Strangers to the Law
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Chapter 5

The Politics of Law

As much as the scientific research and the history of discrimination seemed to dominate the trial, the politics behind the vote for Amendment 2 were at the heart of the legal questions in the case. The measure was, after all, the by-product of what religious right leaders had labeled a national “cultural war” over whose “family values” would be preeminent in society. Reflecting this “warlike” atmosphere, the literature promoting Amendment 2, distributed to voters by Colorado for Family Values, portended the “takeover” of government by “militant homosexuals” intent on foisting a “life-style” upon children. The rhetoric proclaimed that gay activists were using public funds and influence to advance a “gay agenda” on the population at large, and that gay people were diseased, dangerous child molesters undeserving of public respect.

These themes had been sounded for some time, typically by those closely affiliated with the religious right, as conservative leaders brought their scathing antigay messages out from private meetings and religious gatherings to the most public of forums. Presidential candidate Patrick Buchanan was among those leading the cry against gay men and lesbians. Speaking at the 1992 Republican National Convention to a crowd waving signs announcing “Family Rights Forever, ‘Gay’ Rights Never,” he attacked the Democratic party’s candidates as “the most prolesbian and progay ticket in history.” But it was not just Buchanan whose message had taken hold in the Republican party. Leaders of major religious right organizations with large membership and funding bases, including the Reverend Lou Sheldon of the Traditional Values Coalition in California and Dr. James Dobson of Focus on the Family in Colorado, began to make clear their ambitions to shape state and federal policy-making in a conservative, and antigay, direction. Ironically, at the same time, other religious organizations were becoming more accepting of their lesbian and gay members, even orga-
nizing special programs to address gay issues and actively supporting sexual orientation antidiscrimination laws.

Determined to show a new, serious, and influential face of the religious right after a series of embarrassing scandals, longtime religious right leaders, like Sheldon and Dobson, along with a younger generation of religious right leaders—including Ralph Reed, director of the Christian Coalition, one of the nation’s largest and most powerful conservative Christian political groups—worked closely with Republican leaders in an effort to assure that the 1992 elections would reflect their interests. In addition to working within the Republican party, their organizations produced voter guides and other materials that focused attention on, among other things, plans to limit the rights of lesbians and gay men. Declaring that “family values” had been suffering a severe decline and that increasing recognition of the rights of lesbians and gay men was in part to blame, Buchanan, Sheldon, Dobson, and their compatriots announced that a “cultural war” had erupted. For civilization to continue along a positive course, they concluded, the rights of gay people had to be restricted.

Interestingly, these organizational heads, along with Reverend Pat Robertson, who founded the Christian Coalition and numerous other religious right organizations, did not blame any of the decline in family values on the examples set by their own fallen colleagues. Rather, in their literature, radio broadcasts, and public commentary, they focused their blame on gay people, feminists (often called “feminazis”), defenders of reproductive freedom, and “liberals” generally. Campaigns targeting gay people as responsible for society’s problems, religious right organizations found, were a particularly easy and effective way to raise money, by tapping into popular dislike of or discomfort with gay people.

Amendment 2 became the subject of one of these campaigns. In addition to being an effective fund-raiser for right-wing religious groups, Amendment 2 became an outlet for those who believed lesbians and gay men had gained too much influence in the political process and for those harboring antigay antagonism. Both of these sentiments remained strong despite the lack of evidence showing that gay people had strong, much less disproportionate, influence over the Colorado legislature. For example, as of 1992, no bill had even been introduced to prohibit sexual orientation discrimination statewide. At the time of Amendment 2’s passage, ordinances prohibiting sexual orienta-
tion discrimination in employment and other areas had been passed in the Colorado cities of Denver, Boulder, and Aspen either by local city and county councils or through the initiative process. Insurance law, a governor's executive order, and several public universities also prohibited discrimination based upon sexual orientation. This configuration mirrored that in most other states in the early 1990s: No statewide law prohibited sexual orientation discrimination in employment, housing, or public accommodations in Colorado or most states, but those who lived and worked in some major cities or for state government enjoyed limited protections.

Amendment 2's Origins

By positioning Amendment 2 as an initiative requiring voter approval rather than as a bill for the legislature, supporters of the measure hoped to appeal to those who feared gay people were an overly powerful "special interest group." They calculated that, by seeking out voters directly, they had a greater likelihood of success than if they went to elected legislators who they believed were subject to the influence of gay civil rights leaders. Explaining this strategy to the court during the trial of Amendment 2, CFV cofounder Will Perkins testified that "we wanted to use the initiative process instead of trying to go through the legislature [because] we were very aware of the fact of the very strong political influence that the homosexual proponents had. And it's much easier for them to influence a small group of legislators as opposed to having everyone have an opportunity to express their opinion on the issue." As Perkins indicated, the initiative process enables the public to legislate directly and counteract political backroom dealing. However, unlike the legislative process, public ballot contests regarding proposed legislation typically do not involve structured public hearings to examine the proposal's practical consequences but instead are more frequently swayed by emotional rhetoric and sound bites. CFV could reasonably expect that voters going into the booth in Colorado in November 1992 would make their decisions based not on Amendment 2's text but rather on the questions made popular during the campaign, such as whether one is "for or against" homosexuality or whether one opposes "special rights."

The antidiscrimination laws and policies in place were, according
to Amendment 2’s proponents, the product of aggression by gay milit­
tants. CFV leader Tony Marco explained, for example, that, “as a result
of Governor Romer’s executive order [which prohibited sexual orienta-
tion discrimination in state employment], pressure [was] being exerted
by the gay militants on the student affairs departments of universities
and the University of Colorado . . . to make it mandatory [for] all clubs,
whatever their nature on campus, to either accept devout gays in mem-
bership or lose all privileges.”

