a main ordering social principle are the result of colonialism." INT'L LESBIAN, GAY, BISEXUAL, TRANS, AND INTERSEX ASS'N, THE IMPACT OF COLONIAL LEGACIES IN THE LIVES OF LGBTQI+ AND OTHER ANCESTRAL SEXUAL AND GENDER DIVERSE PERSONS 3 (2023), http://tiny.cc/p10dvz. It also examines the significant impact these laws had on human rights. *Id.* These laws "impose heteronormative and binary norms of gender and sexuality, and . . . repress LGBTQ+ and other ancestral sexual and gender diverse practices and identities that do not fit within these norms." *Id.* The link between certain religious moralities during colonial and postcolonial times directly relates to the discriminatory concepts of sexual orientation and gender identity today. *Id.* at 4.

82. In 1851, the territory that would become Colorado was part Indian Territory, part Utah territory, and part territory of New Mexico. S. 587, 31st Cong., Session II, ch. 20 § 7 (1851).

83. George Painter, *The Sensibilities of Our Forefathers*, SODOMY LAWS (Aug. 11, 2004), https://www.glapn.org/sodomylaws/sensibilities/colorado.htm.

84. *Id.*

85. *Id.* In 1885, nine years after Colorado became a state, John Ryan was one of the earliest known defendants charged under Colorado's sodomy statute. Ryan, who pled guilty, was subjected to calls for his death in the Denver newspaper. Jackson Springer, "Against the Order of Nature": Creating a Gay Identity Under the Law in Colorado, 1880-1914 (2018) (B.A. Senior Thesis, Princeton University), https://lgbtqcolorado.org/dev2018/wp-content/uploads/2023/09/SpringerJacksonThesis_compressed.pdf.

In 1886, the City of Denver enacted an ordinance that prohibited people from appearing in public in "dress not belonging to his or her own sex."[86] Not long after, in 1899, the city of Grand Junction also passed a sweeping package of local "morality" laws that included a law stating, "No person shall appear in any public place in this city in a state of nudity or in a dress not belonging to his or her sex."[87] Paradoxically, the two men depicted in the image to the right—who were convicted of sodomy and imprisoned in Canon City State Prison—were punished by being forced to break rocks while wearing dresses just a few years later.[88]

The first half of the twentieth century was no better.[89] Despite finding that same-sex oral sex was not outlawed because oral sex was not included in the definition of sodomy, the Colorado Supreme Court opined that same-sex oral sex was "more vile and filthy than sodomy."[90] In response, the Colorado legislature enacted a "Crimes Against Nature" law in 1939 that included a prohibition on same-sex oral sex.[91] It passed unanimously.[92] In 1953, "Colorado enacted a psychopathic offenders law," which allowed for indefinite institutionalization in the state hospital for anyone convicted of a sex crime, which included same-sex acts.[93] The following year, Denver City Council voted unanimously to make it illegal for

86. Importantly, these laws were not only intended to target transgender people, but also formerly enslaved people that were escaping to freedom. This law was embedded with SOGI and race discrimination. ISHAM WHIT, THE LAWS AND ORDINANCES OF THE CITY AND COUNTY OF DENVER, COLORADO 433 (2013) (Ch. 7 Art. 1 § 2, indecent exposure).

87. *Id.* (Ordinance 83. Art. 6 Sec. 3).

88. *Two Prisoners in the Colorado State Penitentiary*, DENV. PUB. LIBR.: DIGITAL COLLECTIONS, https://cdm16079.contentdm.oclc.org/digital/collection/p15330coll22/id/7289 (last visited Feb. 7, 2024) (Western history collection) (this photo is assumed to have been taken between 1900–1910).

89. In 1925, George Rand was prosecuted for sodomy, and sent to the state psychiatric hospital. The People's History of the Grand Valley, *The Closet: LGBTQ+ Folx in the Grand Valley, 1881-1976*, FACEBOOK (Aug. 31, 2022) https://www.facebook.com/profile.php?id=100065097246827. In 1945, Wendell P. Martin was convicted of a crime against nature. Martin v. People, 162 P.2d 597, 597 (Colo. 1945). In 1947, Harry A. Shier was prosecuted for sodomy and Charles A. Dustin was prosecuted for a crime against nature. Shier v. People, 181 P.2d 366, 366 (Colo. 1947); Dustin v. People, 181 P.2d 457, 458 (Colo. 1947). In 1955, Ray Hawkins was charged with a crime against nature. Hawkins v. People, 281 P.2d 156, 157 (Colo. 1955). In 1954, Lorenzo Harvey, was prosecuted for crimes against nature. The People's History of the Grand Valley, *supra* note 89.

90. Koontz v. People, 263 P.19, 22 (Colo. 1927).

91. *See* Painter, *supra* note 83.

92. The People's History of the Grand Valley, *supra* note 89.

93. Painter, *supra* note 83 (citing *Colorado Laws 1953*, p. 249, ch. 89, enacted Apr. 1, 1953).

a man to dress as a woman, except for entertainment purposes.[94] This ordinance specifically targeted the LGBTQ+ community. In 1959, the Denver Police arrested Carl Harding, a founder of the gay activist organization Mattachine, after he put on Colorado's first national convention for gay rights.[95] The police confiscated Mattachine's member list and outed members publicly, many of whom were subsequently fired from their jobs.[96] The police's terrorization effectively ended the gay rights organization.[97]

By the 1960s, LGBTQ+ people were fighting for their rights in the streets.[98] The more visible the community became, the more likely private citizens were to subject LGBTQ+ people to hate and discrimination.[99] A 1965 article from the Denver Post called gays and lesbians "a serious problem" in society.[100] In 1973, undercover police seduced gay men onto a large bus, dubbed "The Johnny Cash Special," then charged them with sex crimes despite the fact that the anti-sodomy laws were repealed the prior year.[101] The bus effectively criminalized over 380 gay men in three months.[102]

Meanwhile in 1972, on the other side of the culture war, Boulder City Council approved a sexual orientation anti-discrimination ordinance in an attempt to expand rights for the community.[103] Sadly, the Boulder voters overwhelmingly repealed it two years later.[104] In another groundbreaking move, Clela Rorex, a Boulder County clerk, became one of the very first American government officials to issue a marriage license to same-sex couples in 1975.[105] Over the course of a month, the courthouse issued licenses to five gay couples and one lesbian couple.[106] Yet, it did not take long for the state to step in and stomp down those successes.[107] Colorado Attorney General J.D. McFarlane ordered Rorex to stop because "same-

94. *Women's Dress Banned for Men in Denver*, DENV. POST 3 (Dec. 28, 1954).

