6. Civil Rights and "Special Rights"

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“Stop special class status for homosexuality” proclaimed the banner headline on pro-Amendment 2 literature dropped at front doors of voters around the state by Colorado for Family Values (CFV), just prior to the November 3, 1992, election. “Special rights for homosexuals just isn’t fair—especially to disadvantaged minorities in Colorado.” Countering that message both before and after Amendment 2’s passage, opponents of the initiative sported their own buttons and bumper stickers declaring “equal rights for all” and “civil rights are equal rights.”

Raging debates about civil rights—what they are and whether gay people “deserved” them—filled both public and courtroom discussions about Amendment 2. In the undercurrents was the equally important question of whether Amendment 2’s attack on the rights of gay people represented a first step in a strategy that would ultimately brand all civil rights laws as “special rights” to be foreclosed by majority vote.

**Historical Reflection**

Logically, everyone in society should have a vested interest in equal treatment: Every person is, or has the potential to be, part of a minority—by growing older, suffering an injury, getting divorced, or becoming ill. But discrimination against members of various minority groups has been part of U.S. history since the country’s earliest days. And, likewise, the debate about the meaning of equality and the rhetorical equation of civil rights with “special rights” has riveted Americans since well before the age of the media sound-bite. From the time of the Dec-
laration of Independence through modern times, the tension between equality and individual "freedom to discriminate" has propelled citizens into face-offs with each other and has escalated the competition among various political factions seeking control of government.

The inherent danger of a nation in which the majority's will is capable of overwhelming all others greatly concerned the framers of the U.S. Constitution. James Madison, an author and defender of the proposed governing charter, stressed, in *The Federalist Papers*, the great risk for abuse of majority dominance. Without some restraint of the majority's will, he wrote, the compact among citizens to relinquish individual power to government in exchange for life in a civil society would mean little for those in the minority. Where a common passion is felt by the majority in a democracy without constitutional limitations, Madison argued, "there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual."¹

Slowly, the U.S. government began to respond as an institution to this tension between the will of the majority and the rights of a minority. Nearly a century after the Constitution was adopted, amendments to the Constitution to secure basic guarantees of equality laid the groundwork for future civil rights legislation. In 1865, after the Civil War, the Thirteenth Amendment abolished slavery. The Fourteenth Amendment, which guarantees "equal protection of the laws" to all persons, was enacted three years later, in 1868. Even this simple guarantee, however, was approved only after a debate about whether this equal protection guarantee conveyed "special rights." In 1875, to supplement the Fourteenth Amendment's equal protection mandate, Congress enacted legislation to prohibit discrimination in public accommodations, including inns, public conveyances, theaters, and places of public amusement, based on race, color, and previous condition of servitude. But the U.S. Supreme Court, in *The Civil Rights Cases*, invalidated that new protection as an improper exercise of the federal government's power. Justice Joseph P. Bradley wrote that "when a man has emerged from slavery, . . . there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws."²

A Civil Rights Protocol

The historical debates foreshadowed one of the burning questions both in the Amendment 2 trial and before the public generally: When, if ever, should the state be involved in prohibiting discrimination?

Antidiscrimination laws across the country prohibit discrimination based on a wide range of categories. These “protected classifications” frequently include race, gender, religion, national origin, and disability, and often include age, marital status, and status as a war veteran. Beyond those classic groupings, however, great variety exists. The antidiscrimination ordinance of Aspen, Colorado, for example, prohibits discrimination based on more than a dozen classifications, including political affiliation and family responsibility, as well as sexual orientation. In Cincinnati, Ohio, people of Appalachian regional ancestry are explicitly covered under the city’s human rights ordinance. And in Washington, D.C., residents are protected from discrimination based on appearance.

What accounts for these variations? Many local and state governments enacted antidiscrimination laws in the 1960s and 1970s when support for the equal rights of gay people was largely underground. The eight states that had enacted laws prohibiting sexual orientation discrimination by the early 1990s—California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Vermont, and Wisconsin—had done so through amendments to existing civil rights laws.

The success of recent efforts to amend general civil rights laws to cover other characteristics, including sexual orientation, has depended largely on whether the small group of advocates for the amendments can garner sufficient support from a broad-based group of individuals in the community, including from influential community leaders who can mobilize their constituents to lobby for the bill’s passage. This, in turn, required the larger group to be convinced that antigay or other forms of discrimination should be condemned by law.

Why was sexual orientation not included—or even considered—as a protected classification in most antidiscrimination laws at the outset? Yale law professor Burke Marshall, an expert witness for the plaintiffs, addressed this question during his deposition for the Amendment 2 trial. (Because Marshall was physically unable to travel to Denver for the trial, his testimony was videotaped in the form of a deposition and
was shown during the fourth day of trial.) Certainly, Marshall said, there was little question that lesbians and gay men suffered severe social stigma and discrimination in the 1960s and 1970s at the time many of these general antidiscrimination laws were being passed. Marshall himself had helped draft, lobby for, and then enforce the passage of the Civil Rights Act of 1964 while serving as assistant attorney general in charge of the Civil Rights Division in the U.S. Department of Justice, and he was selected by the plaintiffs as an expert witness to distill lessons from this experience for the court.