It was the success of lesbian and gay advocates in achieving these
few laws and policies prohibiting discrimination that, Amendment 2’s
proponents said, triggered the campaign for Amendment 2. But why
did CFV care that Denver, Boulder, and Aspen had sexual orientation
antidiscrimination laws? CFV leader Kevin Tebedo explained at trial:

It wasn’t so much that we cared about Denver, Boulder, and
Aspen. What really concerned us was when the Colorado State
Human Relations Commission had voted four to two, I believe, to
introduce legislation. To get that kind of law at a statewide level, it
became clear to me at least that what had happened in five other
states including at that time Hawaii was a real possibility—to say
that in Colorado a small elite number of individuals in the Col-
orado state legislature would impose a homosexuality law on the
entire state. So no matter where you live in the state of Colorado,
this law was going to affect you.

Tebedo characterized members of the state legislature, and offi-
cials elected by the majority of voters, as an “elite” class intent on
imposing its will on Coloradans at large. CFV’s leaders also stressed
that, in their view, lesbians and gay men had undue influence over
these popularly elected representatives. Ignored in these allegations
was the fact that voters themselves had chosen these “elite” legislators
to represent them and had the option of voting in other candidates in
future elections. As the plaintiffs argued, all citizens, including gay cit-
izens, had a constitutional right to lobby their elected legislators as part
of the democratic process. Also disregarded by CFV was the history of
religious right organizations going directly to these same “elite” legis-
lators, some of whom they had supported, to seek limitations on abor-
tion rights and on recognition of gay couples’ relationships, and expan-
sion of the rights of religious schools and other institutions.
CFV leader Tony Marco testified at the Amendment 2 trial that the measure was “necessary because it was obvious that the aggression of gay militants through the legislature was not going to cease.” He continued:

The legislature is very vulnerable to all kinds of lobbying and other activity without citizens’ direct representation on that activity—lobbying for which I discovered gay militants were very, very well equipped and were very well experienced. And so the only way to insure that this kind of activity would stop would be through passage of [a] constitutional amendment.

With that in mind, Marco said, he called a meeting of citizens from around the state and began the move toward Amendment 2. He and colleagues from CFV contacted a variety of attorneys, including lawyers at the National Legal Foundation, a legal organization founded by Pat Robertson that described itself as “ever ready to defend religious liberty.” Those attorneys assisted with drafting the amendment according to guidelines provided by CFV. As Marco explained, “the fundamental principle behind the drafting of the initiative language was, quite simply, to take those factors which we felt that gay militants had themselves said they desired, plus all of the factors that are attendant on achievement of or awarding of protective class status, and simply say no to those.”

To reinforce this view, the state called George Mason University Law School professor Joseph Broadus as a witness. Broadus told the court that “essentially what [Amendment 2] does is to say to these local governments that have been so completely reckless in their basic concern for the constitutional items in the areas of privacy and freedom of association, . . . ‘If you don’t know how to play with your toys, we are going to take them away from you. You are simply not going to be permitted to legislate in this area.’”

This claim that lesbians and gay men had amassed such a high level of political power that a constitutional amendment was necessary to defend against their influence on elected officials persuaded many and played a critical role in Amendment 2’s ballot box success. But, ironically, at the same time as Amendment 2’s proponents were claiming that gay people had obtained this extraordinary political power, the political clout of lesbians and gay men was being put to an unprece-
dented test nationally. First, of course, Amendment 2 had passed—devastating Colorado's lesbian and gay communities and shocking the rest of the nation's gay citizenry with the message that Amendment 2-type measures might soon be sweeping the country. Second, and more surprising, the national debate about the rights and the lives of gay people that exploded shortly after the newly elected president, Bill Clinton, was inaugurated revealed that antigay hostility remained deeply entrenched.

Although some took Clinton's campaign promise to lift the ban on military service by lesbians and gay men as a sign that gay people had truly gained meaningful political power, others, including some lesbians and gay men, thought Clinton's effort to end this ban as his first gay-positive step was an extraordinary and damaging political error. If there was an elite in the United States, it was the military—given significant deference by the courts and politicians because of its role in preserving national security. Many gay leaders were concerned that the surge in visibility of gay people around this public debate and the increased access some gay leaders suddenly had to key decision makers was not translating into effective influence or action in any arena, including the military. Much of the antigay rhetoric that dominated the Republican convention and the Amendment 2 campaign was now on the national news, where night after night the public debated the merits of lesbians and gay men serving in the military.

However well-intentioned his initial announcement might have been, Clinton's promise turned into a major "compromise," with lesbians and gay men on the losing end. Clinton signed into law a bill that purported to be an improvement on the old ban but in fact retained virtually the same restrictions as its predecessor—any gay person who wanted to serve in the military would have to hide his or her sexual orientation. The "new" policy, codified by Congress, did not reflect a growing acceptance of gay people in America; instead, the law, dubbed "don't ask, don't tell," became a despised moniker among lesbians and gay men that reflected the federal government's acquiescence to the more powerful voices of those, including many in the religious right, who wanted lesbians and gay men neither to be seen nor heard.

This tremendous national debate, as well as the behind-the-scenes political maneuvering at the state and national level by religious right leaders with antigay agendas, all joined to color the environment as Amendment 2 was headed to trial. To gay people, the new military law
along with the proliferation of antigay initiatives like Amendment 2 made clear that the militant aggression was being successfully accomplished not by lesbians and gay men but rather by the religious right.

**History Repeats Itself**

It all had a familiar ring. Thirty years earlier, groups similar to CFV had organized petition drives and proposed measures to bar government from ever passing laws against race discrimination. Urging that it was time to stop government from according “special rights” to racial minorities, these citizen groups in the 1960s attempted to take power away from what they saw as “militant” civil rights activists who they believed had too much influence over elected officials. By putting the issue of civil rights laws directly to voters through the initiative process, proponents of these measures knew they could capitalize on a frightened and poorly informed public.