95. Berlin Sylvester, *A Brief LGBT History of Colorado*, OUT FRONT MAG. (Aug. 20, 2014), *https*://www.outfrontmagazine.com/brief-lgbt-history-colorado/.

96. *Id.*

97. *Id.*

98. *Id.*

99. Keith L. Moore, Queen City of the Plains? Denver's Gay History 1940-1975 (2014) (M.A. thesis, University of Colorado) (available at https://lgbtqcolorado.org/dev2018/wp-content/uploads/2016/02/Keith-Moore-Thesis-1-1.pdf).

100. Liv, *Homosexuality in the Media*, THE CTR. ON COLFAX, https://lgbtqcolorado.org/galleries/homosexuality-in-the-media/ (last visited Feb. 7, 2024).

101. Paul Bindel, *In the Beginning*, OUT FRONT MAG. (Dec. 16, 2015), https://www.outfrontmagazine.com/in-the-beginning/.

102. *Id.*

103. *Celebrating Diversity and Protecting our Community Against Discrimination*, CITY OF BOULDER (Jun. 29, 2023), https://bouldercolorado.gov/news/celebrating-diversity-and-protecting-our-community-against-discrimination.

104. *Id.*

105. *Id.*

106. *Why Boulder County Courthouse is Recognized for its Role in LGBTQ History*, HIST. COLO. (Oct. 24, 2018), https://www.historycolorado.org/story/colorado-voices/2018/10/24/why-boulder-county-courthouse-recognized-its-role-lgbtq-history#:~:text=Colorado%20Attorney%20General%20J.D.%20McFarlane,Clerk%20for%20a%20few%20months.

107. *Id.*

sex licenses were misleading" and "falsely suggested that recipients had obtained all the rights the state afforded to husband and wife."[108]

In the 1980s, the Acquired Immunodeficiency Syndrome (AIDS) epidemic hit Colorado.[109] The LGBTQ+ community was deeply affected, and many went into hiding because of the hateful national rhetoric that followed the outbreak.[110] During this time, cultural polarization around LGBTQ+ people grew in Colorado. In 1991, an anti-LGBTQ+ organization, Focus on the Family, moved its headquarters to Colorado.[111] The Institute for the Scientific Investigation of Sexuality, another conservative, anti-LGBTQ+ organization, quickly followed.[112] In opposition to these hate groups, local Colorado municipalities introduced ordinances to protect gay and lesbian people for the first time in the state's history.[113] Soon after, another hate group, Colorado for Family Values, formed specifically to counter the ordinances and gay rights generally, both of which its members viewed as a threat.[114]

By the early 1990s, Colorado faced yet another wave of SOGI discrimination, which culminated in the passing of Amendment 2.[115] Colorado for Family Values proposed Amendment 2, which prohibited any anti-discrimination protections for LGBTQ+ people—the amendment was passed by a majority of Colorado voters. [116] Amendment 2 was uniquely hateful and gained national attention.[117] Colorado was dubbed "the Hate State."[118] Ultimately, in 1996, the Supreme Court stepped in to declare Amendment 2 unconstitutional and held that Amendment 2 was born of animosity by the people of Colorado towards LGBTQ+ people.[119]

Unfortunately, the SOGI discrimination did not end after Amendment 2 was defeated. In 2000, as the marriage rights of same-sex people entered the spotlight of public discourse, Colorado amended the Uniform Marriage Act by adding a paragraph that stated marriage is valid in

---

108. *Id.*

109. *AIDS in Colorado*, HIST. COLO., https://coloradoencyclopedia.org/article/aids-colorado#:~:text=In%20May%201987%2C%20health%20officials,of%20education%20about%20the%20virus (last visited Feb. 7, 2024).

110. Rick Kitzman, *The Lost, Last Weekend of Denver's Legendary Bathhouse, The Ballpark*, OUT FRONT MAG. (June 15, 2016), https://www.outfrontmagazine.com/lifted-wings-fairies/.

111. *Historical Timeline*, FOCUS ON THE FAMILY, https://www.focusonthefamily.com/about/historical-timeline/ (last visited Feb. 7, 2024).

112. *Paul Cameron*, S. POVERTY L. CTR, https://www.splcenter.org/fighting-hate/extremist-files/individual/paul-cameron (last visited Feb. 7, 2024).

113. Romer v. Evans, 517 U.S. 620, 623–24 (1996).

114. *BRIA 12 4 c Should Homosexuals Have the Right to Laws Protecting Them From Discrimination*, TEACH DEMOCRACY, https://teachdemocracy.org/bill-of-rights-in-action/bria-12-4-c-should-homosexuals-have-the-right-to-laws-protecting-them-from-discrimination (last visited Feb. 7, 2024).

115. James O'Rourke, *Colorado's 'Hate State' History: Then & Now*, COLO. TIMES RECORDER (June 9, 2023), https://coloradotimesrecorder.com/2023/06/colorados-hate-state-history-then-now/54007/.

116. *Id.*

117. *Id.*

118. *Id.*

119. *See* Romer v. Evans, 517 U.S. 620, 634 (1996).