Gregg Kay: [In] 1964, when the Civil Rights Act was passed [to prohibit discrimination in employment, public accommodations, and other contexts], the only groups that you protected with that legislation that you helped draft were race, national origin, gender, and in some cases religion?

Marshall: That’s correct.

Kay: In 1964, gays and lesbians were being discriminated against, weren’t they?

Marshall: That’s correct.

Kay: But you didn’t add them to that list in 1964, did you?

Marshall: No. We were not all wise. We’re not all-foreseeing.

Kay: But everyone knew that gays and lesbians were being discriminated against in 1964. This is not something new that’s popped up in our society.

Marshall: I would agree that it was not something new that’s popped up in society. I would agree that it existed in 1964. The perception of that discrimination did not exist in 1964 in my knowledge.

[...]

Kay: And everyone knew that the discrimination existed?

Marshall: I question whether it was apparent at the time.

Kay: Well, the hostility, the social hostility against gays and lesbians in our society has gotten better in the last 30 years, hasn’t it?

Marshall: The whole problem has become open. In 1964 it was not open. People disguised their sexuality with respect to this in 1964. . . . Therefore, the problem was not as apparent to Con-
Civil Rights and "Special Rights"

In short, no rigid rules dictate which characteristics are protected against discrimination and which are not. The composition of legislatures, the general public's awareness and sentiments, coalition politics, and the publicity given to certain types of discrimination all go into the mix of factors that result in passage of a particular antidiscrimination law.

Still, questions at the Amendment 2 trial, and in society generally, focused on the scope and consequences of civil rights protections, whether laws prohibiting sexual orientation discrimination were necessary, and whether a social consensus existed to support their enactment and enforcement. During the trial, the state offered every possible objection to civil rights laws in general and to those specifically prohibiting sexual orientation discrimination, basing its arguments on economics, politics, and morality, as well as on plain dislike of lesbians and gay men.

Civil Rights or Special Rights

As a general matter, witnesses for both sides at the Amendment 2 trial shared the same basic view that the goal of civil rights laws is to enforce equal treatment. For example, the plaintiffs' expert witness Marshall used the Civil Rights Act of 1964 to illustrate the purpose of civil rights laws.

Marshall testified that the Civil Rights Act of 1964 "was occasioned by the perception of the Congress, by the people of the United States and, by the people directly affected by it, of the pervasive discrimina-
tion . . . in all parts of society.” Designed “to eliminate by law discrimination that is otherwise the social norm or the economic norm, or the political norm,” the Civil Rights Act prohibited discrimination based on race as well as other characteristics to protect individuals, including African-Americans, who “were perceived at that time as requiring protection by law in order to be able to participate fully in the life of the United States, including its economic life.” Marshall reminded the court that “large parts of the country . . . permitted pervasive, endemic discrimination against people” based on factors irrelevant to their job performance. The Civil Rights Act’s aim “was to bring that kind of invidious discrimination under the control of law.”

Commenting on antidiscrimination laws enacted in Colorado subsequent to the federal act’s enactment, one of the state’s witnesses, a former member of the Colorado Civil Rights Commission, Ignacio Rodriguez, echoed Marshall’s analysis while testifying in defense of Amendment 2. The purpose of civil rights laws, Rodriguez stated, is to “correct past discriminatory practices which grievously injure groups of people” and to promote equality.

Despite this agreement about the general purpose of civil rights legislation, the two sides disagreed strongly over many questions, including whether laws prohibiting discrimination provided “special rights” or preserved equal rights for members of minority groups.

Prior to the November 1992 election, the promoters of Amendment 2 argued forcefully to the public that having legal protection against discrimination is a “special right” that lesbians and gay men do not deserve. CFV’s Will Perkins, along with two other citizen-leaders of CFV, spearheaded the adoption of the “No Special Rights” theme used to promote Amendment 2. Perkins testified that, in gathering signatures required to place Amendment 2 on the ballot, the “whole premise of the people that I talked to was that [gay people] have equal rights, and they certainly don’t deserve any special rights. And that’s why they signed the petition.”

Explaining how some rights become “special rights,” Perkins testified that

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3. The legislative history of the Civil Rights Act of 1964 reflects the strong disagreement over its enactment. Just before the act was set to pass, a Southern member of Congress proposed an amendment to have the act forbid discrimination based on sex in addition to the other protected categories, believing that the amendment would doom the act to defeat. Contrary to his expectations, the act passed as amended, which is why Title VII and the other provisions of the Civil Rights Act prohibit sex discrimination as well as discrimination based on race, color, religion, and national origin.
the special right of protected class status is a special right because everybody doesn’t have it in every situation. Now, if everybody has this special right in every situation, then who has a special right? And the answer is nobody. And who loses in that group? The losers are the very people for whom the Civil Rights Act was initiated. People who—groups in society that needed a leg up to get started in education, jobs, employment, through affirmative action.

Former Colorado civil rights commissioner Rodriguez echoed this view, telling the court that, while on the state’s Civil Rights Commission, he voted against amending Colorado’s civil rights laws to prohibit sexual orientation discrimination. He did so, he said, because of his belief that equal rights protections are a “special right” that gay people do not deserve. “Protected status,” Rodriguez testified, “is a bit over and above what the ordinary citizen enjoys....”