And, not surprisingly, the measures that made it to the ballot in the 1960s passed. The first of these to be addressed by the U.S. Supreme Court was an initiative passed by voters in California in 1964. It had amended the state’s constitution to prohibit the state from ever interfering with property owners’ rights to transfer or *not* to transfer their property as they chose. The amendment at issue in that case, *Reitman v. Mulkey*, did not explicitly single out racial minority groups and block government from prohibiting discrimination against them, as Colorado’s Amendment 2 did with respect to lesbians, gay men, and bisexuals. However, in intent and effect, the two were quite similar. Both surfaced during the very time period that laws against discrimination were being enacted, and both aimed to thwart enactment and enforcement of those and similar measures. Further, both claimed to position government in what the amendments’ supporters called a “neutral” position with respect to discrimination.

Recognizing that the California amendment in the *Reitman* case was motivated by prejudice against racial minorities, the U.S. Supreme Court declared it unconstitutional. A closely divided court ruled that

the right to discriminate, including the right to discriminate on racial grounds, was now [with the California amendment] embodied in the State’s basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those
practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.¹

Just two years later, in 1969, the Court took a look at another measure that, like Amendment 2, made it more difficult for minority groups to have laws passed in their interest. In that case, Hunter v. Erickson, voters in Akron, Ohio, had amended their city charter through the initiative process to require popular approval by referendum for any local laws prohibiting housing discrimination based on race, religion, and ancestry. Any other antidiscrimination laws could take effect following passage by city council. An African-American woman, Nellie Hunter, who was denied housing based on her race, filed a lawsuit challenging the amendment’s constitutionality. Hunter had gone to a real estate agent looking to buy a house, but the agent refused to show her a list of houses for sale because the owners refused to sell to “negroes.” When Hunter addressed a complaint to the city’s Commission on Equal Opportunity in Housing, which had been established to enforce the city’s antidiscrimination ordinances, including one prohibiting race discrimination in housing, she was told that the city’s fair housing ordinance had been undone by the charter amendment.

The Akron measure was more specific than California’s in that it singled out and blocked particular civil rights laws. Like California’s, it appeared to apply to both whites and racial minorities by barring the city council from prohibiting housing discrimination against either group absent popular approval. Again, the U.S. Supreme Court invalidated the measure. The Court considered the context of the amendment’s introduction, noting that the amendment had been proposed shortly after laws prohibiting racial discrimination in housing had been enacted at the local, state, and federal levels, and that the measure’s true impact fell on those in the minority group.²

These and other voter initiatives to block passage of laws prohibiting discrimination based on race, like the more recent spate of antigay measures, reflect the popular backlash that typically follows civil rights advances. In seeking voter support, initiative promoters often succeed

by appealing to fears and misunderstandings about civil rights laws in the general public. Unlike elected officials, who presumably have a basic understanding of the purpose and limitations of the laws they pass, the general public, faced with voting directly on an initiative, is often dependent upon hyperbolic media campaigns to understand such laws. These media campaigns often cater to prejudice and rarely provide full and accurate information about the issue up for vote.

In defending Amendment 2 in court, the state made numerous comparisons between gay people and racial minorities, too. The state’s point, however, was that lesbians and gay men were politically powerful compared to racial minorities because, in contrast to other groups such as African-Americans, gay people were never enslaved or denied the right to vote. Ironically, though, the very same initiative tactic used in an attempt to deprive African-Americans of civil rights in the 1960s was, in the 1990s, simply being retooled for use against lesbians and gay men.

**Measuring Power**

Were Amendment 2’s sponsors correct in their claim that lesbians and gay men had taken control of Colorado’s local and state governments? Was there a “gay agenda” that elected officials were putting into effect at the behest of their lesbian and gay constituents?

In presenting testimony at trial, the plaintiffs’ legal team addressed these inquiries to prove their legal claims that Amendment 2 violated a fundamental right, made a suspect classification, and lacked a rational basis for singling out lesbians, gay men, and bisexuals. The issue of how to define political power and measure how much power gay people have took on an especially significant role as the plaintiffs’ team sought to show that Amendment 2 aimed to squelch gay people’s political influence and that Amendment 2 made a suspect classification because, within the mainstream political process, gay people were relatively powerless.

Courts are not often in the business of applying broad social science concepts—such as “political power”—to legal tests and categories. Questions such as “Who comprises the group of lesbians and gay men?” and “How is that group’s political power measured?” are not typical fare for the judiciary. Nonetheless, many people, including judges, hold the view that gay people are a disproportionately power-
ful group in American society, based primarily on the increased visibility of lesbians and gay men in the media. Thus, it was critical for the plaintiffs to gauge the political clout of gay people in a factual and deliberate fashion at trial. In the public campaign for Amendment 2's passage, issues of gay political power had relatively little fact-based examination. Citing statistics purporting to show that gay people were wealthier and better educated than most other Americans, proponents of Amendment 2 sought to reinforce popular notions that gay people, as compared to other minorities, did not need protection against discrimination.

The legal team opposing Amendment 2 saw the trial in October 1993 as an opportunity to correct this provocative misinformation and to help establish sexual orientation as a suspect classification and obtain heightened judicial scrutiny for antigay discrimination by showing that gay people are relatively politically powerless. The team chose as its expert witness in this area someone viewed by his colleagues to be among the leading political scientists to apply political power theory to lesbians and gay men. Kenneth Sherrill, a political science professor at New York's Hunter College who was openly gay, had studied the relationship between political participation and democracy, focusing particularly on questions of "tolerance and intolerance, and [on] questions of how individual citizens and groups of citizens can be effective." His testimony was not specifically law-related but was much more familiar to many in the room than the discussions of chromosome markers and complex genetic studies that had occupied the previous days and that morning of trial.

Guided by the plaintiffs' trial attorney Jeanne Winer, Sherrill defined political science as "the study of power," or, "who gets what, when, and how it's decided." He provided the court with a brief political science primer, explaining that the United States is a pluralist democracy—which means "that the American system not only is representative but [also] protects the rights of a wide range of citizens—most notably the right to compete on an even playing field." Such a system avoids tyranny of the majority, which Sherrill defined as "anything the majority might do which would deprive the minority of its natural rights." Sherrill explained that this pluralist theory was set forth in the Federalist Papers, the set of published arguments advocating adoption of the proposed American Constitution. The genius of the American democratic system, said Sherrill, is its checks and balances on power—
a separation of powers in different government branches, an independent judiciary, and multiple points of access to the political process. These safeguards ensure that all groups have a "fair chance not only to have [their] opinions heard but also to prevent action which would deprive them of their rights."

