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# steppin' out



13th International AIDS Candlelight Memorial and Mobilization: Mourners gathered May 19 at Pioneer Courthouse Square in Portland to remember the loved and lost.

## editorial

# Prejudice loses big

*The U.S. Supreme Court's decision on Amendment 2 is a strong defense against prejudicial forces for gay men and lesbians*

by Richard D. Mohr

**K**nock me over with a feather. Like many gay legal writers, I was worried over the pokiness of the Supreme Court's announcement of its decision on the constitutionality of Colorado's 1992 anti-gay Amendment 2 referendum. The gay legal community expected that, even in the case of a victory, the court would not speak in a clear, unified voice, that the victory would merely be technical. Not so.

Justice Kennedy's opinion for six justices could hardly have been stronger in its defense of gay men and lesbians from prejudicial forces. Our win in *Romer vs. Evans* specifically knocked down as unconstitutional the anti-gay referendum initiatives that have swept the country, from Anita Bryant's 1978 Save Our Children campaign through Cincinnati's 1993 Issue 3 Amendment. But the case portends major positive changes in gay law and politics more generally.

If the decision is applied consistently in future cases, virtually all anti-gay discrimination by governments will be struck down. Why? Kennedy's brief but pointed opinion basically holds that governments cannot simply accumulate anti-gay attitudes, hostilities, hatreds and phobias in policy or law and also claim the laws and policies are rational. Laws "born of animosity toward the class of persons affected," laws that do nothing more than cobble together and give voice to prejudices, will be struck down. The court also showed a robust willingness to examine the rationales that governments give for their anti-gay laws to see whether they aren't simply fronts for prejudice.

Virtually all current legal burdens on gay men and lesbians appeal directly or indirectly to prejudicial forces. Take judicial decisions that have removed custody of kids from their lesbian mothers on the ground that social recriminations that come to the lesbian mother will damage the child. These decisions simply bootstrap policy off of anti-gay prejudice, and now look to be unconstitutional. In 1986 the Supreme Court had upheld anti-gay sodomy laws solely on the ground that they give voice to popular morality. Again, such thinking now no longer looks

to be good law.

And take two biggies: gays in the military and same-gender marriage. The military defends the legal ban on gay men and lesbians solely on the ground that nongay soldiers are made uptight by the presence of gay soldiers. The ban is based on nothing but anti-gay attitudes and so, too, looks ripe for judicial scrutiny. In mid-May, President Clinton's press secretary explained that while Clinton was strongly opposed to same-gender marriage, Clinton couldn't give any reasons for his opposition. Well, strongly held, quite specific beliefs for which one can give no reasons are exactly those which are prejudicial. Clinton is typical on the issue of same-gender marriage; opposition to it is nothing but prejudice on stilts—and so now judicially suspect.

The opinion is important politically as well. It is written by a very conservative, Republican-appointed judge. Prior to his appointment to the Supreme Court, while an appellate judge on the ninth federal circuit, Kennedy heard four gay cases and voted against gays all four times; in a case that blended marriage and immigration issues, he wrote a vicious and dismissive anti-gay opinion. Clearly conservatives can change and grow. Indeed, a "constitutional" majority of the six judges in the *Romer* opinion are Republican appointees: Kennedy and Souter were appointed by Bush, O'Connor by Reagan, and Stevens by Ford.

We have less to fear from conservatives and Republicans than most gay and lesbian activists assume. In his three-man dissent, Justice Scalia rants about sexual degeneracy and decay, but his rages—those of the Christian right wing—are impotent. The gay and lesbian movement should stop being obsessed by the far right. In riveting its focus there, it blinds itself to the future that is unfolding before us—with the Supreme Court's welcome assist.

*Richard D. Mohr is the author of Gays/Justice: A Study of Ethics, Society and Law.*

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