CFV cofounder and executive director Kevin Tebedo reinforced this view that civil rights laws provide “special rights” to minority groups only:

It was a concern to me that if we granted sexual orientation and homosexuality protected class status, we would, in fact, nullify all of the civil rights law[s] in the nation. Everybody has a sexual orientation. I could see at no time no distinction that could be made whatsoever for these groups that were truly discriminated against.

Perkins acknowledged that a consulting attorney to CFV advised him “that special rights is not a legal term and should not be used in the wording of the amendment itself,” for legal reasons. But for a campaign theme, it was a winner! Of those supporting Amendment 2, 40 percent surveyed in exit polls told one of Colorado’s leading pollsters they voted “yes” because gay people “should not have special rights,” while only 3 percent said they supported Amendment 2 because “homosexuality is wrong.”

Amendment 2’s challengers anticipated these views and, through

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4. Affidavit of Paul Talmey. Although most voters told pollsters they supported the amendment because they opposed “special rights,” some organizers of the opposition to Amendment 2 said they believed many pro-Amendment 2 voters disliked or disapproved of gay people but feared being perceived as bigoted and cited the “no special rights” reason to pollsters instead of indicating their true sentiments.
witness testimony, sought to lay the groundwork for a different understanding of the effect of civil rights legislation. Again relying on the ban on employment discrimination in Title VII of the 1964 Civil Rights Act as an example, Duke University law professor Jerome Culp emphasized that civil rights provisions do not protect specified groups but prohibit use of a general classification, such as race or sex, as the basis for discrimination against anyone. Under Title VII, explained Culp, “white males have a right to bring a claim. Under Title VII, people who are from a majority religion have a right to bring a claim. The statute is written so that what’s prohibited is the use of a category, and everybody has some part of that category. Everybody has a gender. Everybody has a race. Everybody . . . has a sexual orientation, and therefore everybody is protected.”

In other words, civil rights laws provide no more protection to those in the minority than to those in the majority. In prohibiting discrimination based on sexual orientation, as Culp explained, the law protected nongay people as much as gay people. The claim by Amendment 2’s supporters that only certain individuals received “special” protections by virtue of being part of a minority group, Culp said, was simply inaccurate.

Culp identified sexual orientation antidiscrimination laws as part of a large-scale civil rights movement that sought to achieve equality for all people, and he criticized the state’s reliance on the “special rights” argument as a notorious political sleight of hand. Culp, an African-American man, testified that he

first encountered the notion of “special rights” when [he] was a graduate student in Boston and . . . tried to rent an apartment in Charlestown, and that happened to be during the situation of busing in Boston and people said that blacks in Boston wanted special rights, and part of that result was that people got beat up on the streets of Boston because they were black and were in the wrong area. . . .

Joseph Hicks, executive director of the Southern Christian Leadership Conference of Greater Los Angeles and executive vice president of the Martin Luther King Legacy Association, reinforced this point as a witness for the plaintiffs. His views on civil rights as “special rights”
were provided to the court through this exchange with plaintiffs’ trial attorney Gregory Eurich.

_Eurich:_ Mr. Hicks, the campaign slogan or a campaign slogan of Colorado for Family Values in the Amendment 2 campaign was “No Special Rights.” Does that phrase mean anything to you as an expert in the civil rights movement in the United States?

_Hicks:_ No, it has no meaning to me, and I can’t perceive of what it actually means because extending civil rights protections, human rights, to people are not special rights. . . .

Surprisingly, the state never argued that when sexual orientation is added to an antidiscrimination law, gay people are in a different or “special” position relative to others discriminated against for reasons not protected by law. For example, although lawyers or used car dealers might suffer discrimination based on their professions, antidiscrimination laws typically do not forbid profession-based discrimination. Again, however, the plaintiffs could have responded by explaining that the political process must be open on an equal basis for all who need protections to seek them, and that if lawyers or used car dealers wanted to organize to pass protective legislation and could persuade others of the need to do so, such laws could be enacted. Also, the plaintiffs could have reiterated that antidiscrimination laws help to ensure equal opportunity to vulnerable groups in the face of discrimination. That other groups also suffer discrimination, but are not included in existing antidiscrimination laws, does not require a ban on existing protections.

_Economic Objections_

In addition to their argument that civil rights constituted “special rights,” the state’s witnesses offered an array of objections tied to the cost to employers and others of complying with these laws. Their central theme was that civil rights laws burden free economic enterprise and are proper only when necessary to give a “leg up” to an economically disadvantaged minority. Not surprisingly, this focus on economic burden to private business has driven a multitude of efforts to dismantle all forms of civil rights laws, including campaigns to repeal and override laws enacted in the 1960s to stop discrimination based on race.
and other characteristics as well as more recently enacted sexual orientation laws.

George Mason Law School professor Joseph Broadus, in defense of Amendment 2, testified that “every civil rights provision ends up awarding special privileges.” Because civil rights laws can affect how property owners use or sell their property—for instance, a homeowner may not refuse to sell his or her house to a prospective buyer based on that person's race, he stated—the laws transfer control of the property from the owner to the protected class. Reflecting this perspective, Broadus described Title VII's prohibition of employment discrimination as “an extraordinary remedy because it makes the government intrude in economic ways in which the government hasn’t previously done.”