Sherrill suggested that one way of measuring any given group's political power is to "look at the net balance of victories and defeats" the group has experienced. But, he said,

You . . . couldn't merely count the victories and defeats, because your group might achieve a substantial number of victories on matters of relatively low priority or importance and fail massively on an issue of great importance. So . . . you have to get a balanced picture.

Winer: What about if some individuals who are members of a particular group are powerful, does that mean that the group itself is necessarily powerful?

Sherrill: No. No.

Winer: For instance, some of the state's witnesses mentioned the fact, in their affidavits, that there are openly gay people in elected office. Does that mean that gays are powerful?

Sherrill: No, it doesn't. And if one looked at the number of openly gay people in elected office in the United States, one would find that it is, I believe, in the range of one-tenth of one percent of all people in all elected offices in this country.

Power Resources

Sherrill testified that "the best way for a pluralist system to function would be for all groups to have fair and equitable access to power resources," which are the resources "a group might use to advance a political goal to try to achieve a political end." Some of these, he said, are "scarce resources" that are, by definition, not available to everyone, such as wealth and fame. Other resources are in boundless supply, such as trust, respect, and affection. Safety, too, is an important power resource, as Sherrill testified: "Obviously, being able to go about your life without fear of violence is a major component of being an effective person in the political world."

Less tangible "resources," like having allies and access to people in
power, are also “absolutely critical” because pluralist democracy requires coalition building to achieve success. That, Sherrill continued, “mean[s] that people must be willing to enter into coalition with you.” Also, shared identity is a power resource, Sherrill explained, because it is a prerequisite to group formation—“people must think of themselves as members of the group.” Continuing, Sherrill explained:

Not only must people think of themselves as members of the group, but often [that membership] must be [their] prime identity because we are, in fact, members of many groups which will overlap. This again is critical to pluralist democracy. We say, “Not only am I a union member, I am also a,” fill in the blank with any other group—“I am a man,” “I am a woman,” or whatever. . . . People have overlapping memberships, and you have to say which membership matters to you the most. So it’s not only identity, but it’s also a question of prime identity.

In reviewing all of the various power resources, from group size, to access, to money, Sherrill explained that “you have to look at them on balance” to assess a group’s power. “In many ways,” he testified, “you have to ask the question, ‘Does a group have access to a sufficient number of them and know how to use them sufficiently . . . ?’” Further, certain resources, such as shared identity, are “absolutely fundamental prerequisites. It would be very hard to conceive of any group being able to take effective political action,” he said, “if it did not have a substantial amount of shared identity. On the other hand, you don’t have to have a lot of money.”

Before examining these specific power resources in the lives of lesbians and gay men, Sherrill offered illustrations of how gay people lacked political power. He first pointed to a legislative amendment proposed by the North Carolina Republican senator, Jesse Helms, that sought to block federal funds for organizations that addressed homosexuality in a positive light, including funding for the production and distribution of AIDS-related materials aimed to educate gay men about how to avoid contracting HIV. Congress passed the Helms amendment in 1987 even though its potential consequence was the further spread of HIV among gay men. And Congress did so despite the fact that gay men and lesbians used all of their political resources to oppose the
amendment. It was, said Sherrill, a stark example of how little political power gay people had.

The failure on . . . what was basically a life and death issue, and which . . . the Congress of the United States was deciding to withhold life-saving information from people, is the most devastating loss that a group of citizens has had in the Congress of the United States in modern times.

Another measure of the political power of lesbians and gay men, said Sherrill, was the congressional debate in 1993 about "gays in the military." Even with the early support of the president of the United States, gay people could not overcome the powerful opposition in Congress to permitting openly gay and lesbian Americans to serve in the military. Winer asked Sherrill about the state's assertion that the national debate showed that gay people had considerable political power.

Winer: . . . Sir, some of the state's witnesses are also claiming that the recent struggle for equality in the military, even though gays lost, . . . actually proves that they are powerful. Could you discuss how that could be?

Sherrill: I think that [claim is] mind-boggling.

Sherrill did not examine whether the fact that the president made a campaign promise to support equal treatment of gay people reflected gay political power. Instead, he pointed out that the president originally supported rescission of the ban and that independent respected research studies had shown that being gay was not incompatible with military service. Nonetheless, the ban was codified into law based, in large part, on arguments that unit cohesion would suffer because non-gay soldiers would be uncomfortable living and working with gay soldiers. This, according to Sherrill, amounted to elected officials giving in to bigotry.

The next phase of Sherrill's testimony focused on assessing the quantity and quality of power resources available to lesbians and gay men and how these resources shaped the battle against Amendment 2. Winer posed an important question about the link between political
power and the substantial financial resources Colorado’s gay commu-
nity marshaled to fight the amendment, touching for the first of several

times on the issue of wealth among gay men and lesbians.

*Winer:* There was a very recent struggle which occurred here in
Colorado, and, according to the state’s witnesses, various coali-
tions to oppose Amendment 2 supposedly outspent Colorado
for Family Values and persuaded 46 percent of Coloradans who
voted to vote against Amendment 2. Doesn’t that prove that
gays and lesbians are quite powerful?

*Sherrill:* No. . . . The first point is that, when what is on the ballot is
the power of the government to protect a group of people
against discrimination and that group loses, that group is pow­

erless, period.

Secondly, the fact that you can raise a good deal of money
does not mean that you know how to spend it. . . . If you expect
to win, you don’t have to raise that much money. If you expect
that you are going to have a hard time, you are going to raise a
lot more. . . . The intensity of the opposition, the numbers of the
opposition, the intensity of feeling on the part of the other side
and the possibility that . . . people relatively new to the political
process are not that experienced and consequently not that skill­
ful in the use of political money also comes into play.