Colorado if "[i]t is *only* between one man and one woman."[120] In 2006, Colorado also adopted Amendment 43, now Colorado Constitution Art. II § 31, prohibiting same-sex marriage.[121] This constitutional amendment remained enforceable until 2014 when a district court decision deemed it unconstitutional.[122]

b. Invidious Discrimination by Private Parties

Private actors, local governments, and school boards in conservative parts of the state perpetuate much of the SOGI discrimination in Colorado today. Many active anti-LGBTQ+ groups are a legacy of the hate groups that moved to Colorado in the 1990s.[123] According to the Southern Poverty Law Center, Colorado has one of the highest number of anti-LGBTQ+ hate groups per capita in the United States.[124] As a result, Colorado has also been home to numerous hate crimes against LGBTQ+ people.[125] SOGI discrimination hate crimes have seen a shocking and steady increase each year: from 2017 to 2022, sexual orientation hate crimes increased 426% and gender identity hate crimes increased 2,400% in Colorado.[126] In 2022, there were 79 incidents of hate crimes based on sexual orientation and 25 incidents of hate crimes based on gender identity in Colorado.[127]

c. Coequal Branches Opinion on SOGI Discrimination

In addition to the state sponsored and private parties' invidious discrimination detailed above, the Supreme Court, in *Frontiero v. Richardson*[128] analyzed Congress's concurrent opinion as a factor in understanding invidious discrimination.[129] The Court held that Congress's opinion was significant because Congress is a coequal branch of the government.[130] Similarly, Colorado's legislative branch recently found SOGI

120. Brinkman v. Long, No. 13-CV-32572, 2014 LEXIS 2809, at *9 (D. Colo. July 9, 2014) (emphasis added).

121. *See id.* at *10.

122. *Id.* at *56–58.

123. *See In 2022, We Tracked 31 Hate and Antigovernment Groups in Colorado*, THE S. POVERTY L. CTR., https://www.splcenter.org/hate-map?state=CO (last visited Feb. 7, 2024).

124. *See id.* (Colorado is now home to four anti-LGBTQ hate groups including Family Research Institute (previously known as the Institute for the Scientific Investigation of Sexuality), Generations, Mass Resistance, and The Pray in Jesus Name Project).

125. Solcyré Burga, *Long Before the Club Q Shooting, Colorado Springs Held a Dark Place in LGBTQ History*, TIME (Nov. 23, 2022, 3:10 PM), https://time.com/6236657/colorado-springs-shooting-lgbtq-history/; *Anti-LGBTQ*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-lgbtq (last visited Feb. 9, 2024).

126. *Public Reports*, COLO. CRIME STATS., https://coloradocrimestats.state.co.us/public/View/dispview.aspx (last visited Feb. 9, 2024) (choose "Hate Crime 5-Year Trend" from the menu on the left side; then choose "Incident Date" in the results table; then select all of the following, "2017, 2018, 2019, 2020, 2021, 2022, and 2023" from the list of dates; then click "Show report" in the upper-right corner; then click "All Hate Crimes" in the results table).

127. *Id.*

128. 411 U.S. 677 (1973).

129. *Id.* at 687–88. (Congress concluded that "classifications based upon sex are inherently invidious" in the passage of Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and the Equal Rights Amendment passed by Congress in 1972 (but never ratified)).

130. *Id.*

discrimination to be inherently invidious, which led the legislature to pass an anti-discrimination act (CADA) that protected against such discrimination.[131]

Overall, it is apparent that there is a history of invidious SOGI discrimination in Colorado. This documented discrimination goes above and beyond what is reasonably required to prove the need for increased protection under the federal Equal Protection Clause. Additionally, this unique and pervasive history of discrimination and cultural polarization are factors in favor of adopting a test entirely different than the federal test. Colorado would instead benefit from a unique and more protective test to remedy the state's historic insufficiencies.

2. Political Powerlessness

The next step of the suspect class analysis requires the court to determine the political powerlessness of the group. The Supreme Court has held that political powerlessness is an important factor in determining suspect classification because it demonstrates an inability to remedy discrimination through the political process.[132] When there is no deficiency in the political process, undesirable legislation can ordinarily be repealed and replaced with nondiscriminatory legislation, and state actors can be held accountable through the election process.[133] Conversely, when there is a deficiency in the political process and a statute is "directed at particular religious, or national, or racial minorities . . . [, or reflects] prejudice against discrete and insular minorities" who cannot be expected to protect their interests adequately through the legislative process, then a suspect classification is warranted to remedy the political failure.[134] Courts have considered the political powerlessness of discrete and insular minorities a special condition because prejudice based on minority identities cannot be remedied in the typical ways.[135]

In 1996, the Supreme Court determined that women could not be classified as a discrete and insular or politically powerless group because women comprised a majority of the electorate.[136] When the Court originally created intermediate scrutiny, it was necessary to craft a new heightened scrutiny specifically for a group that met some aspects of suspect

131. Matt Simonsen, *Master File, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm., __ U.S. __ (2017): Legislative History of SB08-200*, at 72–94 Univ. of Colo. Law Sch. (Sept. 23, 2017), https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1008&context=research-data; S.B. 08-200, ch. 341 § 41 (2008).

132. Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 153 (2011).

133. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (discussing additional factors to consider when determining a statute's constitutionality).

134. *Id.* (citations omitted).

135. *Id.*

136. United States v. Virginia, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting). The Ninth Circuit further elaborated on this idea questioning whether it makes sense "to apply 'political structure' equal protection principles" if the burdened group is "a majority of the electorate." Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 704 (9th Cir. 1997).

classification, but not others.[137] Conversely, the Court considered race to meet all the prerequisites for suspect classification, and therefore, deserving of strict scrutiny analysis because of the related history of horrific discrimination and political powerlessness.[138]

One factor in determining the political powerlessness of a group is the presence of statutory protections enacted to remedy discrimination against that particular group. The Colorado legislature succeeded in securing some protections for the LGBTQ+ community under CADA, which added sexual orientation protections in 2008 and explicit gender identity protections in 2021.[139] Soon after the enactment of sexual orientation protections under CADA, a same-sex couple tried to vindicate their rights under this legislation and failed.[140] The couple was denied public services in violation of CADA based on their sexual orientation.[141] The perpetrator of same-sex discrimination, Jack Phillips, opposed CADA's sexual orientation protections.[142] Phillips, who did not want to provide a public service to the same-sex couple, appealed all the way to the Supreme Court arguing that there should be religious and free speech exemptions from CADA.[143] Ultimately, Phillips won, and the same-sex couple was left without remedy for the discrimination they faced in Colorado.[144] Shortly after this first Supreme Court case was settled, opponents of the protections under CADA brought a second suit arguing for exemptions under the Free Exercise and Free Speech Clauses.[145] The Supreme Court again held that the First Amendment prohibits Colorado from enforcing its anti-discrimination laws to protect LGBTQ+ people.[146] As a result, currently both religious and free speech exemptions allow people in Colorado to explicitly discriminate against LGBTQ+ people in public accommodations. Despite the seemingly protective legislation, the political process is deficient for LGBTQ+ people in Colorado. If the discriminating person argues that their discriminatory action constitutes speech protected by the Free Speech Clause or argues they have a sincerely held belief that requires them to discriminate against LGBTQ+ people, First Amendment defenses render the legislation unenforceable.