This view, which forms the basis for many employers' opposition to all civil rights laws, was reinforced in laypersons' terms by CFV's Perkins. Perkins testified that he fears “gay rights” laws will render him vulnerable to frivolous litigation any time he fires or refuses to hire or promote someone who is gay. Because of this fear, he told the court, a sexual orientation antidiscrimination bill proposed in Colorado Springs was the catalyst for his involvement in the movement opposed to civil rights for gay people. The bill's “potential impact,” he said, was “just more red tape and more problems involving this type of complaint.” He explained:

The things that caught my eye were primarily the fact that, as a business person, if one of my employees filed a complaint against me . . . they could make me give them any information I had in my business or home, and then the [human rights] commission was the judge and jury, and frankly, I thought something like that would make a gestapo embarrassed and I saw this as a real potential problem for business and that's what got me involved, why I went to the hearings.

Another CFV coleader, Tony Marco, testified that he believes that laws prohibiting sexual orientation discrimination create a costly tool that employees can use to harass employers and potential employers. In explaining his opposition to the Colorado Springs bill, Marco testified that the proposed ordinance would have “created a little KGB in
Colorado Springs with unlimited power to harass almost every citizen in the state or in the city with an unlimited budget.” Marco added that “granting these protections allows an immediate factor of intimidation to enter into the employment practice or the practice of hiring in business.”

It is true that those who are most often the victims of discrimination—whether women, older people, or members of racial, ethnic, religious, or other minorities—are most often the ones to bring discrimination lawsuits. And it is true that, as with all lawsuits, some have merit and some do not. However, civil rights commissions have the power to investigate complaints—not to harass businesses or seek out unrelated information. Also, as many civil rights experts note, many people who are victims of discrimination do not file discrimination charges. They are often concerned about the personal and financial costs of doing so, or fear that filing a lawsuit will forever saddle them with a reputation as litigious—a reputation that could interfere with their future employment prospects.

For all of his concern about potential business interference, Perkins had not developed an initiative to limit protections for other minorities. Nor did he acknowledge that antidiscrimination laws offer protection to all persons, and not solely those in the minority. Likewise, Broadus did not testify that he objected to the economic burden of civil rights laws that prohibit discrimination based on a variety of other characteristics, including race, sex, and religion.

**Identifying the Gay-Specific Objections**

All civil rights laws tend to generate debate. However, a special level of vehement opposition arises against laws that seek to protect lesbians, gay men, and bisexuals against discrimination. The state of Colorado, through its legal arguments and its witnesses at trial, presented the full array of these gay-specific objections in its defense of Amendment 2.

First were arguments based on visibility and definition. The state’s witnesses, including CFV leaders Perkins, Tebedo, and Marco, as well as former civil rights commissioner Rodriguez, testified that it is not appropriate for lesbians and gay men to be covered by civil rights laws because gay people are not readily identifiable and because there is no agreed-upon definition of sexual orientation. In other words, the argu-
ment regarding identification went, if sexual orientation is not evident
to the casual observer, how can one know whether alleged discrimina-
tion is based upon sexual orientation?

And similarly, if there is disagreement in popular culture, aca-
demic circles, and even communities of lesbians and gay men about
what it means to be lesbian or gay, how can a civil rights law related to
sexual orientation be administered fairly? This dispute about the mean-
ing of "gay" parallels, in its conflict about how to define a core aspect of
human identity, the long-standing debate in American society and
jurisprudence concerning the meaning of race and who should be con-
sidered a person of color. In past decades, of course, the definition of
race was significant for determining who would be considered "white"
and who would be "colored" for segregation purposes. However, the
civil rights debate about the definition of race today, like the debate
about sexual orientation, focuses on whether and how antidiscrimina-
tion prohibitions should be enforced.

Second, in addition to its argument regarding the definition of sex-
ual orientation, the state, though the same CFV witnesses, Rodriguez,
and Harvard professor Harvey Mansfield, argued that people should
not receive protections for "chosen" behavior. Since being gay, it main-
tained, is defined by a choice of behavior, sexual orientation is not a
sufficiently immutable characteristic upon which to base antidiscrimi-
nation protection.

Ultimately, again relying on testimony of CFV leaders, the state
argued that the citizens of Colorado did not want their state to outlaw
maltreatment of lesbian and gay Coloradans and that they supported
Amendment 2 as a vehicle to prevent the legislature from so doing.
Banning antidiscrimination prohibitions covering gay people, the state
maintained, was an acceptable way for voters to express their disap-
proval of a subset of Colorado’s population that they disliked.

Visibility

Could sexual orientation discrimination be prohibited because there
are no visible cues as to a person’s sexual orientation? Could the diffi-
culty in defining who is “lesbian” or “gay” render such laws vulnerable
to abuse? Ignacio Rodriguez, former state civil rights commissioner,
laid out both arguments in his testimony in response to questioning by
state’s attorney Jack Wesoky.
Wesoky: You were testifying as to the perceived differences between sexual orientation as an identifiable group or homosexuals as an identifiable group, and what I’ll call the traditional minorities as an identifiable group. Why do you not consider them the same?