Stepping back to an even more fundamental question, Sherrill dis­
cussed how the size of the gay population affects the group’s political
power. The state was arguing that, with only about 10 percent of the
population identifying as lesbian or gay, the campaign against Amend­
ment 2 convinced 46 percent of voters to reject the initiative, suggesting
that gay people in Colorado had clout beyond their numbers. Sherrill,
however, said that being 10 percent or less of the population means that
“you are going to have a very hard time entering into any coalitions.
And you have to attract a large number of allies. And it’s not going to
be easy to build up credits because what you can add to a coalition for
somebody else isn’t going to be that much.” Citing Congress’s negative
treatment of gay people in the military and its refusal to pass a federal
law banning sexual orientation discrimination, he noted that lesbians
and gay men do not have many allies at the federal level. Even in Col­
orado, he noted, antigay hostility had escalated to such a high level that
the president of the University of Colorado was forced to wear a bulletproof vest while addressing a gathering of lesbians and gay men because of threats on his life for addressing what had been termed a "fag rally" by one opponent.

"It seems to me," Sherrill testified, "if the president of a university has to wear a bulletproof vest to speak, that the risks of becoming an ally are rather vast."

Fears of being associated with an unpopular cause exacerbate the difficulties of gaining allies and of even mustering support of the group itself. Sherrill testified about the "spiral of silence," a political theory that holds that people generally know when their views are unpopular and that they often fear retaliation or social isolation for expression of those views. The author of this "spiral of silence" theory, Elisabeth Noelle-Neumann, conducted studies in which she asked people whether they would fear having their tires slashed if their car sported a bumper sticker supporting an unpopular cause. Many respondents said that not only would they be afraid, but also they would be unlikely to put the sticker on their cars. Consequently, support for unpopular views is often much more than what appears on the streets or is heard in public discussion, Sherrill said.3

This spiral of silence has two important effects, Sherrill testified: "It discourages people from articulating unpopular viewpoints," and "it multiplies the apparent power of dominant groups in society." Regarding the political power of lesbians and gay men, he said, the spiral of silence diminishes two resources—group numbers and allies. It "discourage[s] people from indicating to others that they are gay or lesbian," and "discourage[s] people whether or not they are gay or lesbian from articulating views in support of gay rights," he explained.

Because popular culture images and public discourse about gay people reflect this silencing effect, they are a valuable indicator of a group's social status and, therefore, its political power. Sherrill noted that, in the media, "gay people do tend to be totally invisible." This is significant, he explained, because gay people "do not grow up in gay homes. So that much of what they learn about their identity must come from media representations of gay people."

Where gay issues are addressed publicly, expressions of hostility

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tend to dominate the popular discourse, Sherrill testified. Vulgar epithets are common. Even allies often feel that they must avoid appearances of affection toward gay people. As an example, Sherrill pointed to the remarks of “presumably well-enlightened” U.S. senator Bill Bradley, a Democrat from New Jersey, during debate over inclusion of sexual orientation as a category for collection of statistics in the Federal Hate Crimes Statistics Act.\(^4\) Sherrill noted that Bradley said, “I don’t want anybody to think I’m voting for this because I approve of this.” Sherrill noted, “One couldn’t imagine . . . saying ‘I don’t want anybody to think that I approve of different religions or different races or anything else of that sort.’” The bill under consideration called only for counting hate crimes against gay people, and yet, said Sherrill, “people like Bill Bradley had to get up and apologize for voting to collect this information. This sends a strong message as to what’s acceptable and what’s not acceptable.” In sum, Sherrill opined, the spiral of silence “has a chilling effect of unbelievable dimension” on the political power of gays and lesbians.

Underlying this spiral of silence is a related power resource—popular affection toward a group—which Sherrill explained is measured best by the warmth of feelings a person has to other groups. Since 1964, the National Election Studies conducted by the Center for Political Studies at the University of Michigan used a technique known as the “feeling thermometer.” Respondents are told to imagine a thermometer which records the warmth or coldness they feel toward various groups of people. Respondents are told that the thermometer records the nicest, warmest possible feelings toward a group at 100 degrees and the most hostile, or coldest, at zero. Feelings that are neither warm nor cold register at 50 degrees. Since 1984, the feeling thermometer has gauged respondents’ feelings about “homosexuals.” And since that year, Sherrill testified, gay people have been consistently identified as the object of the coldest feelings of any group in the American population. The only group ever posting a lower average feeling was “illegal aliens” in 1992, but even then, 24 percent of those surveyed placed their feelings toward gay people at zero degrees—the coldest possible extreme, outnumbering those holding “illegal aliens” in such very low esteem.

Sherrill explained that the power resource of safety, which is related to the popularity of a given group, also substantially affects the ability of lesbians and gay men to organize.

If you know that you are risking your well-being, your life, [and] limb, or if you have good reason to fear it, you are not likely to do something which puts you in a position to have that occur. That is, if you have good reason to believe that you are going to be the object of violence because you state something about yourself as a person or because you advance a political claim, many people will find it prudent not to say those things.

Sherrill then reviewed statistics showing the high levels of violent crime against gay people. Relying on a Denver Police Department study, Sherrill told the court that half of all hate crimes recorded in Denver were committed against gay people, up from 30 percent the year before. “For a small group in the population to be targeted [with] a third or half of the hate crimes in the town of Denver is extraordinary,” he stated.

Winer next asked whether the lack of safety of lesbians and gay men is a source or consequence of powerlessness. “Both,” Sherrill replied. “It’s reinforcing—it is a source of powerlessness, but the more it happens, the more powerless [a group] becomes.”

Another integral part of pro-Amendment 2 argument made during the campaign and at trial rested on suggestions that gay people are wealthier than the average American. CFV literature was riddled with statistics selectively chosen to show that gay men had more money, more “frequent flier” miles accumulated through air travel, and better education than most others in the population. This “information” was used to buttress the arguments of Amendment 2’s defenders that laws prohibiting discrimination against gay people were unnecessary. But, in reality, the statistics were mixed, and at trial, both sides debated this hotly contested point.