LGBTQ+ people have demonstrated a clear and obvious inability to protect themselves through the political process, both nationally and in Colorado, even though there are more pro-LGBTQ+ elected officials now

137. *See id.* at 570–71.
138. To be clear, the horrific discrimination described is not merely historic, it persists in the present as well.
139. S.B. 08-200, Gen. Assemb. (Colo. 2008); H.B. 21-1108, Gen. Assemb. (Colo. 2021).
140. Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617, 621–25 (2018).
141. *Id.*
142. *See id.* at 630.
143. *Id.* at 621–25, 630.
144. *Id.* at 639–40.
145. 303 Creative LLC v. Elenis, 405 F. Supp. 3d 907, 908 (D. Colo. 2019), *aff'd*, 6 F.4th 1160 (10th Cir. 2021), *rev'd*, 143 S. Ct. 2298 (2023).
146. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2315 (2023).

than there were fifty years ago.[147] In Colorado, LGBTQ+ people and other neutral or supportive voters elected a gay governor and a small caucus of LGBTQ+ state elected officials.[148] Yet, in 2022, there were more complaints filed with the Colorado Civil Rights Commission for SOGI discrimination in housing than complaints filed for religious, source of income status, familial status, or national origin discrimination; and more SOGI discrimination complaints in public accommodation than for religious, sex other than SOGI, national origin, or marital status discrimination.[149] Traditional factors used to measure political power, the identity of elected officials and existing legislated protections, are ineffective measures of a group's ability to remedy prejudice.

On a national level, 2023 produced record levels of anti-LGBTQ+ litigation with over 510 bills targeting the community.[150] Political powerlessness has never been more apparent; state legislatures around the country have passed bills to remove transgender people from sports;[151] ban books and education about LGBTQ+ people;[152] remove access to necessary health care for transgender people;[153] restrict the ability to "say gay or trans" in schools;[154] limit the ability for transgender people to obtain accurate identification and records;[155] increase the exemptions from anti-discrimination laws that protected LGBTQ+ people;[156] criminalize the free expression of LGBTQ+ people;[157] block insurance coverage for

147. Lindsey Toomer, *'A Beacon of Hope': Colorado Sees Historic LGBTQ Representation Amid National Attacks*, COLO. NEWSLINE (June 14, 2023, 4:00 AM), https://coloradonewsline.com/2023/06/14/colorado-historic-lgbtq-representation/.

148. Nic Garcia, *Colorado Just Elected Jared Polis the Nation's First Openly Gay Governor*, DENV. POST (Nov. 6, 2018, 8:14 PM), https://www.denverpost.com/2018/11/06/jared-polis-colorado-first-gay-governor/.

149. DEP'T OF REGUL. AGENCIES: COLO. CIVIL RIGHTS DIV., ANNUAL REPORT: FISCAL YEAR 2021-2022 (2022).

150. *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, AM. CIVIL LIBERTIES UNION (Oct. 27, 2023), https://www.aclu.org/legislative-attacks-on-lgbtq-rights.

151. Katie Barnes, *Transgender Athlete Laws by State: Legislation, Science, More*, ESPN (Aug. 24, 2023, 7:00 AM), https://www.espn.com/espn/story/_/id/38209262/transgender-athlete-laws-state-legislation-science.

152. Scott McFetridge, Anthony Izaguirre, & Sara Cline, *School Library Book Bans Are Seen as Targeting LGBTQ Content*, THE ASSOCIATED PRESS (Mar. 20, 2023, 9:23 AM), https://apnews.com/article/lgbtq-book-bans-91b2d4c086eb082cbecfdda2800ef29a.

153. *Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/healthcare_youth_medical_care_bans (last visited Feb. 9, 2024).

154. *LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/curricular_laws (last visited Feb. 9, 2024).

155. *Identify Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/identity_documents (last visited Feb. 9, 2024).

156. *See* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2314–15 (2023) (holding that public accommodation laws play a vital role in protecting the civil rights of Americans, but "[w]hen a state public accommodations law and the Constitution collide, there can be no question which must prevail.").

157. Virginia Chamlee, *Anti-Drag Legislation Is Sweeping the Nation: Here's Where Each State Stands on Drag Bans*, PEOPLE (June 6, 2023, 2:30 PM), https://people.com/politics/anti-drag-legislation-united-states/.

transgender people;[158] prohibit transgender people from using the restroom that aligns with their gender identity;[159] and more. Many LGBTQ+ people are trying in vain to stop these laws from passing, however, they are politically powerless and have been unable to prevent discriminatory legislation even though the courts have previously found similar legislation unconstitutional.[160] Furthermore, even discriminatory laws passed outside of Colorado can impact the rights of LGBTQ+ residents of Colorado. While this sweeping hatred and blatant discrimination is somewhat less present at the state level, it is growing and spreading through municipalities and school boards around Colorado.[161] State actors in Colorado are attempting to ban books in public schools and libraries.[162] They are restricting what students can say, how they can assemble, and the messages they are allowed to communicate on campus.[163] Teachers are prevented from flying pride flags.[164] Drag performers require protection when entering public spaces.[165] Individual court clerks are making it difficult for LGBTQ+ people to change their birth certificates.[166] And expressions of queer pride and joy are getting taken down for fear of property damage.[167]

If this is what political power looks like for LGBTQ+ Coloradans, then political power has no meaning. It contradicts itself at every turn. The extreme polarization and openly hostile debate over someone's identity means that, while some protections may exist and some elected officials—mostly white, cisgender, gay men—are currently in positions of power, the LGBTQ+ community as a whole continues to be degraded and othered by individual and state actors alike. Because access to political power no long

158. Maham Javaid, *New State Bills Restrict Transgender Health Care – For Adults*, WASHINGTON POST (Mar. 1, 2023, 9:00 AM), https://www.washingtonpost.com/nation/2023/02/28/anti-trans-bills-gender-affirming-care-adults/.

159. *Bans on Transgender People Using Bathrooms and Facilities According to Their Gender Identity*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/nondiscrimination/bathroom_bans (last visited Feb. 9, 2024).