Rodriguez: I don’t know how the group would be identified. There are no obvious immutable characteristics. The way I understand it, even sexual practices are very divergent. The only thing the group seems to have in common is an attraction for its own gender. It’s a very heterogeneous group, very different. I don’t believe that there’s, quote, a homosexual lifestyle, for example.

Interestingly, this was one point on which the state’s witnesses and gay people were in agreement. Many gay people asserted that the only difference between them and heterosexuals is that lesbians and gay men have same-sex partners. But other opponents of equal rights for lesbians and gay men have maintained that being gay is, in fact, a “lifestyle choice.” And many gay people countered that sexual orientation is not a predictor of lifestyle and that their lifestyles are as diverse as the lifestyles of heterosexuals.

Wesoky asked how the heterogeneity of gay people that Rodriguez talked about affected enforcement of laws that prohibited discrimination against gay people. Rodriguez responded that because sexual orientation typically becomes known only after the individual in question identifies it, such laws would be “extremely difficult if not impossible to enforce . . . because just about anyone could self-identify” as gay.

“Now, obviously you can’t identify what religion I am by looking at me,” said Wesoky. “How do you differentiate between self-identification of religion and self-identification of sexual orientation?” Rodriguez suggested that an individual’s religious identification might be “general knowledge” but conceded that, generally, self-identification would be required to identify someone’s religion, too. This concession, however, did not weaken Rodriguez’s conviction that laws protecting gay people are uniquely unworkable. He told the court that “authorities would be unable to appropriately address complaints from [gay] people. It’s too intangible. There’s nothing firm or solid there.”

Rodriguez, who had helped draft Colorado’s statewide antidis-
crimination law, which did not include sexual orientation, expanded on these arguments later in his testimony.

Wesoky: Are there any differences that come into your mind or play into your mind when you were deciding whether or not to add that group [i.e., gay people] to the protected list under Colorado law?

Rodriguez: One of the traditional criteria had to do with identity, and being able to identify and enumerate a group, and I don't believe this can be done with a gay, homosexual, lesbian community.

Wesoky: And why do you think that?

Rodriguez: It's a very divergent group. It's not defined even by the groups themselves. There's a disagreement within the homosexual community about identity. . . . Most recently, I read in the paper about a lady in Boulder who indicated that she was a lesbian by choice, that she had chosen that, quote, lifestyle or whatever it is you want to call it. Others say that it is not a matter of choice, and I think the jury is still out on that.

CFV's Marco, too, testified that "even within the gay community itself there is a considerable amount of disagreement regarding whether this characteristic is innate or immutable."

Again, the state's witnesses were correct in suggesting that many gay people hold divergent views about the origins of sexual orientation. Many gay people say they feel certain that being gay is a characteristic they cannot change, regardless of whether the origins are in genetics, biology, or elsewhere. Others, including many women who came out as lesbians during the women's liberation movement in the 1970s, say they made a choice to be gay or bisexual. But what was missing in the state's testimony was any discussion of the origin of heterosexual orientation—or the choice involved in being heterosexual.

Marco also reiterated his view that sexual orientation is "not obvious." After indicating that he had a gay activist roommate while living in New York City during the late 1960s, Marco added that "I would be very confident myself, on the basis of two of the definitions of sexual orientation given by the plaintiffs and one by a leading gay militant, to claim homosexual orientation myself." Later, Marco added, that
because of questions about visibility and definition, laws banning sexual orientation discrimination might lend themselves to abuse.

For example, a person might come in under an ordinance granting protected class status through sexual orientation to apply for a job alongside an African-American person and a woman, let’s say, and say, “Well, I notice you have a number of African-American people working here, you have a number of women, how many homosexuals do you have?” Can you imagine this person who’s a Caucasian male and who says, “I am a homosexual and I want this job?” You have an immediate threat of a lawsuit if the employment is denied and possible grievance complaints on behalf of the other to recognized protected classes who were denied that job. In that case, the plaintiffs’ definition of sexual orientation offers no grounds whatsoever for proof of one’s identity in terms of sexual orientation. So the potential for fraud in cases like this is enormous.

The plaintiffs’ civil rights expert, Burke Marshall, disagreed as he addressed the “visibility” question in his videotaped deposition, in response to questions from Kathryn Emmett.

Emmett: Another point that has been made is that somehow or other the characteristic that qualifies a group for protection under any discrimination laws is the visibility of the trait that binds the group together or identifies members of the group. . . .

Marshall: That also is clearly not correct. Someone’s religion is not marked on her face. Someone’s national origin is not marked on one’s face. In fact, in many cases, one’s race is not clearly marked on one’s face. Hence, the desire [to outlaw discrimination] protects against . . . the desire to “pass,” as it used to be put, and appear to be something that you are not in order to escape the discrimination that comes from what you are. But visibility is not a characteristic of any of these groups except maybe the racial groups.

Supporting Marshall’s testimony, Culp, in response to Eurich’s questioning, also addressed the state’s argument that laws should not
prohibit sexual orientation discrimination because “you can’t tell by looking at somebody if they are gay or lesbian.” “We don’t know your marital status by looking at you,” he noted. “There’s lots of different categories that are not readily apparent. And the notion that [physical appearance] is the only basis or the exclusive basis or necessarily even the primary basis [for legal protection against discrimination] seems to me to be wrong.” Culp also observed that part of the invisibility for many gay people comes from the fact that “social norms are so great to force [gay people] to hide their identities” and provides a “stronger reason to protect gays, lesbians, and bisexuals.”