Sherrill was the first expert at trial to address the issue. He testified about a range of studies. One, based on data accumulated in the General Social Survey by the National Opinion Resource Center at the University of Chicago and analyzed by University of Maryland associate professor of economics M. V. Lee Badgett, showed that gay men earn approximately 20 percent less on average than heterosexual men and
that lesbians earn about the same as or less than heterosexual women. Sherrill asserted, "indicate that, as a group in society, gay people are economically disadvantaged."

Winer next asked Sherrill about campaign contributions to gay political action committees (PACs). The state was expected to use the success of one gay PAC to suggest that gay people are disproportionately wealthy. Sherrill noted several flaws with the argument.

The first is purely as a logical matter, that you generally do not know the sexual orientation of a person who makes a campaign contribution [to any PAC]... The second is that the dominant view in political science is that wealth is probably overestimated in the lay public as a political resource. It's one of those things that you use when you don't have anything else and has relatively brief effects... The third problem is that in order to demonstrate that there is a connection between campaign contributions..., wealth, and political outcome, you have to look at whether or not public policies are in some meaningful fashion affected by the contributions and whether or not one can establish empirically a link between receiving a contribution and behavior in office.

Sherrill testified that overwhelming evidence indicates that campaign contributions have no effect on the political process. He offered two explanations: First, elected officials receive campaign contributions from all kinds of PACs so that, often, groups on different sides of an issue will contribute to the same candidate. Second, by law, the size of PAC contributions are limited and each PAC's contribution to any candidate constitutes only a tiny percentage of the cost of any campaign.

Winer asked specifically about the Human Rights Campaign Fund (HRCF), a PAC dedicated to supporting federal candidates who support equal rights for gay people. In the 1989/90 election cycle, Sherrill reported, HRCF was listed among the top 50 PACs by the Federal Election Commission, which monitors such groups. But Sherrill told the

6. In 1995, the Human Rights Campaign Fund changed its name to the Human Rights Campaign and remained high on the list of the top 50 political action committees, according to the FEC.
court that there is no way to know the sexual orientation of the PAC's contributors and, therefore, the HRCF data provided no basis for reaching conclusions about the wealth of gay people.

Sherrill next addressed the state's claim that lesbians and gay men average around $55,000 in annual income, that they are more likely to be college-educated than other Americans, that they travel overseas more, and that they are more likely to be in managerial positions. Sherrill said that the studies relied on by the state as support for these contentions were market research surveys done by the research firms of Simmons Market Research Bureau and Overlooked Opinions. The surveys, he noted, are designed to appeal to and convince potential advertisers that they can reach an affluent market by buying space in gay and lesbian publications. Respondents to such surveys, Sherrill stated, tend to be people wealthy enough to subscribe to the publications surveyed, rather than gay people in general. Sherrill made clear that such market survey samples do not represent the entire gay and lesbian population.

Sherrill: . . . I don't believe that anyone would—and certainly not anyone who had any competence or expertise in the area of survey research would—suggest that this was a sample of a gay or lesbian population.

Winer: Would a reputable social scientist rely on this type of data at all?

Sherrill: Certainly not as evidence of the characteristics of lesbians and gay men in the United States. They may be representative of those people who read those magazines and newspapers and, even there, it's questionable because it was a mail-back questionnaire, and that builds in bias in the direction of upper status and upper income and higher levels of motivation.

If one were to think for a moment about the difference between people who see a questionnaire in a magazine and throw it out and people who see a questionnaire in a magazine and fill it out and mail it back, there are large . . . motivational factors [that] are highly associated with income and education.

Sherrill said it is very difficult to find a representative sample of lesbians and gay men through such surveys, "given everything we've said thus far about the reasons why lesbians and gay men feel the need to conceal their identity."
On cross-examination, state’s attorney Gregg Kay grilled Sherrill about a USA Today article analyzing United States Census data that seemed to parallel that in the Simmons and Overlooked Opinions market research studies. The data showed relatively high incomes in same-sex households. Sherrill offered similar caveats and, in a short redirect examination, Winer asked Sherrill what specific flaws he found with the USA Today article’s analysis of data on households where same-sex “partners” identified themselves as such. Sherrill noted that at least three-fourths of people in the United States live in parts of the country where there is no protection against sexual orientation discrimination in housing or credit. Consequently, he said, it is typically only people with “substantial wealth” who feel they can afford to identify themselves as gay and as living with a partner in a census survey.

On a later trial day, another of the plaintiffs’ witnesses, civil rights expert Burke Marshall, also addressed the contention that gay people are, on average, not an impoverished group and consequently undeserving of antidiscrimination protections. He responded to questions from his attorney, Kathryn Emmett.

Emmett: Let me ask you this: Is it somehow thought in the community of those involved with antidiscrimination legislation that because a group may be perceived to be or may in fact, arguendo, be more affluent, relatively more affluent, or well-educated, that for some reason protection should not be adopted for such a group?

Marshall: No. That’s not the history of this [practice of enacting antidiscrimination legislation], and that’s not the purpose of it. As I say, it doesn’t have to do with wealth or affluence. The discrimination can go against the wealthy as well as against the poor. If you’re not accepted because you’re a Jew, or if you’re not accepted because of your perceived sexual orientation, that lack of acceptance, the discrimination involved in it, in private life, in public life, and in economic life, has nothing to do with whether or not you’re wealthy, and I don’t think that you could possibly, taking a survey on the kinds of groups that are protected by this kind of legislation, say it has to do with their wealth or lack of wealth.

In addition to wealth, group cohesion is another important power resource, the last addressed by Sherrill. Consistent with the definition
of power that asks whether one group can get others to do what it wants them to do, it is imperative, said Sherrill, that the group decide what it wants others to do. “And that means having discussions, forming community, . . . getting people to self-identify and to identify with the group,” he stated. Self-identification is particularly difficult for lesbians and gay men, he explained:

Gay people are uniquely disadvantaged in American politics and, I would argue, virtually in world politics, in that gay people are randomly distributed at birth. Gay people are born into a diaspora. Gay people are not raised, for the most part, by gay parents. They don’t have role models. The entire childhood socialization process does not bring them into a gay culture or a gay community from which they can form the ability to take collective political action or even to engage in the kind of discussion that would enable the average gay or lesbian in the street to participate in the formation of a list of problems the government would need to deal with them.