160. At the time this was written, courts were unanimous in finding the anti-LGBTQ+ laws were unconstitutional. Orion Rummler, *Anti-LGBTQ+ Laws Are Being Blocked in Federal Court Across the Country*, THE 19TH NEWS(LETTER) (July 5, 2023, 4:00 AM), https://19thnews.org/2023/07/anti-lgbtq-laws-blocked-federal-courts/.

161. Paolo Zialcita, *Colorado Politicians Have Promoted Anti-LGBTQ Rhetoric and Policies—From Local School Boards to Congress—That Escalate Violence, Experts and Advocates Say*, COLO. PUBLIC RADIO (Nov. 22, 2022, 5:45 PM), https://www.cpr.org/2022/11/22/colorado-politicians-anti-lgbtq-rhetoric-policies/.

162. Alayna Alvarez, *Book Ban Battles Proliferate In Colorado and Across U.S.*, AXIOS DENV. (Oct. 5, 2023), https://www.axios.com/local/denver/2023/10/05/colorado-book-bans.

163. *ACLU Demands Colorado Springs Area High School Rescind Its Prohibition Against Apparel Promoting LGBT Equality*, AM. CIVIL LIBERTIES UNION (Nov. 16, 2010, 12:00 AM) https://www.aclu.org/press-releases/aclu-demands-colorado-springs-area-high-school-rescind-its-prohibition-against; Letter from Timothy R. Macdonald, Legal Dir., ACLU of Colorado, to Brad Miller, Miller Farmer Carlson Law (Aug. 16, 2023), https://www.monumentacademy.net/wp-content/uploads/2023/08/August-19-2023-Special-Meeting-Board-Highlights.pdf.

164. ACLU Intake Forms (Spring 2023) (on file with the ACLU of Colo.).

165. Matt Lavietes, *Colorado Shooting Prompts Top Drag Queens to Tour With Armed Guards and Metal Detectors*, NBC UNIVERSAL (Dec. 1, 2022, 1:55 PM), https://www.nbcnews.com/nbc-out/out-news/338olorado-shooting-prompts-top-drag-queens-tour-armed-guards-metal-detercna59478.

166. ACLU Intake Forms, *supra* note 164.

167. *Id.*

supports, and maybe never did support, the policy rationale that was initially articulated in the federal analysis, a test under the Colorado constitution should consider eliminating this criterion.

3. Immutable Characteristics

There is significant research examining the historical, scientific, and legal theories regarding the immutable characteristics of LGBTQ+ people.[168] These sources say that sexual orientation and gender identity are not lifestyle preferences, but substantially immutable characteristics that genetics and hormonal influences predominantly determine.[169] In other words, sexual orientation and gender identity are innate, not the product of individual choices.[170] Evidence supporting this assertion dates back 150 years and the scientific data has only continued to grow exponentially in the last fifty years.[171] It is also clear that when therapists, parents, or priests have tried to "convert" or change people's sexual orientation or gender identity, they have failed miserably.[172] In fact, the practice of conversion therapy is now outlawed in many countries and states because of the harm it causes and its ineffectiveness.[173]

Nevertheless, there could be people for whom it is not an immutable characteristic. Suppose someone simply prefers a more expansive sexuality because it gives them more options to find a compatible partner or partners who share their life goals and high moral standards. Or imagine that someone decided for political reasons that they no longer want to be associated with their gender assigned at birth because of societal expectations related to that gender. How about a person that experienced so much sexual trauma as an adolescent that they no longer feel sexual attraction for anyone? Ironically, in a country that proclaims freedom of belief, religious or otherwise, is a founding principle that must be respected and protected, people without immutable characteristics are subjected to the same explicit and implicit discrimination for the choices they make.

To hold that *only* people with immutable characteristics should receive suspect classification when the state discriminates against them is antithetical to the values of the Colorado constitution under the Inalienable Rights, Freedom of Speech, and Equality of the Sexes provisions.[174] One justification for requiring an immutable characteristic for suspect classification is the notion that legal burdens should bear some relationship to

168. Edward Stein, *Symposium on Intragroup Dissent and Its Legal Implications: Mutability and Innateness Arguments About Lesbian, Gay, and Bisexual Rights*, 89 CHI.-KENT L. REV. 597, 629–32 (2014).

169. *Id.* at 629–34, 637.

170. Jeffrey A. Kershaw, *Toward an Establishment Theory of Gay Personhood*, 58 VAND. L. REV. 555, 580–93 (2005).

171. Stein, *supra* note 168, at 598.

172. Logan Kline, *Revitalizing the Ban on Conversion Therapy: An Affirmation of the Constitutionality of Conversion Therapy Bans*, 90 UNIV. OF CIN. 623, 625, 626 (2021).

173. *Id.*

174. *See* COLO. CONST. Art. 2, §§ 10, 3, 29.

individual responsibility or wrongdoing.[175] The person who was born transgender should not bear the responsibility for state enacted harm levied against them. Similarly, the person who preferred to have an expansive sexuality, decided to be genderless, or experienced a traumatic situation and is now asexual also should not bear the responsibility for state enacted harm levied against them. Those people without immutable LGBTQ+ characteristics have committed no wrongdoing. The idea that being LGBTQ+ is something that one should "be responsible for" is itself a discriminatory supposition. Conversely, the person or government authority discriminating on the basis of a protected status should reasonably bear the responsibility for their actions. In response, some courts have ended their reliance on immutable characteristics, and instead evaluate whether an individual can effectively opt out of the group without sacrificing a core aspect of their identity.[176]

Similar to the above-named constitutional values, freedom of religion is greatly cherished in Colorado. Laws that facially discriminate on the basis of religion are evaluated under strict scrutiny, just like laws that discriminate on the basis of race and alienage.[177] In these circumstances, the court does not differentiate between a person who was born into a particular religious sect and a person who chose to convert to that religion. If a person becomes a Muslim when they are thirty years old, they will still be constitutionally protected against a discriminatory law that prohibits worship in the workplace.[178] This freedom extends to beliefs that are not grounded in a particular religion but are nonetheless sincerely held beliefs.[179] It might be better to build an equal protection test that considers an individual's sincerely held belief. This framework will certainly be more useful for LGBTQ+ classification than the immutable characteristics framework in making suspect classification more inclusive.

