Strangers to the Law

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Chapter 10

The Law and Social Change

While the battle over Amendment 2 was being waged in the legal system, copycat initiatives emerged—from Arizona to Florida, and Alaska to Maine. Each became a lightning rod for religious right organizing efforts. In an attempt to fend them off, lesbians, gay men, and civil rights advocates had to embark on a whole new level of organizing to respond to these assaults.

As the number of initiatives increased and their geographic reach expanded, it became increasingly clear that lesbians and gay men had been targeted for the first line of attack in the religious right’s stepped-up “cultural war.” The initiative campaigns, when they were not directly attacking gay people, couched their messages carefully in deceptive rhetoric. Appealing to voters, they offered seemingly fair messages that everyone should be free to employ or to rent to whomever they wish. They did not underscore, at least publicly, that this freedom would preserve the “freedom” to discriminate.

The initiative campaigns also contained subliminal appeals to racial hatred among whites and to a sense of vulnerability among people of color. The measures, for example, sought to forbid “quota preferences” and affirmative action. Although “quota preferences” was a legally meaningless phrase, both it and affirmative action were commonly associated in the public’s mind with issues of race discrimination. Likewise, by labeling civil rights as “special rights,” the leaders of initiative campaigns tapped into a popular although incorrect view that people of color receive “special” benefits under civil rights laws. To white audiences, these references aimed to suggest that gay people were trying to get “something more” than the average American. And to people of color, these campaign slogans were intended to imply that gay people were trying to take away or take advantage of the hard-earned rights of racial minorities. The campaigns succeeded. This rhetoric, along with the measures themselves, began to change the
course of the American debate about civil rights for the 1990s and beyond.

In addition, although gay people had long been confronted with vicious attacks on their civil rights and basic humanity, the carefully organized, highly sophisticated, and well-funded new round of assaults looked to be the most difficult battle to date. Myriad new gay and lesbian organizations emerged to enter the ever-changing battleground. Both nascent and long-standing organizations found themselves engaged in rapid-fire public exchanges about many of the complex questions raised at trial regarding what it means to be gay as well as what it means to be "equal." A typical antagonistic talk radio host might ask, "Why do you people deserve special protection for your immoral, harmful, and disgusting sexual behavior?" Even friendly hosts would pose questions such as, "Why do gay people want to be singled out for special benefits instead of just being equal like everyone else?" Interviewers on both ends of the political spectrum would inquire, "How do we even know when someone is gay and is eligible for the protection of these laws?" As the experts at trial illustrated, many different answers could be offered in response to these questions, depending on whether one gives a historical, scientific, political, or yet another perspective. Still, activists and community members had little choice but to develop their best answers, learn quickly from their errors, and move on to the next debate.

The Onslaught

Not surprisingly, Amendment 2's passage in Colorado spawned a series of copycat measures all over the country. Just a year later, and barely weeks after closing arguments in the Amendment 2 trial, election day 1993 arrived. With it, one Amendment 2 look-alike in Cincinnati, Ohio, scores of local amendments in Oregon municipalities, and one local initiative to repeal Lewiston, Maine's ordinance prohibiting sexual orientation discrimination appeared on ballots in their respective communities. All of them passed. 1 The number of antigay amend-

1. The Oregon legislature enacted a law that prevented the local charter amendments from taking effect. The Cincinnati enactment was immediately challenged in court. At the time of publication, enforcement of the charter amendment was enjoined but the amendment remained in litigation. The Lewiston, Maine ordinance was repealed.
ments on the books grew exponentially and with more battles unfolding.

Religious right national organizers, encouraged by these solid successes and seeing a potent vehicle for fund-raising and identification of political supporters, launched ambitious plans to reproduce antigay measures throughout the United States. Local religious right activists from all parts of the country began to announce plans for antigay initiatives in their own cities and states. Their campaign strategies picked up on many of the same themes addressed by expert witnesses at the Amendment 2 trial regarding the nature and origins of homosexuality, the political power of gay people, issues of morality and religion, and the historical status of gay people compared to other minority populations. Each campaign attempted to show that being gay was a dangerous behavior, that gay people comprised a wealthy and politically powerful group, and that providing civil rights protections to gay people would endanger respect for and enforcement of existing civil rights legislation.