Even where gay people do agree on a goal, however, such as the defeat of Amendment 2, Sherrill said that the other factors he had identified interfere with their ability to achieve those aims. He noted that, for example, even though equal rights for gay people is a goal of many gay activists, relatively few jurisdictions in the United States have enacted laws prohibiting sexual orientation discrimination. At the time of the trial, only eight states7 and approximately 125 municipalities had such laws.

Ultimately, Sherrill concluded, in light of the limited power resources available to lesbians and gay men as well as the extreme hostility with which gay people are commonly viewed, gay people do not possess much political power at all within American society.

Enter the Defense

Four days later, on Monday, October 18, Clemson University political science professor James David Woodard took the witness stand to serve as the state’s chief rebuttal to Sherrill. Although the court agreed

7. The eight states that had laws prohibiting sexual orientation discrimination on a statewide basis at the time of the Amendment 2 trial included California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Vermont, and Wisconsin.
to designate Woodard as an expert in the area of political science in general, and in the area of the political power of gays, lesbians, and bisexuals in particular, Woodard conceded on cross-examination that he had never published any articles or books addressing lesbians and gay men in the political process (his two books were *The Burden of Busing* [1985] and *American Conservatism from Burke to Bush* [1991]), and that he had never, until that day, given any presentations about gay and lesbian people in the political arena.

Woodard began his testimony on direct examination by agreeing with Sherrill's basic theory of political power. However, he identified two additional sources of power that he maintained should be added to the calculus: "intensity preference," which, he said, reflects how strongly people feel about an issue; and protests, which he said can "win a lot of awards from decision makers." He also testified that lesbians and gay men comprise closer to 1 percent than 10 percent of the population.

Woodard said he believed the "spiral of silence" theory had been largely discounted by two political scientists in a recent journal, who showed that liberals in a politically conservative county felt comfortable discussing their views among their peers. He agreed with Sherrill that the "feeling thermometer" is a popular tool among social scientists and that lesbians and gay men were among the least "warm" on the thermometer. Although he recognized that only one-third of Americans believe that gay people should be school teachers for young children, he went on to testify that the Gallup Poll since the 1970s has shown that the majority of Americans believe that gay men and lesbians can serve well as salespeople and physicians. He noted, too, that over a third of Americans said they were willing to vote for a man or woman they believed to be gay. "My point," he summarized, "is that [the data] do show gays and lesbians may be held in lower esteem by some questions; when asked other questions, for instance, occupational questions, they are not held nearly as low in esteem. There's a wide variety of feelings about them."

In response to a question from Kay about antigay violence, Woodard responded that he did not "have real strong feelings about the safety issue. It's really not my field. . . ."

Turning to media coverage of gay people, Woodard appeared to be much more comfortable with the theories and research in the field,
making evident this was an area closer to his expertise and interest. Explaining the power of television, he testified:

We get most of our information about politics from television, so visual images are very important as to how we perceive various groups. And getting on television is one way of saying and showing that you have political power. It's one way of raising your agenda. It's one way of raising your visibility in society. So television appearances do count. People tend to remember visual images quite a while even though they can't fill in maybe the content of what was said. . . .

Woodard then discussed his study of print media coverage of lesbians and gay men—a study that he had done by comparing the number of articles available in the Readers Guide to Periodical Literature database related to gay people, women, and racial minorities. He said he found that gay people receive a large amount of print media attention, in news and feature stories combined—less than women but more than “minorities.” Woodard acknowledged, however, that he had not performed a content analysis of the coverage and thus did not know whether the coverage he counted had been favorable or hostile. Nonetheless, the sheer number of articles, he contended, meant that “the gay lifestyle [had become] an accepted part of the mass media culture.”

Shifting his attention to sexual orientation antidiscrimination laws, Kay asked how laws and policies could have been passed in more than 100 jurisdictions if gay people numbered only 1 to 10 percent of the population. Here, Woodard stated that gay people have the power of “intensity”:

They are very intense about their goals. . . . As I understand, gay, lesbian, and bisexual people . . . feel very strongly about their sexuality, given the AIDS crisis and other things [that] force them to a very high visible political profile, so they are quite active. I wouldn’t use the word “militant” but I would use the word “intense” [to describe] how they feel, and to draw on [one scholar’s study of] intensity preference, the extreme positions like boycotts and public demonstrations and other things forced decision
makers to try to give them rewards rather than put up with sort of intense, highly visible protests that will come if they do not. So, for that reason, many times they are very successful disproportionate to the size they are because of the intensity and how really [hard] they work at their issue.

Woodard cited the Americans with Disabilities Act to exemplify gay political power because the act “had something in it about discrimination against those who were HIV positive.” While admitting he had not studied the ADA’s passage, he testified nonetheless that the act “is evidence [of] a reward won before Congress because of the lobbying efforts of gays and lesbians.” Gay and disability rights activists, on the other hand, believe that a confluence of factors, including lobbying efforts spearheaded by many nongay groups, secured the passage of the ADA and coverage of HIV within it.

Turning to examine the wealth of lesbians and gay men, Woodard told the court that, from “most reliable resources,” he had found that gay people have incomes “on average or median of over $50,000 a year and, as a result, compared to the normal or the average income, their income is quite high.” They have larger amounts of discretionary income than most Americans, he added. Woodard said that the Simmons market research study of readers of the Advocate, a glossy national magazine read primarily by gay men, formed the basis of his opinions. He acknowledged that the survey “may not be a good indication of homosexuals everywhere, but it’s an indication of Advocate readers, and we [political scientists] do these kinds of surveys all the time.” He asserted that the information could be used as an indirect indicator of gay people’s income generally.