In addition, as Marshall and Culp both implied, the critical inquiry in a discrimination case is not whether the plaintiff is, in fact, gay. It is whether the discriminator treated that person differently because the discriminator believed the person to be gay. For example, if an employer fires an employee whom the employer thought was Jewish, based on the employee’s name or appearance, the fired employee could claim religious discrimination even if the employee was Baptist. Similarly, if a landlord evicts a tenant whom he or she perceives to be a lesbian, because of the friends with whom the tenant associates, the tenant can sue for sexual orientation discrimination even if she is heterosexual (so long as there is a law against sexual orientation discrimination where she lives). The illegal act occurs when the employer or landlord discriminates based on the belief that the person has a particular characteristic.

To add real-world experience to this discussion about the theory behind antidiscrimination laws, the plaintiffs’ attorneys brought to court two witnesses responsible for enforcement of laws prohibiting sexual orientation discrimination. Leanna Ware, director of the Civil Rights Bureau for the State of Wisconsin, testified about enforcement issues under Wisconsin’s law against sexual orientation discrimination in response to questions from Denver’s attorney Darlene Ebert. Wisconsin’s law was enacted in 1982 and is the oldest such state law in the country.

_Ebert:_ Have you heard the argument or been confronted with the argument that sexual orientation laws cannot be enforced because of the alleged difficulty in detecting what an individual’s sexual orientation is?

_Ware:_ Yes, I have heard the argument.
Ebert: Has it been a problem in your investigation of sexual orientation cases?

Ware: It is sometimes an issue that the employer raises—that he or she was not aware of the individual’s sexual orientation—just as it is in some of the other protections that are not visible. Marital status, or diabetes as a disability, is not visible, so it might be a defense that the employer raises in sexual orientation cases as in other cases.

Ebert: And how does one investigate a case, then, where the sexual orientation or other unknown cause for discrimination of an individual is at issue?

Ware: Well, in our investigative process... we would then go back to the complainant and say that “The employer has indicated that he or she wasn’t aware that you were covered under this basis. Why do you believe that the employer was aware?” And usually the complainant will give information about some statements that the employer has made or information that their sexual orientation or marital status or whatever was generally known in the workplace, through witnesses. So it depends on the individual circumstances, but it’s certainly something that we deal with in many cases.

Ebert: Is the investigation of a sexual orientation claim any different from the investigation of other types of discrimination claims?

Ware: No, it is not.

To demonstrate that investigation practices for sexual orientation-based discrimination complaints in Wisconsin were not materially different from those in Colorado, the plaintiffs called Brenda Toliver-Locke as a witness. Toliver-Locke was the compliance officer for Denver’s Agency for Human Rights and Community Relations and was charged with enforcing Denver’s antidiscrimination ordinance, which included a prohibition against sexual orientation discrimination. After sexual orientation was added to the antidiscrimination ordinance in 1990, she testified, over one-fourth of the complaints filed included a sexual orientation discrimination charge.

Ebert: Have you had any difficulty in the cases which you have investigated in determining whether the party against whom
the complaints have been filed, whether those people or companies have been aware of the sexual orientation of the complainant?

Toliver-Locke: We have not had difficulty. Sometimes what happens is the respondent will say, "I was not aware of the sexual orientation of the charging party," and what we do in that case is we go back to the complainant, we ask them for more information about their case that will help us substantiate that allegation. We also ask witnesses and other people that we have identified. We also seek documents or anything that we can get to substantiate that.

Ebert: And what types of evidence have you uncovered when you have gone back to do that additional investigation?

Toliver-Locke: We have often gotten direct quotes that employers may have made to another employee that show that there was some knowledge or perceived knowledge of one's sexual orientation. There may have been rumors that were floating around among the employees and their employer. . . . [S]ometimes we have to look a little deeper, but we have been able to find examples that substantiate them that there was some knowledge of sexual orientation.

Ebert: Have you determined in the course of your investigations whether employers or landlords or people that run schools or whatever have some stereotypical views on visible traits of sexual orientation?

Toliver-Locke: Some people do. They have some perception of what they think are stereotypes of someone with a particular sexual orientation.

On the question of how the definition of the group of lesbians and gay men compares to definitions of other groups subjected to discrimination, civil rights expert Marshall testified that an academic or cultural disagreement over the exact parameters of what it means to be lesbian or gay does not lessen discrimination against those perceived to be gay.

Emmett: Can you tell me how, in your view, gay men, lesbians, and bisexuals as a group would compare to the other groups that—those that you've discussed and others—have been protected in law against discrimination?
Marshall: Well, they share a characteristic, which is their sexuality, that makes them into a community that, when it's known, at least, leads—this is as clear as crystal—leads to rampant discrimination and in some cases violent retaliation simply because of what they are. So that they are a group that is vulnerable once they are known, in the same way that these other groups that I've been talking about are vulnerable. Everything about our recent history says that, including the debate, of course, about gays in the military and what has happened to gays in the military. So that they share a characteristic which is common to them, which is at the core of their personality, which . . . when known, at least, leads to retaliation and discrimination by the outside community because of the characteristic. So they are sort of a classic group that should be protected, could be protected, by laws against discrimination if the voters—you know, if the people that are faced with that problem want to do something.