The Amendment 2 pilot model appeared to be a favorite of antigay activists. Measures introduced in Michigan and Missouri copied Amendment 2 word for word. The proposed measures there sought to stop those states from ever prohibiting discrimination against lesbians, gay men, and bisexuals. Arizonan organizers put their own provocative spin on their initiative. In addition to targeting gay people, the Arizona measure added pedophiles to the list of those who would be deemed ineligible for antidiscrimination protection. This strategy appeared aimed to sweep in wavering voters and to play on the myth that gay people disproportionately commit child sexual abuse.

In other states, initiatives expressed antigay hostility even more overtly. The Oregon Citizens Alliance, sponsor of the failed 1992 antigay measure, introduced the “Minority Status and Child Protection Act” in 1994. This measure, like the others, sought to bar state and local governments from prohibiting discrimination against gay people and provided that “the people find that to be morally opposed to certain sexual behaviors such as homosexuality . . . is a Right of Conscience in accord with . . . [the Oregon] Constitution.” It contained several additional provisions, including prohibition of legal recognition of the relationships of gay couples through marriage or other means, and banning use of public funds “in a manner that ha[d] the purpose or effect of expressing approval of homosexuality.” The initiative also sought to
allow employers to consider "private sexual behaviors" as relevant factors in making personnel decisions. In addition to Oregon, "Citizens Alliance" groups in Idaho and Nevada promoted this text. Washington state had two groups and two initiatives in 1994: One paralleled the Oregon measure and, among other aims, sought to repeal and block laws and policies that would prohibit discrimination against gay people, bisexuals, transsexuals, and transvestites, and to prohibit teachers from discussing homosexuality as acceptable. The second sought to do all this plus prohibit recognition of same-sex marriages or domestic partnerships, prohibit the use of public funds to express approval of homosexuality, limit the borrowing of public library books on the topic of homosexuality to adults only, ban gay people from being parents, bar legal recognition for a person's sex change operation, and allow personnel decisions based on private sexual conduct.

Finally, in Florida in 1994, and in Maine in 1995, more stealth-like measures were introduced. Never once mentioning the word homosexual, these measures sought to impose a blanket limitation on government's ability to pass civil rights laws and simultaneously to repeal all existing laws that provided protections beyond those specified in the initiatives. In Florida, the proposed amendment would have permitted the state government to pass antidiscrimination legislation covering race, gender, age, disability, and six other characteristics. Notably, sexual orientation was not among them. Neither were veteran's status, source of income, or student status, all of which were governed by existing Florida laws that the amendment would have repealed and forever barred. But the rhetoric surrounding the measure's introduction left no question as to its target. To obtain a petition, interested voters were told to dial 1-800-GAY-LAWS. And the pamphlet circulated with the petition addressed only the "special rights" sought by gay people and the wealth and privilege of lesbians and gay men.

Rumbles of similar initiatives in California, Montana, Ohio, Wyoming, and elsewhere also kept gay activists wary. Although measures were not ultimately introduced in those states, most onlookers speculated that antigay forces were only awaiting the outcome of the Amendment 2 litigation in the U.S. Supreme Court before introducing their own. The litigation did not halt every effort though—Amendment 2-type measures were introduced in several legislatures, including in New Mexico and Oklahoma.

Antigay attacks were not limited to the initiative and legislative
processes, either. Apparently as an alternative to an antigay amend-
ment, Ohio religious right organizers opted for an electoral strategy as
Cincinnati’s Issue 3 remained stymied in the courts. Rather than
squelch already-passed laws that would prohibit discrimination
against gay men and lesbians, these organizers decided to develop a
strategy to fight the reelection of legislators who supported legal pro-
tections for gay people. Called Project Spotlight, and backed by reli-
gious right activists in and outside of the state, this plan aimed to exco-
riate publicly and retaliate in an organized fashion against any elected
official who showed support for the rights of gay people. Indeed, any
elected official who refused to go “on the record” against equal rights
for gay people would be a target under this plan for recall efforts and
future challenges.