Woodard said that market research statistics from Overlooked Opinions and the report by USA Today analyzing U.S. Census households with same-sex partners data confirmed for him that average income in gay male households was well above $50,000 annually. He criticized the Badgett study, on which Sherrill had relied to show household income of gay and lesbian couples to be equal to or less than that of heterosexual couples. According to Woodard, the Badgett study was not reliable because it reported findings that were not statistically significant and had not yet been published in a professional peer-reviewed journal. The findings were not statistically significant,
Woodard said, because the sample size was too small—30 lesbian and bisexual women and 47 gay and bisexual men—to generalize meaningfully to the population at large. The Simmons, Overlooked Opinions, and USA Today studies were not perfect, Woodard concluded, but they were “much more accurate [than the Badgett study] because all three of them seem to overlap in giving a view of income.”

Woodard testified that the budgets of the six largest national gay and lesbian organizations also provided evidence of gay wealth and political influence. A chart published in the Washington Blade, a D.C.-based newspaper, illustrated that the cumulative budgets of the six wealthiest national gay organizations in 1993 totaled $12 million. The state had submitted this chart as part of its evidence, and Woodard said it demonstrated that gay men and lesbians had “growing” power. But, on cross-examination, plaintiffs’ attorney Winer startled Woodard and the state’s attorneys by pulling out a second chart from the same Washington Blade article. The second chart showed that the budgets of the top six religious right organizations amounted to nearly twenty times that of the six gay groups.

While still responding to Kay’s direct examination, Woodard focused on the Human Rights Campaign Fund, the gay and lesbian issues PAC discussed earlier by Sherrill, which he noted was in the top 50 of approximately 4,700 political action committees and was one of the fastest growing among the group. Woodard indicated that contributions to HRCF were relatively high, which he testified was a “rough indicator of power” because “one group working in alliance with other groups can have a lot of political power and input.” Woodard said that HRCF had backed a relatively large number of winning candidates—21 of 28 in close elections.

He then compared HRCF’s success rate to the Conservative Victory Committee’s less successful ranking—noting, however, that “I’m not trying to say the two are comparable.” On cross-examination, Woodard admitted that his comparison of HRCF to the conservative political group was based on “a shot in the dark” to make a comparison. But he stuck by his view that both gay people and African-Americans are “politically powerful” groups in the United States today and confirmed his view, stated at a deposition several weeks earlier, that “Blacks would have been better off if they would pursue economic resources rather than civil rights protections.”
After explaining the operation of coalition-building and informal alliances which are critical to exercising political power, Woodard summed up, offering his opinion of lesbians and gay men in this arena.

Given the economic and the organization intensity of the homosexual community, I think we can say it's a powerful interest group that forms some alliances. Now, I don't know exactly which ones they are working on right now, but I would say that we can see evidence of this in . . . for instance, gays in the military or lots of groups that supported the particular need of gay, bisexual people wanting to get in the military who maybe weren't themselves gay but maybe sympathetic to that agenda or idea—certainly labor groups or something like that.

On cross-examination, Winer focused on unsettling the various assumptions on which Woodard based his conclusions. Regarding Woodard's small estimate of the size of the gay population, Winer forced Woodard to acknowledge that the studies he relied upon were conducted with door-to-door inquiries—a technique Woodard had criticized as a "weak" methodology during his deposition taken shortly before trial. Rather than offer a defense of his estimate, Woodard responded simply, "I think it would be difficult to get people's sexuality in a social science research experiment using any methodology."

On the issue of antigay violence, Woodard admitted he had not heard of studies at several different universities around the country showing high percentages of lesbian and gay students who had been physically assaulted or verbally harassed. And in response to Winer's queries regarding the Simmons and Overlooked Opinions studies, Woodard conceded that "it would be improper to survey from a magazine and say this is the way all homosexuals are."

The next day, the state continued its effort to prove that lesbians and gay men were politically powerful by calling to the witness stand Robert Knight, director of cultural studies for the Family Research Council in Washington, D.C. Describing himself as an "opponent of the gay rights movement," Knight testified that he believed the gay community in the United States "has an inordinate influence on the media." Resting his views on his experience working as a journalist and "as a reader of articles and a viewer of network broadcasts," Knight told the court he believed that journalists "sincerely believe the gay rights issue
is a civil rights issue and, since journalists by and large believe in civil rights protections, they don’t accord objections to . . . the gay rights agenda as having any legitimacy at all, hence you don’t see opposing points of view very often in the major press.” Knight testified that daytime television talk shows and other news media programming “all reflect a pro gay bias.” In sum, Knight testified, “I feel . . . that there is much more sympathy in the nation’s newsrooms for the objectives of the gay rights movement than there is in the general population.”

Knight also testified that lesbians and gay men comprised a powerful group. Referring to the platform for the 1993 March on Washington for Lesbian, Gay and Bi Equal Rights and Liberation, he said the gay movement had achieved many of its political aims—including increased AIDS funding, an end to mandatory HIV testing, access to a safe and affordable abortion, recognition of domestic partnerships, and other goals. However, on cross-examination, Knight admitted that many of the goals of the platform either were not achieved or were realized years before the march even took place.

**Remaining Questions**

Did gay people have access to political power? Were the state’s contentions regarding the wealth and influence of lesbians and gay men legitimate? How much should that matter to the court in evaluating government actions that discriminate against gay people?

To measure any group’s political power, one has to have a sense of who comprises that group. Yet, as the expert testimony illustrated, defining a group can depend on a whole host of variables. While, from a psychological or scientific vantage point, being gay may relate to a person’s inner sense of attraction to others, from a political power perspective, public self-identification is critical. Unless a person participates as openly gay or lesbian in some realm of the political process, the fact that he or she may be gay will have little bearing on the power of gay people as a group. Indeed, access to power resources of all sorts, including safety, wealth, allies, and popular affection, depends on lesbians and gay men finding ways to know each other and to develop a shared identity for political purposes. But, as the trial moved forward, the multifaceted dimensions of gay identity continued to reveal themselves. There was no simple answer to the question of what it means to be lesbian or gay.