Lastly, removing the necessity for an immutable characteristic is more in line with the caselaw protecting against gender stereotypes. When SOGI discrimination occurs, it also necessarily includes people who are cisgender and heterosexual but are perceived as LGBTQ+ or do not conform to societal expectations of gender. When classification is the product of false stereotypes, particularly if based on outdated notions of gender and sexuality, immutable characteristics should not determine whether a person is protected from discrimination.[180]

---

175. Kelso 2021, *supra* note 69, at 991 (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973)).

176. Stein, *supra* note 168, at 633.

177. Kelso, *supra* note 69, at 1043.

178. Laura Lane-Steele, *Adjudicating Identity*, 9 TEX. A&M L. REV. 267, 287 (2022).

179. *See* Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1199–1200 (2017).

180. *See* Frontiero v. Richardson, 411 U.S. 677, 684–86 (1973).

4. Contribution to Society

A person's sexual orientation or gender identity is irrelevant to their ability to contribute to society. According to constitutional law scholars, sexual orientation and gender identity are "personal characteristic[s] that ha[ve] no legitimate bearing on one's competence, skill, or value as a human being."[181] LGBTQ+ people contribute to the same degree as their non-LGBTQ+ counterparts.

Furthermore, contribution to society is based on assumptions that equate a person's worth to their economic value.[182] People are more than their contribution to society. This factor has the practical effect of excluding disabled people, people with mental health challenges, the old, and the young.[183] Once again, considering an individual's contribution to society is discriminatory and should not be used to analyze which groups receive protection. All different types of people are a part of the LGBTQ+ community, and a community's ability to contribute to society should not determine whether they receive constitutional protections against state sanctioned discrimination.

B. Inclusive SOGI Protections or Separate Sexual Orientation and Gender Identity Protections

In crafting a test for identifying SOGI discrimination under Colorado's equal protections provisions, a court can decide to create identical or unique protections for sexual orientation and gender identity. Although no one has written about the intricacies of SOGI categorization under the Colorado Constitution, some scholars and judges have weighed the advantages and disadvantages of separate protections for sexual orientation and gender identity under the federal Constitution. Based on scholarly work considering inclusive and separate protections, this Section recommends a SOGI categorization that is most supportive of sex-based equality for Colorado.

In a 2019 law review article, *There's Nothing Rational About It: Heightened Scrutiny for Sexual Orientation Is Long Overdue*, Daniel Galvin argues that issues regarding sexual orientation, but not gender identity, should receive heightened scrutiny under the Equal Protection Clause.[184] Galvin argues that sexual orientation, "the LG and B" of LGBT, meets all the requirements of suspect classification.[185] Similar law review articles have circulated arguments for applying heightened scrutiny to sexual

181. Brief for Constitutional Law Scholars, *supra* note 74, at 3.
182. *Id.* at 11–12.
183. *Id.* at 13.
184. Daniel J. Galvin, Jr., *There's Nothing Rational About It: Heightened Scrutiny for Sexual Orientation Is Long Overdue*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 405, 431 (2019).
185. *Id.* at 405.

orientation classification under the Equal Protection Clause for years.[186] One could surmise that authors shy away from including gender identity because they fear that doing so will reduce their relatively strong argument for strict scrutiny over intermediate scrutiny due to the historical scrutiny prescribed to gender. However, this interpretation of gender discrimination is inherently limited. It is perfectly logical to assume that the impact of discrimination on the basis of a majority gender identity would be different than the impact of discrimination on the basis of a minority gender identity because stigmatization and societal prejudice play important roles on the impact of discrimination. Therefore, when courts decide what level of scrutiny to apply, based in part on political power, they could assign different levels of scrutiny for majority or minority genders. This would afford more protections to minority gender identities such as transgender men, transgender women, or non-binary people. Yet, some authors advocating for only the inclusion of sexual orientation into a heightened scrutiny analysis seem stuck on the idea that all genders must receive the same test.[187] By contrast, some modern courts are finding it easier to justify heightened scrutiny for gender identity because of the blatant increase in political, systemic, familial, and physical violence against transgender, non-binary, and gender non-conforming people.[188] Yet, this view is also limited.

Although gender identity most certainly deserves heightened scrutiny under the Equal Protection Clause, it would be misguided to exclude sexual orientation from a balancing test that is more protective of individual rights. It would be best to create inclusive sexual orientation and gender identity protections. Historically, cultures did not always see a sharp distinction between sexual orientation and gender identity; these cultures lived with a more blended understanding, incorporating mixed presentation of gendered clothing or androgynous clothing, alternate and unique roles in society, varying physical traits, and a relationship with same or different genders.[189] These sexual orientation and gender identity variations existed in nearly every civilization, across people of every skin tone

186. Nicholas Drew, Comment, *A Rational Basis Review That Warrants Strict Scrutiny: The First Circuit's Equal Protection Analysis in* Massachusetts v. U.S. Department of Health and Human Services, 54 B.C. L. REV. E Supp. 43, 43 (2013); Jeremiah A. Ho, *Once We're Done Honeymooning:* Obergefell v. Hodges*, Incrementalism, and Advances for Sexual Orientation Anti-Discrimination*, 104 KY. L.J. 207, 214 (2016); Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1579 (2017); Stacey L. Sobel, *When* Windsor *Isn't Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J. L. & PUB. POL'Y 493, 494 (2015); Alvan Balent, Jr., *Get It Right, Florida: Why the Florida Supreme Court Should Rule That Equal Protection Claims of Sexual Orientation Discrimination Receive Intermediate Scrutiny*, 44 STETSON L. REV. 759, 762 (2015).

187. Galvin, *supra* note 184, at 405, 409.

188. Williams v. Skrmetti (*In re* Interest of L.W.), No. 3:23-cv-00376, 2023 WL 4232308, *12–*13 (M.D. Tenn. June 28, 2023), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023).