In addition to activity on the statewide level, antigay activists
worked fervently in local communities to repeal, and in some cases
prohibit, future passage of ordinances perceived to benefit gay people.
Oregon, as it had for many years, faced yet another wave of municipal
charter amendments to ban local governments from protecting their
lesbian and gay constituents against discrimination. Florida’s cam-
paign moved to the local level. While a court ruling kept off the ballot
an effort to repeal Tampa’s ordinance prohibiting sexual orientation
discrimination, another antigay effort, this time spearheaded by the
“Concerned Citizens of Alachua County,” met with election day suc-
ience. By an overwhelming margin, voters passed an amendment to the
county charter in November 1994 barring the county government from
passing any ordinance that included the classification “sexual orienta-
tion, sexual preference or similar characteristics.” Voters also approved
a companion ballot measure that repealed provisions in the county’s
human rights and fair housing ordinances prohibiting discrimination
based on sexual orientation.2

In Austin, Texas, the antigay effort took the form of a campaign by
“Concerned Texans” to repeal a city law providing health insurance
coverage to unmarried city employees with domestic partners. Several
months earlier, at the behest mainly of lesbian and gay groups in
Austin, the city had passed an ordinance authorizing dependent health

2. The Alachua County charter amendment banning ordinances that would pro-
hit sexual orientation discrimination was invalidated by a Florida district court. How-
ever, the county’s sexual orientation protections were repealed pursuant to the voters’
mandate.
benefits to city employees with domestic partners equal to those provided to married employees. Religious right organizations struck back with a powerful campaign to undo the many years of advocacy that had led to adoption of the equal compensation plan. Their effort succeeded: Domestic partnership benefits for Austin employees were repealed in May 1994.

And in Springfield, Missouri, in February 1994, 71 percent of voters repealed a city law that enhanced penalties for bias crimes motivated by the race, gender, religion, and other traits, including sexual orientation, of the victim. Opponents of the hate crimes law focused their efforts on portraying the law as creating a "mini-gay rights bill."

In still other venues, the fights were not about laws protecting gay people from discrimination or providing benefits to employees with unmarried partners but over who would control the school board and other local government entities. The years of the stealth candidate had arrived. From small town to large city, candidates with unpublicized ties to religious right organizations launched campaigns for public office and often won. Once in office, they began pushing their own agenda to rid schools of gay-positive programming, including multicultural education. In place of such programs, these candidates promoted curricula that highlighted as their role models an English-speaking nuclear family headed by a married heterosexual couple. Although these school board races were quite distinct from the campaigns for antigay ballot measures on the surface, both were driven by similar rhetoric that appealed to popular fears about gay people, diversity, and civil rights. And many of the themes sounded by the expert witnesses during the Amendment 2 trial—including the historical entrenchment of antigay bias and the limited yet feared political power of lesbians and gay men—continued to surface in the public debate.

Reading between the Lines

Through their texts and supporting rhetoric, the statewide ballot measures revealed an important refinement of the radical right's strategy and marked the contours of this new era of backlash against lesbian and gay civil rights. Whether or not a particular measure appeared on the ballot, its introduction forced discussion in each state about the rights of gay people, and, ultimately, about whether civil rights protections should exist at all.
On the surface, these measures appealed to people's fears, ignorance, and hatred of lesbian and gay people. By offering the general public an opportunity to vote away basic rights for gay men and lesbians while leaving those same rights available for all others, the measures left little question that their promoters believed much mileage could be had from popular disapproval and dislike of gay people.

But the impact of these initiatives was intended to reach much further. They offered the public an opportunity to oppose civil rights protections generally. While the apparent aims were limited to gay people, the format of these proposals appeared intended to pave the way for redefining and ultimately eradicating the framework of civil rights. The very process of holding an election on a minority group's ability to obtain protection against discrimination from government ran contrary to a fundamental tenet safeguarded by earlier Supreme Court interpretations of the Constitution—that basic rights should not be put to popular vote. If the ability of one minority group to obtain legal protection could be put on the electoral chopping block, there was little reason to think that any other group's rights might not be similarly vulnerable.

**Fighting Back**

It was a daunting time. Many of the lesbians and gay men leading campaigns against initiatives in their states had not previously been involved in any sort of political battles or were just beginning to learn how to address gay issues in the political arena. In Idaho, for example, prior to the Idaho Citizens Alliance proposal of antigay legislation, only a handful of gay people were willing to be seen on television or use their names when speaking with reporters about gay issues. The 1994 gay pride march and festival held in Boise, for example, attracted a large proportion of nongay people, which reflected both the political success of gay leaders at building bridges and the debilitating fear of many gay people who refused to march out of concern that an employer or family member might witness the parade and identify them as lesbian or gay.