Civil rights expert Culp likewise illustrated that a characteristic need not be genetically immutable and physically visible to be protected by an antidiscrimination law.

Eurich: Well, but aren't the categories that are already covered readily identifiable? Isn't the concept of race a purely dichotomous variable; either you are white or you are black? Culp: Well, I think that is a notion that no longer has much credibility in either the scientific, the historic, or humanistic communities. . . . in this country, black Americans have more genetic material in common with the average white American than white ethnic groups have in common with each other. The kind of genetic notion and the kind of notion of race as a thing that exists is commonly, and I think appropriately, challenged now. Eurich: It's important in terms of analyzing discrimination cases, perceptions of people, or whether they have some immutable characteristics they can scientifically demonstrate? Culp: I think the most important characteristic is their exclusion from the protections that the civil rights movement has been trying to extend—the protections of access to public accommodations, access to jobs, access to housing, access to political participation.
Identity vs. “Chosen Behavior”

In addition to charges related to the visibility of sexual orientation, the state, through its witnesses, urged that sexual orientation is a behavior and therefore not appropriate for civil rights protection. “Our argument consistently was throughout the campaign that how you have sex, for whatever reason, is not an appropriate criterion for civil rights,” Will Perkins testified. This view—that laws prohibiting sexual orientation discrimination amounted to protections for sexual behavior—drove much of the Amendment 2 campaign. It surfaced consistently as a thorny question at trial, as well as in the public debate about lesbian and gay civil rights.

The argument persuaded many people, as evidenced, at least in part, by the Amendment 2 campaign’s success at the polls. In fact, the equation proffered by Amendment 2’s proponents, in which lesbians and gay men were defined by sexual behavior and then deemed undeserving of civil rights laws, was a powerful and widespread myth. It took full advantage of popular misconceptions about gay people as well as about the nature of discrimination and the purpose of civil rights laws.

The equation contained two sub-arguments. First, it maintained that people’s choices are an inappropriate basis for civil rights protections—in other words, the only characteristics worthy of legal protection are those that are immutable and involuntary in nature. That argument failed though, in light of widespread protections against religious discrimination, with religion being neither immutable nor involuntary. Second, it assumed that being gay is a choice—and an unpopular one. As CFV’s Kevin Tebedo stated, “the public out there . . . seems to be interested not only in the civil rights and ethical issues, but they are also interested in society’s view of what is acceptable and what is not acceptable behavior in American society.”

Opponents of gay civil rights protections urged that such laws would encourage gay men and lesbians to engage in disapproved acts. Testifying for the state, Harvey Mansfield, a government professor at Harvard University, expressed this view on cross-examination.

_Eurich: One of the reasons you think there’s something wrong with being gay is you believe being gay is surely partly voluntary, correct?_
Mansfield: Not being gay, but behaving in—I think that would come out in reference to the sexual practices of gays, which are different, as are the political beliefs of gays. . . . They have choices in their own life and they are capable of leading a moral life within the limits of the tendencies or inclinations they have which may not be voluntary.

The state's concern was that laws prohibiting sexual orientation discrimination enabled more people to feel free to reveal that they are lesbian or gay. Where antigay hostility runs rampant, lesbians and gay men are more cautious about revealing their sexual orientation. To the plaintiffs, the real question was not whether such laws give sanction to homosexuality or "homosexual sex," but instead whether they provided sanctuary for people to live openly without fear of invidious discrimination.

Real Discrimination

Were lesbians and gay men unable to live openly in Colorado? Although this question did not need to be answered for the court to decide the constitutionality of Amendment 2, it was addressed by both sides.

Plaintiffs challenging Amendment 2 had given personal testimony almost a year earlier at the preliminary injunction hearing, highlighting the impact of this antigay discrimination on their lives in Colorado. Angela Romero had testified about losing her job as school resource officer with the Denver police department when her supervisor found out she was a lesbian. She had testified, too, that she endured repeated derogatory comments and graffiti about lesbians and gay men made by other officers and received inadequate backup while on patrol, because she was a lesbian. Paul Brown had testified about being "let go" from a job by a manager who then rehired another man who had spray-painted "Paul is a fag" across the office building wall.

Toliver-Locke, Denver's antidiscrimination compliance officer, testified that the law met a real need. "We have had some cases that have demonstrated that people are definitely being discriminated against because of their sexual orientation," said Toliver-Locke, "both in employment and in housing and in public accommodations."

The evidence before the court, including police reports and records
of discrimination complaints, demonstrated there could be no real question about whether lesbians and gay men in Colorado experienced discrimination and bias-motivated violence. They did. But the state, which on one hand tried to show that sexual orientation antidiscrimination laws were unnecessary, then used the existence of this discrimination to make one of its key arguments for Amendment 2—that fighting discrimination against gay people would take away from fighting discrimination against more “acceptable” minorities.