189. DAVID B. CRUZ & JILLIAN T. WEISS, GENDER IDENTITY AND THE LAW 3 (2021).

and belief system.[190] For example, in eighteenth century Europe, the public had a connected understanding of male same-sex acts with effeminacy and cross-dressing, a so-called unitary concept of sexual orientation and gender identity.[191] In western Arabia between the thirteenth and eighteenth centuries, children assigned female at birth were raised as men, dressed as men, and married women.[192] In Africa, in the Kingdom of Dahomey, there were female warriors with masculine traits[193] who remained unmarried and childless.[194] Sadly, certain political and cultural moments led to the condemnation of same-sex acts, gender variance, and androgenous or ambiguous gender expressions.[195]

It was not until the early 1900s that scientists and medical practitioners started to differentiate between transgender people and gay, lesbian, or bisexual people, and began considering them as distinct conceptual groups.[196] It is likely that the social scientists, medical practitioners, media, and the public at large overemphasized the differences between sexual orientation and gender identity in an attempt to fit people into neat little boxes.[197] As a result of this new way of categorizing identities, the LGBTQ+ community made a concerted effort to explain the differences between sexual orientation and gender identity, likely to avoid fitting into the least popular box.[198] For some people these distinctions and delineations are still very important, but for others, the lines have blurred.

At its best, the modern-day LGBTQ+ movement is an inclusive movement that includes individuals with same-sex attractions; those born

---

190. It is hard to say all civilizations, but it was probably all civilizations. Some cultures might have failed to record the variations in sexual orientation and gender identity or forced it underground for some reason. *Id.*

191. *Id.* at 5.

192. *Id.* at 4.

193. *Id.* at 3.

194. *Id.*

195. "Passing" or "assimilating" into a dominant society became a safety mechanism to avoid prosecution. *Id.* at 5.

196. *Id.* at 5–6.

197. Lesbian and gay people, most particularly white lesbian and gay people, spent many years trying to differentiate themselves from the transgender community because people who were more obviously queer were targets for violence and ridicule. Evan Greer, *Powerful Gay Rights Groups Excluded Trans People for Decades—Leaving Them Vulnerable to Trump's Attack*, WASH POST (Oct. 29, 2018, 6:00 AM), https://www.washingtonpost.com/outlook/2018/10/29/trumps-attack-trans-people-should-be-wake-up-call-mainstream-gay-rights-movement/. Gay and Lesbian people used this 'othering' method to reach a respectable place in "polite society" where they could more easily blend in and be relatable to the people in power. *Id.* Similarly, people in the transgender community, like Christine Jorgensen, made it very clear that they were experiencing a medical challenge and were not gay. *From GI Joe to GI Jane: Christine Jorgensen's Story*, NAT'L WWII MUSEUM NEW ORLEANS (June 30, 2020), https://www.nationalww2museum.org/war/articles/christine-jorgensen. Jorgenson, one of the first widely known transgender people in the twentieth century, wanted to make the distinction clear because she would have faced dishonorable discharge from the military if people attributed the incorrect label to her experience. *Id.*

198. Genny Beemyn, *Transgender History in the United States: A Special Unabridged Version of a Book Chapter*, *from* TRANS BODIES, TRANS SELVES 18–20 (Laura Erickson-Schroth, ed., 2014) (available at https://www.umass.edu/stonewall/sites/default/files/Infoforandabout/transpeople/genny_beemyn_transgender_history_in_the_united_states.pdf); *The Homophile Movement*, MAKING HISTORY, https://info.umkc.edu/makinghistory/the-homophile-movement/ (last visited Feb. 10, 2024).

with ambiguous genitalia; people across the constellation of gender identities; individuals that have romantic feelings towards all genders; those who have no desire for sexual relationships at all; people without a gender identity; and so many more.[199] These identities shift over time from one category of queerness to another category of queerness as people become aware of the nuances in their own sexual orientation and gender identity, or discover new and more accurate labels.[200] Some people are fluid in their sense of sexuality and gender, with fluctuations occurring in a relatively short time period.[201] Many people fall into multiple categories at the same time; for example, someone who is agender, presents as their gender assigned at birth, and is bisexual.[202] It is important that the movement is inclusive because externally perceived characteristics, styles, and behaviors may transgress many different identities. For example, a butch lesbian, a non-binary person, and an intersex person might all appear the same to an outside observer; however, the discrimination that each individual faces might vary. Finally, some people may feel comfortable revealing one identity and not another in public.

For a wide range of reasons, including equity and the complexity of identity, it makes the most sense to create an inclusive SOGI classification. LGBTQ+ people should remain together in legal protection because it is the most supportive option in a time of rampant discrimination.

C. Proposed Test Under the Colorado Constitution

Colorado should not adopt one of the federal balancing tests or use the federal suspect class factors to evaluate the state constitutional protections for LGBTQ+ people. The federal reasoning is not based on sound policy, and there are distinct historical and cultural considerations in Colorado that warrant an independent analysis. The test to determine whether LGBTQ+ people should receive the most stringent protections under the Due Process provision and Equality of the Sexes provision should consider the following: state actors and private parties' historical and present discrimination in Colorado and nationally; the benefit of providing more stringent protections; the risk to people's safety in providing more stringent protections; and the challenges to enforcement with more stringent protections. Under this test, LGBTQ+ people should receive the most

199. *LGBTQ+ Glossay*, UC DAVIS HEALTH: OFFICE FOR HEALTH EQUITY, DIVERSITY AND INCLUSION, https://health.ucdavis.edu/diversity-inclusion/LGBTQI/LGBTQ-Plus.html (last visited Feb. 10, 2024); Erin Blakemore, *From LGBT to LGBTQIA+: The Evolving Recognition of Identity*, NAT'L GEOGRAPHIC (Oct. 19, 2021), https://www.nationalgeographic.com/history/article/from-lgbt-to-lgbtqia-the-evolving-recognition-of-identity.

200. Taylor Kunin-Ur, *Queer Labeling: Why It's Important and Why It's Not*, OUTWRITE (Feb. 13, 2023), https://outwritenewsmag.org/2023/02/queer-labeling-why-its-important-and-why-its-not/.

201. Beth Sissons, *What Does It Mean to be Genderfluid?*, MED. NEWS TODAY (Dec. 19, 2023), https://www.medicalnewstoday.com/articles/genderfluid#overview.

202. Please enjoy this educational unicorn. *The Gender Unicorn*, TRANS STUDENT EDUC. RES., https://transstudent.org/gender/ (last visited Feb. 10, 2024).

stringent protections under the equal protection provisions of the Colorado constitution.