In other states, such as Florida and Washington, statewide gay organizations had existed for many years. For the most part, however, these groups had been sustained by a small handful of dedicated volunteers who did not have the capacity to organize a major statewide opposition campaign. In both of those states, as well as in Arizona, Mis-
souri, Nevada, and elsewhere, activists familiar with working in their own communities quickly had to develop statewide networks. In particular, activists working in states with large, conservative rural populations that could weigh heavily in an election had to develop strategies for organizing in towns and villages where they had few contacts, let alone organizational support.

Adding to the stress of organizing were early polls in most states showing that without an enormous and successful education campaign, gay people had virtually no chance of success at the polls. Before the passage of Cincinnati’s antigay amendment in November 1993, and just after the overwhelming defeat of lesbians and gay men in the national battle about whether the military should accept openly lesbian and gay servicemembers, three of the then-largest national gay political organizations—National Gay and Lesbian Task Force (NGLTF), the Human Rights Campaign Fund, and the Gay and Lesbian Victory Fund—launched plans for a series of intensive skills-building courses in political campaigns for lesbian and gay statewide organizers. At NGLTF’s annual Creating Change conference for lesbian and gay activists, for example, “Fight the Right” programs took over many slots previously reserved for other programming, as activists, intent on gathering and sharing information, met in large hotel ballrooms to discuss the immediate threats they faced. At training conferences hosted by other organizations, campaign members came together to learn how to identify voters, construct a “message,” and develop literature to carry out a campaign against an antigay measure.

Despite organizers’ tireless efforts, the campaigns were rarely smooth. In addition to intrastate geographic rifts, basic strategy differences emerged, both within gay groups and in the campaigns themselves. The question of how visible gay people should be and how prominently equal rights for gay people should be highlighted surfaced in virtually every campaign. Since the measures being fought were targeted at lesbians, gay men, and bisexuals, gay people naturally became active in staffing the initiative opposition teams. But whether the campaign message should have an antigovernment or a progay slant proved to be a difficult call state-by-state. In some states, pollsters showed that campaign messages that depicted the antigay initiative as creating “more” government appealed to voters more than messages depicting it as hostile to lesbian and gay residents. In most campaigns, including the one against Amendment 2, gay people were rarely fea-
tured in television advertisements opposing the amendment. Much more frequently, nongay community leaders were pictured or quoted as opposing the proposed measures.

One notable exception to this trend was a group known as the "Lesbian Avengers" that embarked on bus trips throughout the United States to focus attention and organizing efforts on various embattled states. They, as well as local organizations including some groups of cross-dressing performers in local bars and nightclubs, insisted that the anti-initiative campaigns present gay people in all their diversity. Still others viewed the campaigns as efforts not just to win at election time but also as an invaluable opportunity to debunk myths about civil rights and gay people in many different communities.

In addition to the political battles, new legal battles also formed part of the response to the onslaught. In virtually every state where an initiative was introduced, local attorneys coordinated with staff attorneys of Lambda Legal Defense and Education Fund and the ACLU to launch preelection challenges to keep measures off the ballot. Working on the premise that the civil rights and political participation of a minority group, or indeed, of any group of people, should not be put to popular vote, lawsuits were prepared and filed throughout the country asking courts to strike these measures from the ballot. The challenges typically argued that the measures did not comply with procedural requirements for initiatives because their texts were unclear or their ballot summaries were misleading or inaccurate. In addition, the suits alleged the measures were unconstitutional and should be struck from the ballot because they plainly violated the fundamental constitutional rights of lesbians and gay men. The great majority of these lawsuits were not successful as a legal matter as courts seemed reluctant to be perceived as "taking away" the voters' right to decide. Florida was a notable exception. There, the state supreme court struck the proposed amendment from the ballot as inaccurate and misleading to voters.

Even when the preemptive legal challenges failed, however, many activists believed they contributed importantly to the overall fight against the initiatives because they slowed down the process of collecting signatures necessary for placement on the ballot. Other organizers felt differently, maintaining that the lawsuits slowed fund-raising and organizing efforts by creating the impression that the problem posed by the initiative could be resolved in court.
At a minimum, it was clear that they provided organizers with an opportunity to call public attention to legal flaws of each measure. The media and education campaigns that accompanied the legal challenges underscored that these measures were divisive as well as unconstitutional. Lawyers for the challengers told reporters that the antigay proposals would waste taxpayer money and would make all people vulnerable by subjecting the rights of the minority to the majority. By framing their comments in this way, the lawyers sought to appeal to popular concerns about government spending and harm to the state's reputation in addition to the political dangers posed by the measure.