**Dilution**

Throughout the campaign and the trial, Amendment 2’s supporters urged that laws against sexual orientation discrimination would dilute popular support for civil rights laws by adding protections for an unpopular group. At the same time, they urged that adding protections for sexual orientation would take away enforcement resources needed for combating other civil rights violations. The professed fear that enforcement of legal protections for gay people would drain resources seemed to clash directly with the state’s argument that gay people did not need protection from discrimination. Still, the state pressed forward, apparently having decided to offer all possible theories to the court without regard to the contradiction.

The state’s witnesses reinforced both aspects of the “dilution” argument repeatedly throughout their testimony. For example, civil rights expert Broadus was asked whether states including characteristics such as sexual orientation in civil rights laws breed disrespect for civil rights laws generally. He replied that, “to the extent that [state governments] proceed kind of indiscriminately, not as carefully as the federal government has in extending them, they will bring measures into disrepute.” On the question of whether enforcement of existing civil rights laws suffers when other protected classifications are added, Broadus also endorsed the state’s argument: “I think there can be a dilution of resources by expanding [the number of] groups . . . the fact remains that the ability of the courts to assume litigation is not endless.”

Former Colorado Civil Rights Commission chair Rodriguez offered similar views.

Wesoky: Given your experience in the civil rights field, . . . do you believe that the addition of sexual orientation to the list of
[classes protected against] discrimination in Colorado Civil Rights law would or would not be a departure from the historical aims of civil rights laws?

Rodriguez: A drastic departure.

Wesoky: Why do you say that, sir?

Rodriguez: Drastic, in that I think it would weaken and dilute those civil rights protections that had been earned by minorities, by women, by the disabled over the years.

Wesoky: Why do you say it would weaken or dilute those protections for the enumerated groups?

Rodriguez: I think that there’s—at this point in time—a general acceptance and respect for civil rights laws and the need for them. Inasmuch as the gay, lesbian group has not demonstrated that need, I think that that would lower the [esteem] in which the general public holds civil rights law.

CFV’s Will Perkins also reinforced this point, testifying that inclusion of sexual orientation in antidiscrimination laws “will dilute the whole meaning of civil rights and dilute the resources that are available to be used.”

And Colorado Civil Rights Division regional supervisor Tom Duran testified that because of lack of adequate funding, “it doesn’t make sense to include another class [in the state’s civil rights law] because there is no fund[ing] available to investigate, to mediate, to take to hearing.” He added that addition of sexual orientation as a protected classification in the state law “might be injurious to those parties that are already . . . defined protected classes.” Further, he maintained that a statewide prohibition against sexual orientation discrimination would “probably not” receive the same respect as other protected classifications because the majority of Colorado’s population have “ill respect or a lack of respect for . . . this class of individuals.”

In contrast, however, both Toliver-Locke and Ware, each with direct experience enforcing laws against sexual orientation discrimination, testified that the laws neither put an excessive demand on their enforcement resources nor diluted respect for other provisions of the civil rights laws. In addition, Toliver-Locke, as chief enforcer of Denver’s antidiscrimination ordinance, explained that opposition to the law’s coverage of discrimination based on sexual orientation had not affected general opinion of the city’s civil rights laws.
Toliver-Locke: We have observed that there are people who—employers or landlords or whatever the nature might be, depending on the case—who just do not feel that sexual orientation should be a protected class. So they are against that portion of the ordinance.

Ebert: Have you observed employers or landlords who have similar reactions to other provisions of the ordinance such as marital status? Military status?

Toliver-Locke: No.

Ebert: Or any of the others?

Toliver-Locke: [No.]

Ebert: Because of that observation, has that made protections . . . against race discrimination, sex discrimination or any of the other groups more difficult to enforce?

Toliver-Locke: No, ma'am.

Turning to the question of whether expansion of civil rights law coverage greatly burdens a government’s resources to enforce other civil rights protections, Burke Marshall noted that while there is some increase in demand on the state, “a great deal of the enforcement of the laws is by private lawsuit, so that although there may be an added burden that is, you know, measurable, but not significant, on the court systems in any particular jurisdiction, there isn’t even that increase in the demand on the resources of the state.” Therefore, he concluded, “I can’t see any basis for believing that it would undercut the implementation or efficacy of the prohibitions against discrimination” based on other characteristics.

The Debates Continue

Again, despite their extensive testimony, civil rights experts could not identify a single or absolute indication of what it means to be lesbian or gay. Opponents of gay civil rights sought to capitalize on this ambiguity, charging that if there is not a clear definition of who gay people are, then it is inappropriate to provide civil rights protections to those claiming to be gay. Gay advocates responded that civil rights legislation is concerned not with the victim’s actual identity but rather with the discriminator’s perception of the victim: if the discriminator fired someone because he or she believed the employee to be gay, that is
enough. On this theory, the meaning of "gay" or "lesbian" would be determined by the individual discriminator's perceptions. Or, perhaps, genetic, psychological, historical, and political science vantage points are each independently sufficient, with sexual orientation antidiscrimination laws prohibiting antigay acts based on any of these fields' definitions of "gay." With each new witness, it was increasingly clear that no single definition of gay identity would make sense for the wide variety of contexts in which gay people's civic participation and civil rights would be evaluated.