V. SEXUAL ORIENTATION AND GENDER IDENTITY AS A FUNDAMENTAL RIGHT

In addition to suspect classification, LGBTQ+ people's fundamental right to exist should be recognized in the Colorado Constitution. The Colorado Supreme Court has recognized "fundamental rights" as those rights which have been recognized as having value essential to individual liberty.[203] Fundamental rights are often based on the penumbra doctrine, where they emerge out of the shadows of what explicitly exists.[204] This doctrine, which Justice Holmes first illustrated, is said to create a general right that is derived from specific guarantees in the Bill of Rights.[205] For example, the First, Third, Fourth, and Fifth Amendments of the federal Constitution have a penumbra where privacy is protected from government intrusion, which creates a fundamental right to privacy.[206] The Ninth Amendment supports the penumbra doctrine, which says that the rights of the people are not limited to those enumerated in the Constitution.[207]

As previously mentioned, the Colorado Constitution, unlike the federal Constitution, is "not one of limited powers where the state's authority is restricted to the four-corners of the document."[208] Therefore, according to the court in *Lujan*, the fundamental rights of Colorado citizens are not necessarily explicitly or implicitly stated within the four corners of the Colorado Constitution document.[209] Because Colorado is less limited than the federal Constitution, this lends further credence to the penumbra doctrine under the Colorado Constitution.

Under the Colorado Constitution, self-determination of sexual orientation and gender identity, and living in accordance with those identities, appears to be a fundamental right that is supported by the penumbra of Section 10, Freedom of Speech and Press; Section 3, Inalienable Rights; and Section 29, Equality of the Sexes.[210] Other federally recognized fundamental rights, such as the decision to marry, bear children, and hold membership in political organizations, are related to privacy and associational interests derived from similar clauses in the Bill of Rights.[211]

---

203. Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1015 n. 7 (Colo. 1982).

204. Nathan S. Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause: Common Interpretation*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701 (last visited Feb. 10, 2024).

205. Henry T. Greely, *A Footnote to "Penumbra" in* Griswold v. Connecticut, 6 CONST. COMMENTARY 251, 253–56 (1989).

206. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

207. *Id.* at 499.

208. *Lujan*, 649 P.2d at 1017.

209. *Id.*

210. COLO. CONST. Art. 2, §§ 10, 3, 29.

211. *See* Obergefell v. Hodges, 576 U.S. 644, 663–64, 666–67 (2015); Carey v. Population Services Int'l, 431 U.S. 678, 685 (1977); Tashjian v. Republican Party of Conn., 479 U.S. 208, 214–16 (1986).

Similarly, sexual orientation and gender identity are related to privacy and associational interests.

First, the Freedom of Speech and Press provision of the Colorado Constitution states that no law shall be passed impairing the freedom of speech.[212] The Colorado Constitution has a long tradition of guaranteeing greater protections of free speech and expression than the First Amendment's guarantees, which is already very protective of speech and expression.[213] Furthermore, in Colorado, freedom of association is "an element of the broad right to freedom of expression" and operates to "protect[] 'the right of individuals to associate to further their personal beliefs.'"[214] It would be impossible to disentangle self-identification and SOGI expression from freedom of speech.[215]

Next, the Inalienable Rights Provision of the Colorado Constitution ensures "all persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties, . . . and of seeking and obtaining their safety and happiness."[216] When the Colorado Supreme Court analyzed the Inalienable Rights Provision, it found there are fundamental and inherent rights with which all humans are endowed which protect a person's pursuit of happiness and freedom, even though no specific mention is made of them in either the national or state constitutions.[217] The Supreme Court gives a similar summary to the meaning of liberty that is at the core of the Inalienable Rights Provision: "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[218] Correspondingly, living in accordance to one's sexual orientation and gender identity cannot and should not be separated from the inalienable right to seek and obtain happiness.

Lastly, the Equality of the Sexes Provision states that "[e]quality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex."[219] Although the original interpretation of "sexes" may have only included men and women, the Colorado Supreme Court has interpreted this provision to prohibit differential treatment based on circumstance of sex, social

212. COLO. CONST. Art. 2, § 10.
213. Bock v. Westminster Mall Co., 819 P.2d 55, 58–60 (Colo. 1991).
214. State Bd. for Cmty. Colls. and Occupational Educ. v. Olson, 687 P.2d 429, 439 (1984) (quoting Healy v. James, 408 U.S. 169, 181 (1972)).
215. For an in-depth discussion on the right to transgender identity, transgender expression, and gender-affirming medical care guaranteed by free speech interests, check out Parker Rose Wingate, *Trans Bodies, Trans Speech*, 41 MINN. J. L. & INEQ. 331 (2023).
216. COLO. CONST. Art. 2, § 3.
217. Colo. Anti-Discrimination Comm'n v. Case, 380 P.2d 34, 244–45 (Colo. 1962).
218. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).
219. COLO. CONST. Art. 2, § 29.

stereotypes based on gender, and culturally induced dissimilarities.[220] As *Bostock v. Clayton County*[221] determined, sexual orientation and gender identity are enmeshed with equality on account of sex.[222]

All three provisions clearly support a finding that, under the Colorado Constitution, there is a fundamental right to self-determination of sexual orientation and gender identity, the ability to express one's sexual orientation and gender identity in the way they see fit, to associate freely under those identities, and to receive related care in support of those identities.

CONCLUSION

We have entered a period that may one day be considered the third reconstruction. Once again, it is crucial to rely on states to interpret their constitutions as ensuring expansive individual rights and protect targeted groups against invidious discrimination. The Colorado Constitution affords protections under individual provisions, such as the Due Process Provision[223] and Equality of the Sexes Provision,[224] as well as implied fundamental rights under the penumbra principal. Under the individual provisions, Colorado would be best served by adopting a unique test based on state actors and private parties' historical and present discrimination in Colorado and nationally; the benefit of providing more stringent protections; the risk to people's safety in providing more stringent protections; and the challenges to enforcement with more stringent protections.

220. People v. Salinas, 551 P.2d 703, 706 (Colo. 1976).
221. 140 S. Ct. 1731 (2020).
222. *Id.* at 1746.
223. COLO. CONST. Art. 2, § 25.
224. COLO. CONST. Art. 2, § 29.