To the great relief of many lesbians and gay men, most of these initiatives failed to gather the signatures necessary to be placed on their state's ballots. By the time the last deadline for signature gathering in 1994 came and went, only two statewide antigay measures were going to voters: one in Oregon and the other in Idaho. After difficult campaigns in both states, both were defeated—albeit narrowly—at the polls.

But even as activists celebrated the narrow defeats of antigay measures in Oregon and Idaho in November 1994, serious concern underlay the festivities. The proposed antigay amendment to the Alachua County, Florida, charter had passed overwhelmingly, despite the efforts of gay activists and others in this county that includes the university town of Gainesville. Additionally, antigay organizations in Oregon, Idaho, and elsewhere immediately announced they would be back. Several variations on an amendment to Oregon's constitution were proposed swiftly, most of them known as "The Minority Status and Child Protection Act," appealing explicitly to the same themes discussed above. Idaho's antigay organization introduced a similar measure. Maine activists confronted a stealth-style antigay initiative proposed by "Concerned Maine Families." The measure, although clearly aimed at limiting the rights of gay people, was not explicitly antigay. It had garnered enough signatures to achieve a place on the November 1995 ballot, but intensive organizing efforts by Maine civil rights supporters defeated the measure at the polls. Replete with the rhetoric refined in initiative battles, themes of "special rights" and the "immorality" of gay people remained prominent on the national stage as these next battles over the dignity and equality of gay people took shape.
Looking to the Future

As soon as the U.S. Supreme Court's decision striking down Amendment 2 was announced, both antigay commentators and gay activists identified the ruling as a watershed in the public struggle over gay and lesbian equality. Within hours, leaders of some of the nation's most virulently antigay groups were not only condemning the Court's action but also grappling with the new landscape presented by the ruling. On radio shows and in news media soundbites, they acknowledged that the debate had shifted out from under them. This far-reaching type of antigay initiative, one of the religious right's most popular vehicles ever for garnering support and grassroots activism, had just been trounced by a solid majority of the highest court in the country. Even worse, from their perspective, the Court had condemned antigay animus as a basis for law-making.

Gay people, on the other hand, both individually and in groups, raced to call each other to share the news, uncorked champagne, and joined in large rallies in cities throughout the country. Speaking to each other and to the media, the message was clear: The tide was turning and, for the first time in history, the U.S. Supreme Court had acknowledged the prejudice behind an antigay law and had rejected it.

But what was in this ruling that so devastated the religious right? Certainly, the principle that government cannot legislate based on a desire to harm a group of people was not a new one and had been made clear in several non–gay related cases. But, since 1986, when the Court upheld Georgia's "sodomy" law, saying that "majority sentiments about homosexuality" were a sufficient basis for legislation, governments had frequently justified antigay discrimination with a simple reference to those "majority sentiments." Taking a cue from that case, Bowers v. Hardwick, in which the Court called a gay man's claim to constitutional privacy rights "at best facetious," governments had typically seen little need to convey respect to their lesbian and gay constituents, much less to adopt laws and policies to provide meaningful equality.

Lower courts had treated the Hardwick decision as a signal that

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they, too, should reject the legal claims of gay people challenging discrimination. For years, lesbians and gay men had been going to court when nonjudicial remedies had failed, challenging everything from government denial of security clearances to judicial denials of custody and visitation to gay and lesbian parents. And for years, courts had been rejecting those claims, ruling that since states could criminalize consensual sexual relations of same-sex couples, they could also ban gay people from holding certain jobs or from parenting their children. Gay people bringing these challenges were met with skepticism at best and overt hostility at worst. Most of these courts assumed that gay people, as a group, could be defined by their sexual conduct. Therefore, they concluded, following the “logic” of the Hardwick ruling, that courts should not demand substantial justifications for antigay discrimination by government when the “conduct that defines the class of gay people” could be criminalized. Even where lawyers did try to challenge the popular view that Hardwick gave states authority for all forms of antigay discrimination, they gained little ground.

And when six members of the Court declared that the state could not legislate with an aim of making gay people “unequal to everyone else,” religious right-wing commentators realized how dramatically the tide had changed and how the legacy of Bowers v. Hardwick might soon draw to a close. Some went so far as to demand the impeachment of several Supreme Court justices, characterizing the Supreme Court as a liberal elite body subject to pressure by the “militant homosexual minority.”

The Court’s ruling made this shift in several important ways that had as much to do with political and social realities as with law. First, the majority recognized that gay people are more than sex acts. In contrast to Hardwick and the cases that followed—cases that treated gay people and “sodomy” as interchangeable concepts—the Court in Romer telegraphed the message that “homosexuals” are people and that they are entitled to full constitutional rights.

Second, the majority recognized that antigay animus had motivated Amendment 2—and rebuffed it. Whereas previously such animus might have been labeled “presumed moral disapproval of the majority” as in Hardwick, the Court now refused to countenance a measure that was so blatantly motivated by prejudice.

Third, after many years of battles in which the religious right had
hammered the message that gay people were somehow seeking "special rights" when advocating for laws prohibiting sexual orientation discrimination, the Court added its authoritative view that the "special rights" rhetoric was meaningless. Appearing to speak directly to the general public in an effort to clear up any misunderstanding, the Court's opinion stated plainly that

we find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.4

Almost immediately, the Court's ruling had several important effects. Within three weeks of its ruling, the Supreme Court took up a case challenging Cincinnati's Amendment 2 clone, known as Issue 3. The petition for review of the federal appeals court ruling upholding that antigay city charter amendment had been sitting in the Court for nearly a year, awaiting the outcome of Romer. On June 17, 1996, the Supreme Court acted. It granted review of the case, vacated the appeals court ruling, and sent the case back to the appeals court for a new ruling in light of Romer. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented from the Court's decision. Insisting that the Cincinnati case was different because it involved a city charter amendment rather than a statewide amendment, Scalia argued that the Court should have either let the appeals court ruling stand or set the case for argument before the Court. Again, however, his views did not prevail.5

Shortly thereafter, the Oregon Citizens Alliance, the group that had promoted antigay initiatives in Oregon for nearly a decade, announced it would be withdrawing a series of antigay amendments it had been circulating for placement on the state's 1996 ballot. The proposed amendments, most of which were known as "The Minority Status and Child Protection Act," paralleled Amendment 2's ban on civil

4. Id. at 1627.
rights protections for gay people and included a variety of other provisions restricting gay people’s rights in family recognition and access to public funding. A few weeks later, on July 1, 1996, an announcement in Idaho further illustrated the Romer ruling’s ability to topple other anti-gay measures. There, the Idaho Citizens Alliance announced that it, too, was withdrawing the antigay “Family and Child Protection Act” proposed for voter initiative on the 1996 ballot. After years of political and legal warfare in the voter initiative process over the basic rights of lesbians and gay men, Romer appeared to have edged to a close this era of gay politics in which popular initiatives took direct aim at gay people’s ability to obtain protection against discrimination.6

Romer’s immediate effect on other antigay initiatives in the political arena was matched by a renewed sense of strength among lesbian and gay civil rights advocates. During the previous several years, the silver lining of the antigay initiative battles for many lesbians and gay men had been in the dramatic growth of community organizing and the greatly increased numbers of gay and nongay people speaking out publicly in support of gay people’s equality. With the authoritative weight of a Supreme Court ruling supporting the rights of gay people, both seasoned and newly minted activists experienced a tremendous boost of moral and legal force. At the moment of the ruling, gay civil rights advocates were immersed in many difficult battles over the issues of equal marriage rights, the “don’t ask, don’t tell” law restricting the rights of lesbian and gay servicemembers, advocacy efforts for passage of sexual orientation antidiscrimination laws, efforts to defund AIDS-related services, and myriad other arenas in which the struggle for equality and freedom from discrimination and bias-motivated violence was taking place. With the backing of the Supreme Court, the tone of the lobbying, discussions, and political warfare could shift. The Supreme Court’s message, after all, was a clear one—laws cannot be created with the sole goal of giving legal effect to popular dislike of gay people. Even the most virulently antigay lawmakers would have to be more careful in pursuing their goals because any indications of animus would make their handiwork vulnerable to legal challenge.

6. At publication time, the last of the Colorado-style antigay initiatives, Cincinnati’s “Issue 3,” had been upheld again by the federal court of appeals but remained in litigation.
But the political struggle for the rights of gay people was not over. Just two days after the *Romer* ruling, President Clinton disregarded the decision's clear message when he announced his support for the "Defense of Marriage Act," also known as DOMA, a bill in Congress that sought to ban federal recognition of same-sex couples' marriages and to authorize states to do the same. The bill was crafted to respond to the initial success of a Hawaii lawsuit seeking the right to marry for same-sex couples. This announcement, both in timing and substance, was unsettling to many supporters of the rights of gay people. In addition to being a deliberate political setback to gay people in the wake of a landmark legal victory, Clinton's announcement reinforced antigay opponents in their most recent efforts to ban recognition of "gay marriage" on a state-by-state basis. Bills had already been introduced in 38 states around the country to deny recognition to same-sex couples' marriages solemnized out of state and, in some cases, to ban solemnization of marriages of same-sex couples in that state. (Of these, 16 had been enacted by the end of 1996, 25 by mid-1997.)

Although nothing could take the sting out of Clinton's quick announcement of support for the antigay marriage measure, the Court's ruling provided activists with a new and more solid base from which to ground a response to these legislative assaults. Antigay sentiment was behind DOMA, activists charged. And, they added, it was precisely this sort of lawmaking based on antigay sentiment that the Supreme Court had just rejected. While Congress moved forward with the proposed legislation and Clinton signed it in September 1996, all parties were on notice that the legislation would be measured against the *Romer* decision.

Similarly, courts reviewing the military's "don't ask, don't tell" law that places severe restrictions on lesbian and gay servicemembers also had *Romer* to consider. While laws and policies related to the military typically receive great deference from courts, it is unclear how the discrimination of "don't ask, don't tell" will be reconciled with the principles proclaimed in *Romer*. Courts inclined to defer to the military's judgment might now face a stark challenge, because the government has defended the "don't ask, don't tell" law based on a need to protect nongay soldiers from discomfort at working closely with lesbians and gay men. That justification appears to run squarely counter to *Romer's* rejection of such animus in legislation.
So, too, "sodomy" laws,\(^7\) bars to recognition of gay youth groups in public schools, and other forms of state-sponsored discrimination should increasingly be called into question.

It remains difficult to predict the impact *Romer* will have on these—and other—laws. The decision’s core principle should, in theory, mean the end to all antigay discrimination by government because, lesbian and gay rights advocates argue, there is no reason other than dislike or disapproval of gay people for government to treat gay people differently from nongay people. However, *Romer* will not likely be such an across-the-board panacea; many judges continue to hold deeply biased views about lesbians and gay men, and other judges, who lack information about gay people, base their rulings on unquestioned fears and myths. Also, particularly in the contexts of the military and marriage, knee-jerk reactions rather than rational reasoning frequently control outcomes both in courts and in legislatures.

The majority’s opinion in *Romer* does not attempt to educate readers about gay people to overcome these biases or correct misinformation. It does not offer a definitive explanation of who gay people are—indeed, it does not even attempt to take on that complex question. Perhaps appropriately, that question remains open to multifaceted answers that take into account that being gay means one thing when analyzed from a political perspective, another when considered from a scientific vantage point, and still another when viewed throughout history. Instead, the Court’s opinion, and the demise of Colorado’s Amendment 2, make the simple yet profound point that lesbians and gay men may not, by virtue of being members of a socially vulnerable minority, be separated out from their neighbors and rendered strangers to the law.

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7. As of 1996, at least 19 states had "sodomy" laws in force to prohibit certain private, noncommercial, sexual acts between consenting adults. These states included Alabama, Arkansas, Arizona, Florida, Georgia, Idaho, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Missouri, North Carolina, Oklahoma, Rhode Island, South Carolina, Texas, Utah, and Virginia. Of these, 5 (Arkansas, Kansas, Maryland, Missouri, Oklahoma, and Texas) prohibit private sexual relations only when they take place between adults of the same sex. Over time, these laws have come to have a tremendous stigmatizing effect on gay people. Frequently they are relied upon to justify employment discrimination against lesbians and gay men and sometimes to justify depriving gay parents of custody of or visitation with their children.